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ETHNOCIDE AND INDIGENOUS PEOPLES: ARTICLE 8 OF THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Abstract

Article 8 of the *Declaration on the Rights of Indigenous Peoples* provides that Indigenous peoples and individuals have the right to be free from forced assimilation and destruction of culture. In addition, this provision requires that states provide effective mechanisms for prevention and redress of actions that: deprive Indigenous peoples of their integrity as distinct peoples; dispossess Indigenous peoples of land; force population transfers, assimilation or integration; or promote or incite discrimination. This article aims to develop a greater understanding of this novel provision. It investigates the historical development of art 8 of the *Declaration on the Rights of Indigenous Peoples*, together with the concept and jurisprudence of cultural genocide expressed in the *Convention on the Prevention and Punishment of the Crime of Genocide* in an effort to determine the scope and content of the right, whether or not it is legally binding and its enforcement. Article 8 should ensure Indigenous peoples are able to use their own languages and protect their historical, cultural and religious heritage and objects in libraries, museums, schools, historical monuments, places of worship or other cultural institutions. In essence, this article protects the right of Indigenous peoples and individuals to live in an environment where they can enjoy their own cultures and where those cultures are able to develop and flourish.

I Introduction

The *United Nations Declaration on the Rights of Indigenous Peoples* ('*Declaration*') [1] was adopted by the General Assembly of the United Nations in September 2007, concluding more than twenty years of negotiations. It is significant as the only human rights instrument that specifically addresses the rights of Indigenous peoples.

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1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

This article focuses on art 8 of the *Declaration* ('Article 8'): the right of Indigenous peoples and individuals not to be subjected to forced assimilation or destruction of their cultures.[2] The inclusion of this right is significant, as the condemnation of ethnocide and cultural genocide (the terms used in the initial draft of Article 8)[3] has long been hailed as an effective avenue of protecting Indigenous peoples' rights.[4] Having said that, Article 8 is a novel provision and has received little academic attention since its adoption seven years ago.[5]

Article 8 prescribes that Indigenous peoples should be free from forced assimilation and cultural destruction. However, exactly what is meant by 'forced assimilation' and 'destruction of culture'? Do these concepts overlap entirely with the pre-existing notions of ethnocide and cultural genocide? What does the right entail and how can it be used by Indigenous peoples to safeguard their cultures?

In an effort to answer these questions, this article will examine Article 8 in terms of its historical development, specifically considering the *travaux préparatoires* of the *Convention on the Prevention and Punishment of the Crime of Genocide* ('*Genocide Convention*')[6] and its subsequent jurisprudence. The *Genocide Convention* is significant in this context as there was considerable debate surrounding the inclusion of cultural genocide within the definition of genocide.[7] This debate has continued in

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2 *Declaration* art 8.

3 As discussed in detail in Part III, B Travaux Préparatoires, there is no clear agreement on the meaning of the terms ethnocide and cultural genocide. In general, ethnocide is regarded as the destruction of people and cultural genocide as the destruction of the physical manifestations of culture.

4 Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations: Report of the Working Group on Indigenous Populations on its Fifth Session*, 38th sess, Agenda Item 11, UN Doc E/CN.4/Sub.2/1987/22 (24 August 1987) 16 [61]; Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Working Group on Indigenous Populations on its Eleventh Session*, 45th sess, UN Doc E/CN.4/Sub.2/1993/29 (23 August 1993) annex 1 art 7 ('*Report of the Working Group on Indigenous Populations on its Eleventh Session*'); C C Tennant and M E Turpel, 'A Case Study of Indigenous Peoples: Genocide, Ethnocide and Self-determination' (1990) 59 *Nordic Journal of International Law* 287, 297.

5 It received only a passing reference in Siegfried Weissner et al, 'Sofia Conference (2012): Rights of Indigenous Peoples' (Final Report, International Law Association, 2012) <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> 8 and a short discussion in the context of rights to land in Jérémie Gilbert and Cathal Doyle, 'A New Dawn Over the Land: Shedding Light on Collective Ownership and Consent' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 289, 295–6.

6 *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

7 Genocide is defined as committing acts, including killing of members of a group, with the intention of destroying a national, ethnical, racial or religious group in whole or part: ibid art 2. The debates surrounding the inclusion of cultural genocide in the *Genocide Convention* are discussed below in Part IV, B Travaux Préparatoires.

the genocide jurisprudence, despite the fact that cultural genocide was not included in the *Genocide Convention*.

The first part of this article outlines the right contained in Article 8. The second part looks at the *Declaration* in detail, tracing its historical development and the negotiations in relation to Article 8 in each phase of the drafting. The third part has regard to the development of the *Genocide Convention* and its jurisprudence in relation to cultural genocide. The final part of the article uses these sources to develop a greater understanding of the right in terms of its scope and content, its legal enforceability and its enforcement.

Article 8 is particularly relevant for Indigenous peoples living in post-colonial states. In countries such as Australia, where Indigenous people have been, and continue to be, marginalised, Article 8 addresses persistent human rights violations.[8] This article argues that Article 8 is of great significance for Indigenous peoples as it serves as a concrete recognition of their right to be free from forced assimilation or the destruction of their cultures. This freedom should ensure Indigenous peoples are able to live in an environment where they are free to enjoy their own cultures and where those cultures are able to develop and flourish.

II The Right

Article 8 provides:

> 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
> 2. States shall provide effective mechanisms for prevention of, and redress for:
> (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
> (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
> (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
> (d) Any form of forced assimilation or integration;
> (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.[9]

8 Human Rights and Equal Opportunity Commission, 'Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Human Rights and Equal Opportunities Commission, 1997) ('*Bringing Them Home*'); Anna Cowan, 'UNDRIP and the Intervention: Indigenous Self-Determination, Participation, and Racial Discrimination in the Northern Territory of Australia' (2013) 22(2) *Pacific Rim Law & Policy Journal* 247.

9 *Declaration* art 8.

This is a novel provision with few, if any, precedents. There is no comparable provision in the *Universal Declaration on Human Rights*,[10] the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[11] the *International Covenant on Economic, Social and Cultural Rights* ('*ICESR*')[12] or the *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*.[13] There is no such provision in the Inter-American system for the protection of human rights,[14] the *European Convention on Human Rights*[15] or the African *Banjul Charter*.[16] The provision regarding propaganda designed to promote or incite racial or ethnic discrimination echoes art 4 of the *Convention on the Elimination of All Forms of Racial Discrimination*.[17]

The protection from ethnocide found in Article 8 is closely linked to the prohibition on genocide included in art 7 of the *Declaration*. This article affords Indigenous peoples the 'collective right to live in freedom, peace and security as distinct peoples' and prohibits 'any act of genocide or any other act of violence, including forcibly removing children of the group to another group.'[18]

The connection between Article 8 and genocide is also apparent as the initial drafts of the article used the term 'cultural genocide'.[19] While the *Genocide Convention*

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10 *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('*Universal Declaration*').

11 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

12 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

13 *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, Supp No 49, UN Doc A/47/49 (18 December 1992).

14 'Official Documents: American Declaration of the Rights and Duties of Man' (1949) 43(3) *American Journal of International Law Supplement* 133; *American Convention on Human Rights*, opened for signature 22 November 1969, OAS Treaty Series No 36 (entered into force 18 July 1978); *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, opened for signature 17 November 1988, OAS Treaty Series No 69 (entered into force 16 November 1999).

15 *European Convention on Human Rights*, opened for signature 4 November 1950, CETS No 005 (entered into force 3 September 1953) (amended on 1 October 2009).

16 *African (Banjul) Charter on Human and Peoples' Rights*, adopted 27 June 1981, 21 ILM 58 (entered into force 21 October 1986).

17 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 7 January 1969) art 4 ('*Convention on the Elimination of All Forms of Racial Discrimination*').

18 *Declaration* art 7(2).

19 *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN Doc E/CN.4/Sub.2/1993/29, annex 1 art 7; Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Sub-Commission on*

does not contain any such provision, cultural genocide was included in the initial drafts of the *Genocide Convention*.[20] Consequently, the drafting of the *Genocide Convention* is also relevant in this context.

Article 8 has received very little academic attention, which is surprising for such an innovative right. The Australian Human Rights Commission has interpreted arts 7 and 8 to give Indigenous peoples the following rights:

> the right to life, including the right to live as a distinct group. These rights are to be enjoyed freely and securely. This includes the protection of our minds and bodies … to be free from forced assimilation, genocide, violence and the destruction of our cultures. Governments should take steps to prevent:
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> - actions that take away our cultural values or identities
> - actions that dispossess us from our country
> - any form of forced assimilation, relocation or removal of our children
> - information or stories about us that lead to discrimination against us.
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> If any of these rights are violated, governments should provide some form of compensation.[21]

Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session, 46th sess, UN Doc E/CN.4/Sub.2/1994/56 (28 October 1994) 103, 1078 art 7 ('*Draft United Nations Declaration on the Rights of Indigenous Peoples in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session*'). The amended version of the article was included in the Chairperson-Rapporteur's proposals for the draft Declaration and submitted to the Commission on Human Rights: Commission on Human Rights, *Report of the Working Group Established in Accordance With Commission on Human Rights Resolution 1995/32 on its Tenth Session: Addendum*, 61st sess, UN Doc E/CN.4/2005/89/Add.2 (1 April 2005) 12–13 ('*Report of the Working Group on its Tenth Session: Addendum 2*'); Commission on Human Rights, *Report of the Working Group Established in accordance with Commission on Human Rights Resolution 1995/32 on its Eleventh Session*, 62nd sess, UN Doc E/CN.4/2006/79 (22 March 2006) annex I 26 art 7 ('*Report of the Working Group on its Eleventh Session*').

20 Secretary-General of the United Nations, *Draft Convention on the Crime of Genocide*, UN Doc E/447 (26 June 1947) 5 ('*Draft Convention on the Crime of Genocide*'); Ad Hoc Committee on Genocide, *Report of the Committee and Draft Convention Drawn up by the Committee*, UN Doc E/794 (24 May 1948) annex art 3; Sixth Committee of the General Assembly, *Summary Record of the Eighty-Third Meeting*, 3rd sess, 83rd plen mtg, UN Doc A/C.6/SR.83 (25 October 1948) 206 ('*Eighty-Third Meeting of the Sixth Committee of the General Assembly*'); General Assembly, *Summary Record of the Hundred and Seventy-Ninth Plenary Meeting: Continuation of the Discussion on the Draft Convention on Genocide: Reports of the Economic and Social Council and of the Sixth Committee*, 3rd sess, 179th plen mtg, UN Doc A/PV.179 (9 December 1948) 847–8 ('*Hundred and Seventy-Ninth Plenary Meeting of the General Assembly*').

21 Australian Human Rights Commission, 'The Community Guide to the UN Declaration on the Rights of Indigenous Peoples' (Report, Australian Human Rights Commission, 2010) 28.

It is interesting to note that the Australian Human Rights Commission states that the government 'should take steps to prevent' the actions outlined, but makes no reference to the government establishing effective redress mechanisms in relation to those actions, which is also referred to in Article 8. This will be discussed in detail below.

In order to better understand the right, it is necessary to examine the historical development and *travaux préparatoires* of the *Declaration* and the *Genocide Convention* in detail.

III Declaration on the Rights of Indigenous Peoples

A *Historical Development*

In 1985, the Working Group on Indigenous Populations ('WGIP') began drafting a declaration on the rights of Indigenous peoples.[22] At its first meeting in relation to formulating a specific instrument for Indigenous rights, WGIP decided that such an instrument should be in the form of a declaration 'in the first instance' with the possibility that a convention may 'emerge further down the road, possibly with inspiration from the declaration'.[23] This decision was in keeping with its mandate to 'give special attention to the evolution of standards concerning the rights of Indigenous populations'.[24] WGIP stressed the need for special Indigenous rights standards as a result of

> [i]nequalities and oppression suffered for centuries; ethnocidal practices; the actual dismal situation and marginalized existence in many countries, notwithstanding lofty statutes and policies; lack of understanding and knowledge reflected in accusations of backwardness and primitiveness; and forced assimilation and integration by majority populations …[25]

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22 Working Group on Indigenous Populations, *Report of the Working Group on Indigenous Populations on its Twenty-Fourth Session,* UN Doc A/HRC/Sub.1/58/22 (14 August 2006) 5 [1b]. WGIP was authorised by Economic and Social Council in 1982: *Study of the Problem of Discrimination Against Indigenous Populations*, ESC Res 1982/34, UN ESCOR, 1st sess, 28th plen mtg, Supp No 1, UN Doc E/1982/82 (7 May 1982). It was established in order to review developments in relation to the promotion and protection of the human rights and fundamental freedoms of Indigenous populations and give special attention to the evolution of standards concerning the rights of Indigenous populations: Working Group on Indigenous Populations, *Report of the Working Group on Indigenous Populations on its Twenty-Fourth Session*, UN Doc A/HRC/Sub.1/58/22 (14 August 2006) 5 [1a].

23 Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations: Report of the Working Group on Indigenous Populations on its Fourth Session*, 38th sess, Agenda Item 11, UN Doc E/CN.4/Sub.2/1985/22 (25 August 1985) 19 [85] ('*Report of the Working Group on Indigenous Populations on its Fourth Session*').

24 *Report of the Working Group on Indigenous Populations on its Fourth Session*, UN Doc E/CN.4/Sub.2/1985/22, 19 [85].

25 Ibid 14 [61].

Member states played a limited role in the drafting of the *Declaration*, as the process involved unprecedented input from Indigenous groups in the early drafting stage.[26] Indeed, the drafting proceeded on the basis of two drafts prepared by Indigenous groups.[27] While WGIP was an expert body consisting of five members, more than 600 people attended WGIP's 11th session in 1993.[28] This number swelled to more than 790 attendees at the 12th session in 1994, significantly outnumbering the 42 governmental observers present.[29]

Following almost a decade of drafting and consultation with Indigenous groups, states and experts, WGIP adopted the text of the draft Declaration in 1993.[30] The draft Declaration was then submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which adopted it in 1994 before passing it to the United Nations Commission on Human Rights for consideration.[31]

The Commission on Human Rights began its consideration of the draft Declaration in 1995. To do so, the Commission on Human Rights established an on-going inter-sessional Working Group on the Draft Declaration on the Rights of Indigenous Peoples (the 'Working Group on the Draft Declaration') composed of representatives of member states.[32] States became actively involved in the negotiations at this point. More than 60 States and just under 70 Indigenous and non-governmental organisations were at the first session of the Working Group on the Draft Declaration,

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26 Russel Lawrence Barsh, 'Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force' (1996) 18(4) *Human Rights Quarterly* 782, 782–3.

27 *Report of the Working Group on Indigenous Populations on its Fourth Session*, UN Doc E/CN.4/Sub.2/1985/22, annex III–IV.

28 *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN Doc E/CN.4/Sub.2/1993/29, 4 [3], 7 [11]. In 1993, 34 State observers, more than 200 Indigenous organisations and non-governmental organisations, and more than 100 individual observers were present: *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN Doc E/CN.4/Sub.2/1993/29, 4 [5], 5–7 [8]–[11].

29 In 1994 more than 250 Indigenous organisations and non-governmental organisations present and more than 60 individual observers were present: Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Working Group on Indigenous Populations on its Twelfth Session*, 46th sess, UN Doc E/CN.4/Sub.2/1994/30 (17 August 1994) 5 [5], 5–8 [10]–[12], 8 [13].

30 *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN Doc E/CN.4/Sub.2/1993/29, 44 [209], annex I.

31 *Draft United Nations Declaration on the Rights of Indigenous Peoples in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session*, UN Doc E/CN.4/Sub.2/1994/56, 103.

32 *Establishment of a Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of General Assembly Resolution 49/214 of 23 December 1994*, CHR Res 1995/32, UN ESCOR, 51st sess, 53rd mtg, Supp No 4, UN Doc E/1995/23 (3 March 1995) 111.

with similar numbers attending the last session in 2006.[33] Indigenous organisations continued to have a presence in the negotiations and their participation was 'absolutely fundamental to the process of elaborating a draft declaration'.[34]

The negotiations that took place in the Working Group on the Draft Declaration were long and drawn out, serving to highlight the gulf between Indigenous peoples' expectations and what states were willing to accept. Only two articles were adopted in the third session of the Working Group on the Draft Declaration in 1997,[35] and no provisions were agreed upon at the fourth, fifth, seventh, eighth, ninth or tenth sessions.[36] The highlight of progress at the sixth session was agreement by governments to adopt art 45: that nothing in the finalised *Declaration* may be interpreted as allowing any act contrary to the *Charter of the United Nations*.[37] Some Indigenous representatives were so frustrated by the lack of progress that they went on a hunger

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33 Ibid 3–4 [8]–[13]. Similar numbers of states and Indigenous and non-governmental organisations were present at the 11th session in 2006: *Report of the Working Group on its Eleventh Session*, UN Doc E/CN.4/2006/79, annex II 79–80 [3]–[8].

34 Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995*, 53rd sess, UN Doc E/CN.4/1997/102 (10 December 1996) 6 [22] ('*Report of the Second Session of the Working Group on the Draft Declaration*'). Similar sentiments were expressed by Denmark, Canada, Norway, Chile, Sweden, New Zealand, the United States, Colombia and Russian Federation: at 6–8 [23], [24], [26]–[28], [30], [31], [33], [34].

35 The articles that were adopted were art 43 ('All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals') and art 5 ('Every indigenous individual has the right to a nationality'): Commission on Human Rights, *Report of the Working Group Established in accordance with Commission on Human Rights Resolution 1995/32*, 54th sess, UN Doc E/CN.4/1998/106 (15 December 1997) 8–9 [41], [42].

36 Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, 55th sess, UN Doc E/CN.4/1999/82 (20 January 1999) 5 [27]; Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, 56th sess, UN Doc E/CN.4/2000/84 (6 December 1999); Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, 58th sess, UN Doc E/CN.4/2002/98 (6 March 2002) ('*Report of the Seventh Session of the Working Group on the Draft Declaration*'); Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, 59th sess, UN Doc E/CN.4/2003/92 (6 January 2003) ('*Report of the Eighth Session of the Working Group on the Draft Declaration*'); Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, 60th sess, UN Doc E/CN.4/2004/81 (7 January 2004); Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 on its Tenth Session*, 61st sess, UN Doc E/CN.4/2005/89 (28 February 2005).

37 Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, 57th sess, UN Doc E/CN.4/2001/85 (6 February 2001) 23 [141].

strike.[38] The Commission on Human Rights' adoption of the draft Declaration,[39] based on 'a final compromise text'[40] in June 2006 has been described as a 'miracle'.[41]

Events took yet another turn when the draft Declaration was passed to the General Assembly ('GA') for adoption. The Group of African States sought to delay the vote on the draft for another year and submitted a list of 30 amendments.[42] This led Canada, Colombia, New Zealand and the Russian Federation to offer another series of 20 amendments.[43] Ultimately, only nine amendments were agreed upon.[44] The most significant of the amendments was in relation to self-determination and territorial integrity.[45] There was also a successful amendment to art 8(2)(d) of the

38 Statement by the International Indian Treaty Council, the Indigenous World Association and the International Organization of Indigenous Resource Development (non-governmental organisations in consultative status to the United Nations Economic and Social Council) in Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 on its Tenth Session: Addendum*, 61st sess, UN Doc E/CN.4/2005/89/Add.1 (24 February 2005) annex III A 4. The hunger strike started on 29 November 2004 and ended on 2 December 2004 following meetings between the six participants and representatives of the Commission on Human Rights: *Hunger Strike by Indigenous Peoples* (3 December 2004) The Ogiek People <http://www.ogiek.org/indepth/break-hunger-strike.htm>.

39 The Declaration received 32 votes in favour (Azerbaijan, Brazil, Cameroon, China, Cuba, Czech Republic, Ecuador, Finland, France, Germany, Guatemala, India, Indonesia, Japan, Malaysia, Mauritius, Mexico, the Netherlands, Pakistan, Peru, Poland, Republic of Korea, Romania, Saudi Arabia, South Africa, Sri Lanka, Switzerland, United Kingdom of Great Britain and Northern Ireland, Uruguay, Zambia), two against (Canada and Russia) and 12 abstentions (Algeria, Argentina, Bahrain, Bangladesh, Ghana, Jordan, Morocco, Nigeria, Philippines, Senegal, Tunisia, Ukraine): *Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of General Assembly Resolution 49/214 of 23 December 1994*, HRC Res 1/2, UN GAOR, 61st sess, 21st mtg, UN Doc A/61/53 (29 June 2006) 18.

40 *Report of the Working Group on its Eleventh Session*, UN Doc E/CN.4/2006/79, 7 [30].

41 'A UN Declaration on the Rights of Indigenous Peoples: Rights and Wrong Sides of History' (2006) I(1) *Indigenous Review Quarterly* 20.

42 Namibia, *Amendments to Draft Resolution A/C.3/61/L.18*, 61st sess, UN Doc A/C.3/61/L.57/Rev.1 (21 November 2006); *Resolution to Defer Consideration of the Draft Declaration on the Rights of Indigenous Peoples*, GA Res, 61st sess, 82nd plen mtg, UN Doc A/Res/61/178 (20 December 2006); African Group, *Draft Aide Memoire* (9 November 2006) Indigenous Peoples of Africa Co-ordinating Committee <http://www.ipacc.org.za/uploads/docs/Africanaidememoire.pdf>; 'Draft Declaration Faces Litmus Test at UNGA: There is a Way Out for the African Group' (2007) II(2) *Indigenous Rights Quarterly* 7, 7.

43 Permanent Mission of Canada, Permanent Mission of Colombia, Permanent Mission of New Zealand and Permanent Mission of the Russian Federation, *Proposed Amendments to the Draft Declaration on the Rights of Indigenous Peoples* (13 August 2007). Author has document on file.

44 Rachel Davis, 'Summary of the UN Declaration on the Rights of Indigenous Peoples' (Briefing Paper, Jumbunna Indigenous House of Learning, University of Technology Sydney, November 2007).

45 *Declaration* art 46.

draft Declaration, which removed 'by other cultures or ways of life imposed on them by legislative, administrative or other measures' that appeared after 'any form of forced assimilation or integration'.[46]

The *Declaration* was passed by the GA in September 2007 with 143 votes in favour. Four States voted against adoption (Australia, Canada, New Zealand and the United States) and eleven abstained (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).[47] This was the first time states had voted against a human rights declaration.[48] However, following a change in government, Australia changed its position in relation to the *Declaration* and endorsed it on 3 April 2009.[49] New Zealand, Canada and the United States have all also moved to endorse the *Declaration*.[50]

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46 African Group, *Amendments to the United Nations Declaration on the Rights of Indigenous Peoples* (2007) 4. Author has document on file.

47 *Declaration*, 15.

48 *Universal Declaration* (8 States abstained); *United Nations Declaration on the Rights of the Child*, UN Doc A/PV.841; *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, GA Res 1904 (XVIII), UN GAOR, 18th sess, 1261st plen mtg, UN Doc A/PV.1621 (20 November 1963); *United Nations Declaration on the Elimination of Discrimination Against Women*, GA Res 2263 (XXII), UN GAOR, 22nd sess, 1597th plen mtg, UN Doc A/PV.1597 (7 November 1967); *Declaration on the Right of Mentally Retarded Persons*, GA Res 2856 (XXVI), UN GAOR, 26th sess, 2027th plen mtg, UN Doc A/PV.2027 (20 December 1971) (9 States abstained); *Declaration on the Rights of Disabled Persons*, GA Res 3447 (XXX), UN GAOR, 30th sess, 2433rd plen mtg, UN Doc A/PV.2433 (9 December 1975); *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 3452 (XXX), UN GAOR, 30th sess, 2433rd plen mtg, UN Doc A/PV.2433 (9 December 1975); *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR, 36th sess, 73rd plen mtg, UN Doc A/PV.73 (25 November 1981); *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, Supp No 49, UN Doc A/47/49 (18 December 1992); *Declaration on the Elimination of Violence Against Women*, GA Res 48/104, UN GAOR, 48th sess, 85th plen mtg, UN Doc A/PV.85 (20 December 1993).

49 Jenny Macklin, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Speech delivered at Parliament House, Canberra, 3 April 2009) <http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf > 2.

50 New Zealand, *Parliamentary Debates*, House of Representative, 20 April 2010, 10229 (Simon Power) <http://www.parliament.nz/en-NZ/PB/Debates/Debates/6/5/a/49HansD_20100420_00000071-Ministerial-Statements-UN-Declaration-on.htm>; Aboriginal Affairs and Northern Development Canada, 'Canada Endorses the United Nations Declaration on the Rights of Indigenous Peoples' (News Release, 2-3429, 12 November 2010) <http://www.aadnc-aandc.gc.ca/eng/1292354321165/1292354361417>; US Department of State, *Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship and Improve the Lives of Indigenous Peoples* (16 December 2010) US Department of State <http://www.state.gov/documents/organization/153223.pdf>.

B Travaux Préparatoires *of the Declaration*

The issues of ethnocide and cultural genocide are evident throughout the *travaux préparatoires,* revealing the concerns of both state and Indigenous representatives. At its first session in 1982, WGIP considered the recently adopted *Declaration of San José*.[51] The *Declaration of San José* describes ethnocide in terms of 'the loss of cultural identity among Indian populations of Latin America.'[52] Ethnocide occurs when 'an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language, whether collectively or individually.'[53] It involves an 'extreme form of massive violation of human rights'[54] such as the right of ethnic groups to respect for their cultural identities. The *Declaration of San José* contended that this right is established by numerous declarations, covenants and agreements of the United Nations ('UN') and its specialised agencies, as well as various regional intergovernmental bodies and numerous non-governmental organisations.[55]

Article 1 of the *Declaration of San José* equates ethnocide with cultural genocide, stating that it is 'a violation of international law equivalent to genocide, which was condemned by the United Nations *Convention on the Prevention and Punishment of Genocide* of 1948.'[56] This marked the first official recognition of ethnocide within the UN.[57] However, it must be noted that it is only a declaration made by a meeting of experts in Latin America under the auspices of the United Nations Education Scientific and Cultural Organisation ('UNESCO') and therefore has limited application.

The issues of ethnocide and cultural genocide were raised by Indigenous organisations as early as 1987.[58] The preservation of the cultural identity of Indigenous populations

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51 United Nations Education Scientific and Cultural Organisation, *Meeting of Experts on Ethno-Development and Ethnocide in Latin-America: Final Report, Declaration of San José,* UN Doc SS 82/WS.32 (12 July 1982) preamble para 1 ('*Declaration of San José*'). See Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations: Report of the Working Group on Indigenous Populations on its First Session*, 35th sess, UN Doc E/CN.4/Sub.2/1982/33 (25 August 1982) 12 [52], 13 [60], 16 [78]. It was also mentioned in subsequent meetings: *Report of the Eighth Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/2003/92, 13 [59].

52 *Declaration of San José,* UN Doc SS 82/WS.32, preamble para 1.

53 Ibid preamble para 2.

54 Ibid.

55 Ibid.

56 Ibid art 1.

57 Erica-Irene Daes, *Discrimination Against Indigenous Peoples: Study on the Protection of Cultural and Intellectual Property of Indigenous Peoples*, ESCOR, 45th sess, UN Doc E/CN.4/Sub.2/1993/28 (28 July 1993) 4 [2].

58 Sub-Commission Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations: Report of the Working Group on Indigenous Populations on its Fifth Session*, 38th sess, Agenda Item 11, UN Doc E/CN.4/Sub.2/1987/22 (24 August 1987) 9 [34], 16 [60].

was justified as Indigenous cultures form 'part of humankind's cultural heritage and there was an urgent need to reduce pressure towards cultural assimilation.'[59]

The right was included in the draft Declaration adopted by WGIP at its 11th session in the following terms:

> Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:
>
> a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
> b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
> c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
> d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
> e) Any form of propaganda directed against them.[60]

During discussions at the session, the Chairperson-Rapporteur clarified that 'cultural genocide' referred to the destruction of the physical aspects of a culture and 'ethnocide' described 'the elimination of an entire "ethnos" and people.'[61]

The considerable discussion in relation to the draft article focused on the reference to 'cultural genocide', which was subsequently replaced by 'forced assimilation or destruction of their culture' in the final version of the article. Some states in the Working Group on the Draft Declaration expressed reservations in relation to the terms 'ethnocide' and 'cultural genocide', as they were 'not clear concepts to be usefully applied in practice'.[62] This was reiterated by Canada, Chile and the United States.[63] The United States suggested that the provision should reiterate the application of the *Genocide Convention* to Indigenous peoples and state that

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59 Ibid 16 [61].

60 *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN Doc E/CN.4/Sub.2/1993/29, annex 1 art 7. The substance of art 7 of the draft Declaration was included as art 8 of the *Declaration*.

61 Ibid 16 [48]. This article was repeated in subsequent drafts: *Draft United Nations Declaration on the Rights of Indigenous Peoples in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session*, UN Doc E/CN.4/Sub.2/1994/56, 103, 107–8 (art 7).

62 Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995: Organization of the Work of the Session*, 52nd sess, UN Doc E/CN.4/1996/84 (4 January 1994) 14 [64].

63 *Report of the Second Session of the Working Group on the Draft Declaration*, UN DocE/CN.4/1997/102, 35 [183], 36 [186], 36–7 [188]; *Report of the Eighth Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/2003/92, 12 [53]–[55].

they have a right to be free from 'actions aimed at destroying their rights to belong to the group and enjoy their own culture, language and religion.'[64] For other states, the term 'genocide' was not problematic, unlike the concepts of cultural genocide and ethnocide, while others stressed that the notion of 'cultural ethnocide' had no precedent in international law.[65] Australia supported the right of Indigenous peoples not to be removed forcibly from their lands.[66]

As far as some Indigenous organisations were concerned, art 7 of the draft Declaration was simply a restatement of the provisions of the *Genocide Convention*. The terms 'ethnocide' and 'cultural genocide' were regarded as important due to the history and impact of colonisation.[67] However, in later meetings Indigenous representatives stressed that it did not simply mirror existing international law but sought to establish standards for distinct peoples.[68] The article was strongly supported by Indigenous representatives who resisted efforts to dilute it or eliminate references to ethnocide or cultural genocide.[69] For Indigenous representatives, the notion of ethnocide included forced relocations, population transfers, forced assimilation into the dominant society and dispossession of land.[70] One representative noted that 'in many instances, acts of cultural genocide had preceded or accompanied acts of genocide.'[71]

Discussion surrounding the controversial terms continued in 2003 and a number of alternatives were suggested,[72] as it was felt that ethnocide and cultural genocide were not 'terms that were generally accepted in international law.'[73] In response, an Indigenous representative claimed that because the terms were used in the *Declaration of San José* they did exist in international law.[74] This was rejected on the basis

64 *Report of the Second Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/1997/102, 37 [188].

65 *Report of the Seventh Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/2002/98, 17 [73].

66 *Report of the Second Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/1997/102, 36 [185].

67 Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995: Organization of the Work of the Session*, 52nd sess, UN Doc E/CN.4/1996/84 (4 January 1994) 14 [64].

68 *Report of the Seventh Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/2002/98, 17-18 [74].

69 Ibid 17 [74]; *Report of the Eighth Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/2003/92, 13 [59].

70 *Report of the Seventh Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/2002/98, 18 [74]–[75].

71 Ibid 18 [75].

72 *Report of the Eighth Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/2003/92, 12–13 [51]–[61].

73 Ibid 12 [52].

74 Ibid 13 [59].

that the declaration 'was developed by experts on ethnodevelopment and ethnocide, not by states, and … was not generally accepted in international law.'[75] States were also unclear about the meanings of the terms, what the scope and content of the right was and whether the intention was to create a new right that was unique to Indigenous peoples.[76] Norway suggested amending the article to refer to 'genocide, forced assimilation or destruction of their culture'.[77] This change in wording was supported by New Zealand, Canada and some Indigenous representatives.[78] In 2005, New Zealand proposed that the controversial terms 'ethnocide and cultural genocide' be replaced with 'forced assimilation or destruction of their culture'.[79] The amended version of the article was included in the Chairperson-Rapporteur's proposals for the draft Declaration and submitted to the UN Commission on Human Rights.[80]

The only change between the draft Declaration and the final *Declaration* was the removal of the words 'by other cultures or ways of life imposed on them by legislative, administrative or other measures' that appeared after 'any form of forced assimilation or integration' in part (d) of the article.[81]

Analysis of the *travaux préparatoires* reveals the concerns of states and Indigenous representatives with the concepts of ethnocide and cultural genocide. Much of the

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75 Ibid 12 [52].

76 Ibid 12 [53]–[54].

77 Ibid 12 [55].

78 Ibid 13 [60], 23, 24.

79 Commission on Human Rights, *Working Group Established in accordance with Commission on Human Rights Resolution 1995/32: Information Provided by States*, 61st sess, UN Doc E/CN.4/2004/WG.15/CRP.1 (6 September 2004) art 7; Commission on Human Rights, *Report of the Working Group on its Tenth Session: Addendum 2*, UN Doc E/CN.4/2005/89/Add.2, 12–13.

80 *Report of the Working Group on its Tenth Session: Addendum 2*, UN Doc E/CN.4/2005/89/Add.2, 12–13; *Revised Chairman's Summary and Proposal: Draft Declaration on the Rights of Indigenous Peoples* in *Report of the Working Group on its Eleventh Session*, UN Doc E/CN.4/2006/79, annex I 26 art 7.

81 This was one of only nine amendments of the thirty suggested by the African Group in the GA that was agreed upon before the final adoption of the *Declaration*: African Group, *Amendments to the United Nations Declaration on the Rights of Indigenous Peoples* (2007) 4. Author has document on file. There is no discussion of this particular amendment in any of the documents associated with the African Group's amendments to the *Declaration*: African Group, *Draft Aide Memoire*, above n 42; Albert Barume et al (African Group of Experts), *Response Note to The Draft Aide Memoire of the African Group on the UN Declaration in the Rights of Indigenous Peoples* (21 March 2007) International Working Group for Indigenous Affairs <www.iwgia.org/sw21505.asp>; African Commission on Human and Peoples Rights, *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples* (May 2007) African Union <http://www.achpr.org/files/special-mechanisms/indigenous-populations/un_advisory_opinion_idp_eng.pdf> ; 'Draft Declaration Faces Litmus Test at UNGA: There is a way out for the African Group', (2007) II(2) *Indigenous Rights Quarterly* 7.

debate focused on the meaning of these terms, which were considered to be unclear or not generally accepted under international law. There was no clear agreement on the meaning of the terms ethnocide and cultural genocide. Initially the two were regarded as interchangeable and concerned with loss of cultural identity such that Indigenous peoples were not free to enjoy, develop and transmit their own cultures and languages. A subsequent distinction was made between ethnocide as the destruction of the people and cultural genocide as the destruction of the physical manifestations of culture. There was little discussion in relation to what conduct constituted either ethnocide or cultural genocide, beyond the comments of Indigenous representatives that included forced relocations, population transfers, forced assimilation into the dominant society and dispossession of land within the concept of ethnocide. The confusion surrounding the terms ethnocide and cultural genocide led to their replacement with 'forced assimilation or the destruction of their culture'.[82] Neither of these concepts were the subject of detailed discussion. It is unclear whether the change in wording has a significant impact on the meaning of the right, as forced assimilation and destruction of culture appear to be synonymous with ethnocide and cultural genocide. Consequently, the scope and content of the right are still to be determined.

IV The Genocide Convention

As cultural genocide was the subject of considerable debate in the drafting of the Genocide Convention, an analysis of the drafting process may offer further insights into the meaning of Article 8. This link between the *Declaration* and the *Genocide Convention* is evident in the Sub-Commission on Prevention of Discrimination and Protection of Minorities' technical review of the draft Declaration.[83]

A *Historical Background*

A 1946 resolution of the GA proposed a convention on genocide.[84] The resolution affirmed that genocide was 'a crime under international law which the civilized world condemns'.[85] The groups that it specified for protection were 'racial, religious, political and other groups'.[86]

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82 *Declaration*, art 8(2)(d).

83 Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Technical Review of the United Nations Declaration on the Rights of Indigenous Peoples: Note by the Secretariat*, Agenda Item 15, UN Doc E/CN.4/Sub.2/1994/2 (5 April 1994) 8 [36].

84 *The Crime of Genocide*, GA Res 96 (I), UN GAOR, 1st sess, 55th plen mtg, in *Yearbook of the United Nations* [1946–47] 255, 255–6; Matthew Lippman, 'The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later' (1994) *Temple International Law Journal* 1, 7–8.

85 *The Crime of Genocide*, GA Res 96 (I), UN GAOR, 1st sess, 55th plen mtg, in *Yearbook of the United Nations* [1946–47] 255, 255.

86 Ibid.

The initial draft of the *Genocide Convention* was prepared by the UN Secretary-General in June 1947, assisted by a group of experts.[87] The draft Genocide Convention stated that the purpose of the convention 'is to prevent the destruction of racial, national, linguistic, religious or political groups of human beings.'[88] Genocide was defined as 'a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part, or of preventing its preservation or development.'[89] This initial draft included a provision pertaining to cultural genocide.[90]

The Social and Economic Council's Ad Hoc Committee and the Commission on Human Rights adopted a draft Genocide Convention with a separate provision in relation to cultural genocide in 1948, before transferring it to the GA for consideration.[91] The GA referred the draft Genocide Convention to its Sixth Committee.[92] The Sixth Committee ultimately decided to exclude the cultural genocide provision from the draft Genocide Convention.[93] Following its adoption by the Sixth Committee, the draft Genocide Convention was recommended for adoption by the GA.[94] Debate continued in the GA as the Union of Soviet Socialist Republics reintroduced an amendment to include cultural genocide in the draft Genocide Convention.[95] The amendment was rejected by 31 votes to 14, with

87 *Draft Convention on the Crime of Genocide*, UN Doc E/447, 15.

88 Ibid art 1(I).

89 Ibid art 1(II).

90 Ibid.

91 Ad Hoc Committee on Genocide, *Summary Record of the Twenty-Sixth Meeting*, UN Doc E/AC.25/SR.26 (12 May 1948) 4, 7; Commission on Human Rights, *Summary Record of the Seventy-Sixth Meeting*, 3rd sess, UN Doc E/CN.4/SR.76 (1 July 1948) 15; Commission on Human Rights, *Draft Convention on the Prevention and the Punishment of Genocide*, 3rd sess, UN Doc E/CN.4/136 (15 June 1948).

92 *Yearbook of the United Nations* [1948–49] 953. The final version of the *Genocide Convention* was completed in the Sixth Committee of the General Assembly during 51 meetings over a two-month period: William A Schabas, 'Origins of the Genocide Convention: From Nuremburg to Paris' (2007–2009) 40 *Case Western Reserve Journal of International Law* 35, 40; Josef L Kunz, 'The United Nations Convention on Genocide' (1949) 43 *American Journal of International Law* 738, 739.

93 *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 206.

94 Sixth Committee of the General Assembly, *Summary Record of the One Hundred and Thirty-Second Meeting*, 3rd sess, UN Doc A/C.6/SR.132 (1 December 1948) 701; Sixth Committee of the General Assembly, *Report of the Sixth Committee on Genocide: Draft Convention and Report of the Economic and Social Council*, UN Doc A/760 (3 December 1948) 8–13 [25].

95 USSR, *Amendments to the Draft Convention on the Prevention and Punishment of Genocide Proposed by the Sixth Committee*, UN Doc A/766 (5 December 1948) 1 [2].

ten abstentions.[96] The GA unanimously adopted the *Genocide Convention* on 9 December 1948.[97]

B Travaux Préparatoires *of the* Genocide Convention

1. *Secretary-General's Draft Convention on the Crime of Genocide*

The initial 1947 draft Genocide Convention made a distinction between physical genocide, biological genocide and cultural genocide.[98]

According to the 1947 draft, the cultural aspects of the definition of genocide include:

> Destroying the specific characteristics of the group by:
>
> a) Forced transfer of children to another human group; or
> b) Forced and systematic exile of individuals representing the culture of a group; or
> c) Prohibition of the use of the national language even in private intercourse; or
> d) Systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or
> e) Systematic destruction of historical or religious monuments or their diversion for alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.[99]

This aspect of genocide was divisive.[100] Two of the experts felt that it was 'an undue extension of the notion of genocide'.[101] In contrast, another expert considered that 'a racial, national, or religious group cannot continue to exist unless it preserves its spirit and moral unity.'[102] The continued existence of such groups was morally justified on the grounds of the groups' valuable contributions to civilisation in terms of cultural diversity. [103] Cultural genocide 'was a policy which, by drastic methods, aimed at the rapid and complete disappearance of the cultural, moral and religious life of a group of human beings.'[104] Despite these differences, all the experts agreed

96 *Hundred and Seventy-Ninth Plenary Meeting of the General Assembly*, UN Doc A/PV.179, 847–8.

97 Ibid 851.

98 *Draft Convention on the Crime of Genocide*, UN Doc E/447, 17.

99 Ibid art 1(II).

100 Ibid 26.

101 Ibid 27 (Professors Donnedieu de Vabres and Pella).

102 Ibid (Professor Lemkin).

103 Ibid.

104 Ibid.

that the transfer of children to another human group should be covered by the convention on genocide.[105]

2. *Ad Hoc Committee on Genocide*

The inclusion of cultural genocide was 'one of the thorniest aspects'[106] of drafting the *Genocide Convention* undertaken by the Ad Hoc Committee on Genocide established by the Economic and Social Council in 1948.[107] The delegates were deeply divided over whether or not the concept should be included, the definition of cultural genocide and whether it should be dealt with in the *Genocide Convention* or more properly under minority human rights protection.[108]

The Ad Hoc Committee voted by six votes to one to include cultural genocide in the draft Genocide Convention, albeit as a separate article.[109]

The final version of the cultural genocide provision,[110] included in the Ad Hoc Committee's Report, was in the following terms:

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105 Ibid.

106 Commission on Human Rights, *Summary Record of the Seventy-Sixth Meeting*, 3rd sess, UN Doc E/CN.4/SR.76 (1 July 1948) 7.

107 *Genocide*, ECOSOC Res 117 (VI), 6th sess, 160th plen mtg, UN Doc E/777 (3 March 1948); Ad Hoc Committee on Genocide, *Summary Records of Meetings*, UN Doc E/AC.25/SR.1-28 (5 April 1948–9 June 1948).

108 Ad Hoc Committee on Genocide, *Report of the Committee and Draft Convention Drawn up by the Committee*, UN Doc E/794 (24 May 1948) 17. States in favour of the inclusion of cultural genocide: see Ad Hoc Committee on Genocide, *Summary Record of the Fifth Meeting*, UN Doc E/AC.25/SR.5 (16 April 1948) 2 (Mr Perez-Perozo (Venezuela)), 6 (Mr Azkoul (Lebanon)), 5 (Mr Lin Mousheng (China)); 8 (Mr Morozov (USSR)). States against inclusion**:** Mr Maktos (United States) (Ad Hoc Committee on Genocide, *Summary Record of the Fourteenth Meeting*, UN Doc E/AC.25/SR.14 (21 April 1948) 10); Mr Ordonneau (France) (Ad Hoc Committee on Genocide, *Summary Record of the Fifth Meeting*, UN Doc E/AC.25/SR.5 (16 April 1948) 4; Ad Hoc Committee on Genocide, *Summary Record of the Tenth Meeting*, UN Doc E/AC.25/SR.10 (16 April 1948) 12); Mr Azkoul (Lebanon) (Ad Hoc Committee on Genocide, *Summary Record of the Fifth Meeting*, UN Doc E/AC.25/SR.5 (16 April 1948) 3). A number of States considered that cultural genocide should be dealt with in relation to minority rights: Mr Rudzinski (Poland) (Ad Hoc Committee on Genocide, *Summary Record of the Third Meeting*, UN Doc E/AC.25/SR.3 (13 April 1948) 3–4); Mr Ordonneau (France) (Ad Hoc Committee on Genocide, *Summary Record of the Fifth Meeting*, UN Doc E/AC.25/SR.5 (16 April 1948) 4; Ad Hoc Committee on Genocide, *Summary Record of the Fourteenth Meeting*, UN Doc E/AC.25/SR.14 (21 April 1948) 9); Mr Maktos (United States) (Ad Hoc Committee on Genocide, *Summary Record of the Fourteenth Meeting*, UN Doc E/AC.25/SR.14 (21 April 1948) 10).

109 Ad Hoc Committee on Genocide, *Summary Record of the Fifth Meeting*, UN Doc E/AC.25/SR.5 (16 April 1948) 8; Ad Hoc Committee on Genocide, *Summary Record of the Tenth Meeting*, UN Doc E/AC.25/SR.10 (16 April 1948) 12.

110 There were a number of iterations of the cultural genocide provision: Ad Hoc Committee on Genocide, *Summary Record of the Twelfth Meeting*, UN Doc E/AC.25/SR.12 (23 April 1948) 3; Ad Hoc Committee on Genocide, *Summary Record of the*

> In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or religious belief of its members such as:
>
> 1) prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;
> 2) destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.[111]

The Ad Hoc Committee's Report explained that the inclusion of cultural genocide recognises that it is possible to suppress a group, not just by murdering individuals, but also by abolishing the specific traits that make them into a group.[112]

3. *Sixth Committee of the General Assembly*

The inclusion of cultural genocide was one of the major issues discussed in the Sixth Committee. Some members of the committee supported the inclusion of cultural genocide on the basis that it had been included in the original GA resolution.[113] They focused on the indivisible nature of cultural and physical genocide. Pakistan described cultural genocide as the end and physical genocide the means.[114] Lebanon stated that cultural and physical genocide were 'two facets of one and the same act having the same origin and the same purpose, namely, the destruction of a group, whether by the extermination of its members or by the eradication of its distinctive characteristics.'[115] Ecuador pointed out that whether the genocide was cultural or physical the result was the same.[116]

Fourteenth Meeting, UN Doc E/AC.25/SR.14 (21 April 1948) 5, 12–14; Ad Hoc Committee on Genocide, *Summary Record of the Twenty-Fourth Meeting*, UN Doc E/AC.25/SR.24 (12 May 1948) 6–7.

111 Ad Hoc Committee on Genocide, *Report of the Committee and Draft Convention Drawn up by the Committee*, UN Doc E/794 (24 May 1948) annex art 3.

112 Ibid 17.

113 Sixth Committee of the General Assembly, *Summary Record of the Sixty-Fifth Meeting*, 3rd sess, UN Doc A/C.6/SR.65 (2 October 1948) 22 ('*Sixty-Fifth Meeting of the Sixth Committee of the General Assembly*'); Sixth Committee of the General Assembly, *Summary Record of the Seventy-Fifth Meeting*, 3rd sess, UN Doc A/C.6/SR.75 (15 October 1948) 113; *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 195–6 (Mr Pérez Perozo (Venezeula)). See also *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 194 (Sardar Bahadur Khan (Pakistan)).

114 *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 193.

115 Sixth Committee of the General Assembly, *Summary Record of the Sixty-Sixth Meeting*, 3rd sess, UN Doc A/C.6/SR.66 (4 October 1948) 33.

116 *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 203.

There was also a sentiment that a failure to protect against cultural genocide would 'facilitate the perpetration of physical genocide'.[117] Egypt argued that whilst '[c]ultural genocide was certainly not such a heinous crime as the physical destruction of a group … it did nevertheless constitute a real danger for human groups.'[118] The member gave examples of the kind of conduct that could constitute cultural genocide, including systematic destruction of schools and libraries, the attempt to assimilate groups and forced conversions.[119]

Amongst the supporters of the inclusion of cultural genocide, there was a clear sense that the notion of genocide contained in the *Genocide Convention* had to be narrow in scope to obtain the largest number of signatories.[120] Venezuela contended that it was essential that the term be used with great accuracy and only in reference to 'violent and brutal acts which were repugnant to the human conscience, and which caused losses of particular importance to humanity, such as the destruction of religious sanctuaries, libraries, etc.'[121]

Opposition to the inclusion of cultural genocide was based on the difficulty in adequately defining the term. Opponents argued that it would be better dealt with under human rights or minority protection conventions.

France felt that the notions of physical and cultural genocide should be separated as physical genocide can be defined in precise legal terms whereas the conception of cultural genocide is less precise and could lead to excessive interference in the domestic affairs of states.[122] The words 'cultural genocide' 'failed to convey the idea of the destruction of a culture', according to Denmark.[123] They stated that

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117 Ibid 204; *Sixty-Fifth Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.65, 27 (Mr Kovalenko (USSR)); *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 202 (Mr Khomussko (Byelorussian Soviet Socialist Republic)).

118 *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 199.

119 Ibid. See also Mr Tarazi (Syria) at 200; Mr Tsien Tai (China) at 198.

120 Sixth Committee of the General Assembly, *Summary Record of the Sixty-Ninth Meeting*, 3rd sess, UN Doc A/C.6/SR.69 (7 October 1948) 31 (Mr Petren (Sweden)); Sixth Committee of the General Assembly, *Summary Record of the Seventy-Second Meeting*, 3rd sess, UN Doc A/C.6/SR.72 (12 October 1948) 82 (Mr Reid (New Zealand)).

121 *Sixty-Fifth Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.65, 22. See also *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 204 (Mr Correa (Ecuador)); Sixth Committee of the General Assembly, *Summary Record of the Sixty-Third Meeting*, 3rd sess, UN Doc A/C.6/SR.63 (30 September 1948) 7 (Mr Raafat (Egypt)).

122 Sixth Committee of the General Assembly, *Summary Record of the Sixty-Third Meeting*, 3rd sess, UN Doc A/C.6/SR.63 (30 September 1948) 8; *Sixty-Fifth Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.65, 58–9.

123 *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 198.

'it would show a lack of logic and of a sense of proportion to include in the same convention both mass murders in the gas chambers and the closing of libraries.'[124] South Africa felt that the definition of cultural genocide broadened the concept and 'went too far in respect to the protection of minorities.'[125] The Netherlands were systematic in their rejection of the draft Genocide Convention's definition of cultural genocide, stating that there was an essential difference between cultural genocide and genocide as defined in the draft Genocide Convention, cultural genocide was too vague a concept to allow precise definition and delimitation for the inclusion in the convention and the inclusion of cultural genocide in the convention might give rise to abuses by reason of the vagueness of the concept.[126] India stated that cultural genocide, whilst reprehensible, could not be linked to 'genocide proper'.[127]

A number of delegates supported the concept of cultural genocide but argued it should be dealt with in relation to human rights. France considered that the punishment of cultural genocide was related to the protection of human rights and would be better protected under that rubric.[128] Other delegates considered some other form of protection was appropriate, such as a separate supplementary convention.[129]

The inclusion of cultural genocide in the draft Genocide Convention was opposed outright by Sweden, Denmark, Canada, Iran, New Zealand, India, Peru, South Africa, the Netherlands, the United States and Belgium.[130]

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124 Ibid 199.

125 Committee of the General Assembly, *Summary Record of the Sixty-Fourth Meeting*, 3rd sess, UN Doc A/C.6/SR.64 (1 October 1948) 8.

126 *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 203.

127 Sixth Committee of the General Assembly, *Summary Record of the Sixty-Fourth Meeting*, 3rd sess, UN Doc A/C.6/SR.64 (1 October 1948) 15; *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 201. See also Sixth Committee of the General Assembly, *Summary Record of the Sixty-Fourth Meeting*, 3rd sess, UN Doc A/C.6/SR.64 (1 October 1948) 16 (Mr Manini y Rios (Uruguay), Sir Hartley Shawcross (United Kingdom)); *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 203 (Mr de Beus (Netherlands)), 197 (Mr Amado (Brazil)), 202 (Mr Egeland (South Africa)), 203 (Mr Gross (United States of America)).

128 Sixth Committee of the General Assembly, *Summary Record of the Sixty-Third Meeting*, 3rd sess, UN Doc A/C.6/SR.63 (30 September 1948) 13 (Mr Chaumont (France)).

129 Sixth Committee of the General Assembly, *Summary Record of the Sixty-Sixth Meeting*, 3rd sess, UN Doc A/C.6/SR.66 (4 October 1948) 31 (Mr Abdoh (Iran)); *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 197 (Mr Petren (Sweden)).

130 *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 197–20.

The Sixth Committee ultimately decided to exclude provisions in relation to cultural genocide from the draft Genocide Convention.[131] Nehemiah Robinson concluded, at the time, that the reasons for the rejection were 'that "cultural" Genocide was too indefinite a concept to be included in a Convention; that the difference between mass murder and the closing of libraries was too great; that cultural Genocide falls rather in the sphere of protection of minorities.'[132]

4. *General Assembly Consideration of the Genocide Convention*

A proposed amendment to include cultural genocide in the *Genocide Convention* ensured that the cultural genocide debate continued in the GA. The amendment was a new art 3, which sought to include in the definition of genocide

> any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or racial origin, or religious beliefs such as:
>
> a) Prohibiting the use of the language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group;
> b) Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.[133]

The discussion in relation to this amendment largely echoed that which had taken place in the Sixth Committee meetings on the same topic. The USSR and Poland stressed the importance of cultural genocide protection, its connection with physical genocide and that its absence could be used to justify oppression of minorities.[134]

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131 The decision to exclude received 25 votes in favour (Union of South Africa, United Kingdom, the United States of America, Australia, Belgium, Bolivia, Brazil, Canada, Chile, Denmark, Dominican Republic, France, Greece, India, Iran, Liberia, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Peru, Siam, Sweden and Turkey) to 16 against (USSR, Yugoslavia, Byelorussian Soviet Socialist Republic, China, Czechoslovakia, Ecuador, Egypt, Ethiopia, Lebanon, Mexico, Pakistan, Philippines, Poland, Saudi Arabia, Syria and Ukrainian Soviet Socialist Republic), 4 abstentions (Venezuela, Afghanistan, Argentina and Cuba) and 13 delegations absent during the vote: Ibid 206.

132 Nehemiah Robinson, 'The Genocide Convention: Its Origins and Interpretation' (1949) reprinted in (2007–2009) 40 *Case Western Journal of International Law*, 19.

133 USSR, *Amendments to the Draft Convention on the Prevention and Punishment of Genocide Proposed by the Sixth Committee*, UN Doc A/766 (5 December 1948) 1 [2].

134 General Assembly, *Summary Record of the Hundred and Seventy-Eighth Plenary Meeting: Draft Convention on Genocide: Reports of the Economic and Social Council and of the Sixth Committee*, 3rd sess, 178th plen mtg, UN Doc A/PV.178 (9 December 1948) 813–14 (Mr Morozov (USSR)) ('*Hundred and Seventy-Eighth Plenary Meeting of the General Assembly*'); *Hundred and Seventy-Ninth Plenary Meeting of the General Assembly*, UN Doc A/PV.179, 842 (Mr Katz-Suchy (Poland)).

Venezuela again raised the issue of the impact of cultural genocide protection on States with significant immigrant populations.[135] The United States and United Kingdom did not think that the draft Genocide Convention should be broadened in any way.[136] Many delegates stressed the importance of the unanimous adoption of the *Genocide Convention*, which meant that something as contentious as cultural genocide could not be included.[137] Others argued that protection in relation to cultural genocide should be dealt with under the auspices of human rights.[138] Ultimately, the amendment was rejected.[139]

The fact that cultural genocide was not included in the final version of the *Genocide Convention* makes it clear that the notion of genocide is restricted to the physical destruction of a group. The inclusion of a cultural genocide provision would have been significant in recognising the inherent link between a racial, ethnic or religious group and its culture. Moreover, it would have placed culture in a central position in one of the cornerstones of the UN system. However, the issue of the existence of cultural genocide in international law persists: it has been raised in a number of cases, before both domestic and international tribunals,[140] long after the negotiations on the drafting of the *Genocide Convention* ended.

5. *Three Aspects of Cultural Genocide*

The *travaux préparatoires* of the *Genocide Convention* enhance our understanding of cultural genocide by highlighting three distinct aspects of the concept.

The first is the inclusion of the concept of the forced transfer of children from one group to another within understandings of cultural genocide. Even those who opposed the inclusion of the concept accepted this as cultural genocide.[141] This also relates to forced assimilation or conversion of groups.

A second aspect relates to the use of language, evident in the included prohibition on the use of language in private, in schools and in publications, together with systematic destruction of books in that language.

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135 *Hundred and Seventy-Eighth Plenary Meeting of the General Assembly*, UN Doc A/PV.178, 815 (Mr Peréz Perozo (Venezuela)).

136 Ibid 820–1 (Mr Gross (United States)); *Hundred and Seventy-Ninth Plenary Meeting of the General Assembly*, UN Doc A/PV.179, 837 (Mr Fitzmaurice (United Kingdom)).

137 *Hundred and Seventy-Eighth Plenary Meeting of the General Assembly,* UN Doc A/PV.178 822 (Mr Dignam (Australia)), 824 (Mr Abdoh (Iran)), 826 (Mr Sundaram (India)), 829 (Mr Raafat (Egypt)); *Hundred and Seventy-Ninth Plenary Meeting of the General Assembly*, UN Doc A/PV.179, 835 (Mr Alfaro (Panama)), 836 (Mr Amdao (Brazil)), 839 (Mr Kaeckenbeeck (Belgium)).

138 *Hundred and Seventy-Ninth Plenary Meeting of the General Assembly*, UN Doc A/PV.179, 827 (Mr Sundaram (India)).

139 Ibid 847–8.

140 See below Part IV, C *Jurisprudence.*

141 *Draft Convention on the Crime of Genocide*, UN Doc E/447, 27.

A third aspect is evident in the destruction of cultural material such as documents, objects of cultural, historical or religious significance and historical, cultural or religious monuments. This understanding is reflected in the restrictions on use or destruction of libraries, museums, schools, historical monuments, places of worship or other cultural institutions of a group. These amount to an attack on the continued enjoyment of a group of their cultural life.

C *Jurisprudence*

Until the creation of the International Criminal Court in 2002 there was no treaty body responsible for the *Genocide Convention*.[142] As such it 'lay all but dormant for much of its existence.'[143]

However, the 1990s, some 40 years after the conclusion of the treaty itself, saw an increase in activity related to the treaty. Decisions in domestic courts such as *Kruger v The Commonwealth*[144] in Australia and *Hugo Princz v Federal Republic of Germany*[145] in the United States raised issues of genocide. Ad hoc tribunals were established, including the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of former Yugoslavia ('ICTY') in 1991 and the International Criminal Tribunal for Rwanda in 1994.[146] Much of the jurisprudence on genocide is a product of ad hoc tribunals in relation to the atrocities committed in the former Yugoslavia, Rwanda and Sudan. The jurisprudence, whilst recognising that cultural genocide is not a crime under the *Genocide Convention*, sheds light on the notion of destruction of culture.

The ICTY recognised, in the trial of Radislav Krstic, that the drafters of the *Genocide Convention* expressly rejected the notion of cultural genocide as it 'was considered too vague and too removed from the physical or biological destruction that motivated the Convention.'[147] The Trial Chamber stated

> [t]he physical destruction of a group is the most obvious method, but one may also conceive of destroying a group through purposeful eradication of its culture

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142 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute of the International Criminal Court*').

143 David L Nersessian, 'The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention' (2003–2004) 36 *Cornell International Law Journal* 293, 294.

144 *Kruger v Commonwealth* (1997) 190 CLR 1 ('*Kruger*').

145 *Hugo Princz v Federal Republic of Germany* 26 F 3d 1166, 1174 (DC Cir 1994).

146 SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993); SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994).

147 *Prosecutor v Krstic (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-98-33-T, 2 August 2001) [576] ('*Krstic*').

> and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community.[148]

The Trial Chamber also stated that it is possible to take into account evidence relating to cultural and other non-physical forms of group destruction in determining whether there is the requisite intention to destroy the group.[149] However, the Trial Chamber concluded that 'an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.'[150]

The Appeals Chamber agreed with the Trial Chamber's analysis of the governing legal principle.[151] Judge Shahabuddeen handed down a partially dissenting judgment, which held that there must be an intention to destroy the group, but that intention does not have to be physical or biological.[152] He also argued that the destruction of culture may be used as evidence of an intention to destroy the group.[153] In this particular case, 'the razing of the principal mosque confirm[ed] an intent to destroy the Srebrenica part of the Bosnian Muslim group.'[154] However, he also stated that this was in no way an argument for the inclusion of cultural genocide under the *Genocide Convention*.[155] Judge Shahabuddeen's view was echoed in the subsequent cases of *Blagojevic*[156] and *Krajisnik*,[157] and was further endorsed by the International Court of Justice ('ICJ') in *Bosnia v Serbia*.[158]

The ICJ considered the cultural aspects of genocide in *Bosnia v Serbia*.[159] Bosnia claimed that Serb forces deliberately destroyed historical, religious and cultural

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148 Ibid [574]. This was on the basis of the working group established to report of human rights violations in South Africa in 1985 and the International Law Commission's 1996 report that state genocide corresponds to the crime of persecution under the Nuremberg Tribunal's statute, which included acts designed to destroy the social or cultural bases of a group: at [575].

149 Ibid [577], [579].

150 Ibid [580].

151 *Prosecutor v Krstic (Appeal)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [26].

152 Ibid [51].

153 Ibid [51].

154 Ibid [53].

155 Ibid.

156 *Prosecutor v Blagojevic* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-02-60-T, 17 January 2005) [659].

157 *Prosecutor v Krajisnik* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-00-39-T 27, September 2006).

158 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 124 [344] ('*Bosnia v Serbia*').

159 Ibid.

property, including mosques, Catholic churches, synagogues, cemeteries, monasteries, archives and libraries, in an attempt to wipe out traces of the group's existence.[160] The Court concluded that there was 'conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group'.[161] However, the Court stressed that

> [t]he destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention.[162]

The ICJ determined that Serbia had not committed acts of genocide but had failed in its obligations to prevent the genocide in Srebrenica in July 1995 and, by failing to cooperate fully with the ICTY, to punish genocide.[163]

In Australia, prior to the enactment of the *International Criminal Court Act 2002* (Cth),[164] the applicability of the crime of genocide in domestic courts arose in relation to government policies affecting Indigenous people in *Kruger* (before the High Court)[165] and in *Nulyarimma v Thompson* (in the Federal Court).[166] In each case, the court stated that genocide did not form part of Australian law.[167] This was reiterated by the Senate Legal and Constitutional Affairs References Committee in its report on the Anti-Genocide Bill 1999 (Cth).[168] The orthodox view that genocide does not include cultural genocide and, as such, cultural genocide is not prohibited under treaty law was confirmed in *Kruger*, where Dawson J stated that '[t]he Genocide Convention is not concerned with cultural genocide, references to cultural genocide being expressly deleted from it in the course of its being drafted.'[169]

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160 Ibid 121–3 [335]–[343].

161 Ibid 124 [344].

162 Ibid.

163 Ibid 161 [449]–[450]; 168 [471].

164 *International Criminal Court Act 2002* (Cth) s 3(1). The *International Criminal Court Act 2002* (Cth) had the effect of making genocide part of Australia's domestic law by accepting the jurisdiction of the International Criminal Court, as set out in the *Rome Statute of the International Criminal Court*, which includes genocide.

165 *Kruger* (1997) 190 CLR 1.

166 (1999) 96 FCR 153.

167 *Kruger* (1997) 190 CLR 1, 70–71; *Nulyarimma v Thompson* (1999) 96 FCR 153, 166 [32], 173 [58].

168 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Humanity Diminished: The Crime of Genocide* (2000) 27.

169 *Kruger* (1997) 190 CLR 1, 72.

In *Kruger*, the Court held that the removal of Indigenous children from their families between 1925 and 1949 (under the Northern Territory's *Aboriginals Ordinance 1918*)[170] did not come within the scope of the *Genocide Convention*, as there was no intention to destroy the group.[171] Justice Dawson stated that the *Genocide Convention* does not form part of domestic law, as there is no legislation implementing it, a requirement referred to in *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh*.[172] Further, the *Ordinance* predated the *Genocide Convention*, which does not have retrospective force.[173] Even if there were a requirement to interpret the *Ordinance* in keeping with Australia's international obligations, the result would be no different as there was nothing in the *Ordinance* 'which authorises acts committed with intent to destroy in whole or part any Aboriginal group'; words or intent to this effect would be required for the acts to amount to genocide.[174] Accordingly, the plaintiffs' claims were rejected.[175]

Kruger must be seen in the wider context of the Human Rights and Equal Opportunity Commission's national inquiry into the separation of Indigenous children from their families requested by the federal Attorney-General.[176] The report of the inquiry, *Bringing Them Home*, stated that '[t]he Australian practice of Indigenous child removal involved both systematic racial discrimination and genocide as defined by international law.'[177] This was on the basis that '[g]enocide does not necessarily mean the immediate physical destruction of a group'.[178] The report referred specifically to the provision in art 2 of the *Genocide Convention,* which includes the forcible transfer of children.[179] The fact that not all Indigenous children were removed did not detract from a finding of genocide, provided that the requisite intention to destroy the group as such in whole or part could be proven.[180] The report stated that

> [t]he predominant aim of Indigenous child removals was the absorption or assimilation of the children into the wider, non-Indigenous community so that their unique cultural values and ethnic identities would disappear, giving way to models of Western culture … Removal of children with this objective in mind is genocidal because it aims to destroy the 'cultural unit' which the Convention is concerned to preserve.[181]

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170 *Aboriginals Ordinance No 9 of 1918* (Cth) ('*Ordinance*').

171 *Kruger* (1997) 190 CLR 1, 5, 40 (Brennan CJ), 70–1 (Dawson J), 88 (Toohey J), 107 (Gaudron J), 144 (McHugh J), 159 (Gummow J).

172 (1995) 183 CLR 273, 286–7, 298, 304, 315, cited in ibid 70–71.

173 Ibid 70.

174 Ibid.

175 Ibid 73 (Dawson J), 88 (Toohey J), 107 (Gaudron J), 144 (McHugh J), 159 (Gummow J).

176 *Bringing Them Home*, above n 8.

177 Ibid 230.

178 Ibid 235.

179 Ibid.

180 Ibid 236–7.

181 Ibid 237.

The report further concluded that

> from 1946 laws and practices which, with the purpose of eliminating Indigenous cultures, promoted the removal of Indigenous children for rearing in non-Indigenous institutions and households were in breach of the international prohibition of genocide.[182]

The inquiry determined that there was an obligation, imposed by international law, on the Australian government to make reparations in relation to the wrongs committed.[183] Such reparation should include acknowledgement and apology, guarantees against repetition, measures of restitution, measures of rehabilitation and monetary compensation.[184]

This position was in contrast to the finding in *Kruger* and the Final Report of the Royal Commission into Aboriginal Deaths in Custody, where it was determined that the removal of Indigenous children was for their own protection.[185] This is evident in the Commission's report:

> The crime of genocide requires the act constituting it to be performed intentionally. The crucial issue of intention raises difficulty because assimilationist policies are clearly undertaken, not for the purpose of exterminating a people, but for their preservation. Whether or not they are informed by despairing, patronising or idealistic motives, such policies are ultimately benign in so far as they intend to preserve the individual members and their descendants but as members of a different culture.[186]

The report further stated that it was evident, from the discussions surrounding the drafting of the *Genocide Convention* and art 27 of the *ICCPR*, that 'assimilation, at least in its broad terms, was not seen by the UN to meet the criteria of the Convention against genocide.'[187]

A similar policy of removing Native American children from their families to state-run boarding schools, with the aim of assimilation, was carried out in the United States from 1876 to the 1970s. Lorie Graham states that the removal of Native American children was an 'integral part of a larger government effort to eradicate indigenous cultures and communities in the United States.'[188] She further

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182 Ibid 241.

183 This was on the basis of art 8 of the *Universal Declaration*, art 2(3) of the *ICCPR*, art 39 of the *Convention on the Rights of the Child* and art 6 of the *Convention on the Elimination of All Forms of Racial Discrimination*: ibid 243–4.

184 Ibid 245.

185 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5 [36.3.7].

186 Ibid.

187 Ibid [36.3.17].

188 Lorie M Graham, 'Reparations, Self-Determination, and the Seventh Generation' (2008) 21 *Harvard Human Rights Journal* 47, 68.

argues that '[t]he use of the terms "genocide" and "ethnocide" in conjunction with the treatment of indigenous peoples and their children, while perhaps controversial, is consistent with the various domestic, international, and scholarly definitions' of the crime.[189] The issues associated with this policy were addressed by the *Indian Child Welfare Act 1978*,[190] which included reparations provisions on rehabilitation, restitution, prevention of future harm and collective compensation.[191]

In Canada, there was a policy of compulsory enrolment in residential boarding schools for Indigenous children.[192] In 2006, an agreement was reached between the Canadian government, Indigenous groups and church organisations to settle class actions in relation to the compulsory residential boarding schools.[193] The agreement made almost CAD$2 billion available for reparations, including the settlement costs of class actions, contributions to a healing foundation, the establishment of a Truth and Reconciliation Commission and a commemoration fund.[194]

D *Cultural Genocide's Lessons for the* Declaration

Despite clear statements throughout the genocide jurisprudence that cultural genocide does not come within the ambit of the *Genocide Convention*,[195] cultural genocide remains relevant — the destruction of a culture may be used as evidence of the requisite intention to destroy the group physically.[196] As such, cultural genocide may be relevant in proving claims of physical genocide. The International Law Commission and Special Rapporteurs have argued that cultural genocide should be included in the *Genocide Convention*.[197]

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189 Ibid 67–8.

190 25 USC §§ 1901–1963 (1978).

191 Graham, above n 188, 90, 102.

192 Ibid 48, 50, 87.

193 *Indian Residential Schools Settlement Agreement*, 8 May 2006 <http://www.residentialschoolsettlement.ca/settlement.html> ('*Indian Residential Schools Settlement Agreement*'). The issue of abuse in Indian Residential Schools was raised in a number of Canadian cases including *AQ v Canada (Attorney General)* (1998) 169 Sask R 1, *DA v Canada (Attorney General)* (1998) 173 Sask R 312 and *LH v Canada (Attorney General)* [2005] SCC 25.

194 *Indian Residential Schools Settlement Agreement*, [1.01], [3].

195 *Kruger* (1997) 190 CLR 1, 72.

196 *Krstic* (Case No IT-98-33-T) [580].

197 Matthew Lippman, 'The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide' (1985) *Boston University International Law Journal* 1, 63; 'Report of the International Law Commission on the Work of its Forty-Eighth Session (6 May–26 July 1996)' [1996] II(2) *Yearbook of the International Law Commission* 46; Nicodéme Ruhashyankiko, *Study of the Question of the Prevention and Punishment of the Crime of Genocide,* 31st sess, UN Doc E/CN.4/Sub.2/416 (4 July 1978) [461]; B Whitaker, *Review of Further Developments in Fields with which the Sub-Commission has been Concerned: Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, 38th sess,

Moreover, the jurisprudence in relation to the cultural aspects of genocide is significant in the context of the *Declaration* as it provides some insight into the concept of destruction of culture. It highlights the concern with culture as historical, cultural and religious heritage. This historical, cultural and religious heritage includes religious places, demonstrated by the reference to mosques, churches, synagogues and monasteries in *Bosnia v Serbia*, and repositories for cultural material, such as libraries and archives.[198]

The Australian, Canadian and United States' experiences of the removal of Indigenous children are also relevant to the interpretation of Article 8, which specifically refers to 'any form of forced population transfer' and 'any form of forced assimilation or integration', and art 7 of the *Declaration*, which refers to 'forcibly removing children of the group to another group'.[199] Forced populations transfers, assimilation or integration necessarily involve the absorption of Indigenous peoples into another community such that their own cultural identity is lost.

One significant difference between the *Declaration* and the *Genocide Convention* is that in the former there is no requirement that the action is taken with the intent of destroying the group. The issue of intent was raised in the Australian context where it was argued that there was no genocidal intent in the policies of forced removal of Indigenous children; rather, the intention was to preserve individual members of the group.[200] This suggests that it would be significantly easier to prove instances of forced population transfers, forced assimilation or integration under the *Declaration* than under the *Genocide Convention*.

Article 8 provides that states are to 'provide effective mechanisms for prevention of, and redress for' such actions.[201] Some types of redress that could be used are described in the Human Rights and Equal Opportunity Commission's report, *Bringing Them Home*, and include acknowledgement and apology, guarantees against repetition, measures of restitution, measures of rehabilitation and monetary compensation.[202] These are reflected in measures used in the United States and Canada, which focused on rehabilitation and healing, the establishment of a Truth and Reconciliation Commission, restitution, commemoration, prevention of future harm and collective compensation.[203] Clearly a wide range of government responses can be encompassed in the notions of effective measures for prevention and redress.

UN Doc E/CN.4/Sub.2/1985/6 (2 July 1985) 17 [33]. Some commentators have even argued that protection against cultural genocide can be implied into the *Genocide Convention*: See Tennant and Turpel, above n 4, 296.

198 *Bosnia v Serbia* [2007] ICJ Rep 43, 121–3 [335]–[343].

199 *Declaration* arts 7–8.

200 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5 [36.3.7]; *Kruger* (1997) 190 CLR 1, 5, 47, 70.

201 *Declaration* art 8.

202 *Bringing Them Home*, above n 8, 245.

203 Graham, above n 188, 90, 102; *Indian Residential Schools Settlement Agreement*, [1.01], [3].

V Scope and Content of the Right

Having looked closely at the historical development of Article 8, together with its antecedents in the *Genocide Convention*, it is now time to use those insights to develop a better understanding of the right contained in the article.

A *Content of the Right*

Article 8 guarantees Indigenous peoples and individuals a number of specific rights. These include the right to

- integrity as distinct peoples with cultural values and distinct identities;
- land, territory or resources;
- be free from forced population transfers;
- be free from forced assimilation or integration; and
- be free from propaganda to promote discrimination.

Article 8 refers to Indigenous peoples and individuals, making it explicit that the rights contained in the article are both individual and collective. The inclusion of both individual and collective rights is one of the hallmarks of the *Declaration*. It is significant as it reflects the way in which Indigenous peoples consider their rights and as such is an apt method of protection.

Although the terms 'cultural genocide' and 'ethnocide' are not used, Article 8 reflects the same preoccupations evident in the discussion of cultural genocide in the drafting of the *Genocide Convention* and ethnocide from the *Declaration of San José*:[204] concern over the loss of cultural identity and Indigenous peoples' freedom to enjoy, develop and transmit their own cultures and languages. The first two parts of Article 8 give Indigenous peoples the right to enjoy their own cultures, cultural values and identities and the right to the land, territory and resources that are an integral part of their cultures.[205] The third and fourth parts of the article aim to protect the integrity of Indigenous peoples as groups by protecting them from forced population transfers, assimilation or integration. The final part of the article enhances this protection by preventing propaganda that promotes discrimination.

The notion of enjoying one's own culture links into the minority rights provisions contained in art 27 of the *ICCPR*.[206] Article 27 of the *ICCPR* provides that persons belonging to minorities have the right to live in a society that does not interfere with their enjoyment of their own culture and, indeed, takes active steps to ensure that their culture is able to develop. The notion of enjoying one's own culture was initially

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204 Siegfried Wiessner et al, 'The Hague Conference (2010): Rights of Indigenous Peoples' (Interim Report, International Law Association, 2010) <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> 17.

205 Gilbert and Doyle, above n 5, 295; Jérémie Gilbert, 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 14 *International Journal on Minority and Group Rights* 207, 224; *Declaration* art 8(2)(b).

206 *ICCPR* art 27.

regarded in terms of access to high culture, that is, art, literature and music through museums, libraries and schools.[207] This view was reflected in *Bosnia v Serbia*, in which protection of culture in the sense of historical, cultural and religious heritage was emphasised over culture as daily life.[208] Over time, the concept of culture has evolved to encompass all aspects of a minority group's way of life that are relevant to its cultural identity.[209] This is evident in *Krstic*, in which it was suggested that culture is a significant aspect of any group's identity and should be protected.[210] As such, culture may be regarded as encompassing high culture, mass culture and culture as a way of life. Culture also includes the preservation of identity and cultural heritage, literature, graphic and dramatic arts, the establishment and maintenance of museums, theatres and libraries, access to mass media including print media, radio and television and the ability to transmit culture, including dietary practices, distinctive clothing and legal traditions, from one generation to the next.[211] Culture may even include economic activity where that economic activity has a cultural dimension.[212] Consequently, the right to enjoy culture under art 27 'means all aspects of that culture; what is at stake is the ability of ethnic minorities to preserve their cultural identity and their cultural inheritance, *their own culture*.'[213] This is particularly the case in relation to Indigenous peoples, for whom cultural identity is regarded as firmly rooted in their ways of life.[214]

Article 8 also creates an obligation for states to 'provide effective mechanisms for prevention of, and redress'.[215] This suggests that states are under an obligation

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207 Patrick Thornberry, *Indigenous Peoples and Human Rights* (Juris Publishing, 2002) 162; Yvonne Donders, *Towards a Right to Cultural Identity?* (Intersentia, 2002) 142.

208 *Bosnia v Serbia* [2007] ICJ Rep 43, 121–3 [335]–[343], 124 [344].

209 See eg UNESCO, *Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to it (Nairobi)*, Records of the General Conference, 19th sess, Vol 1, UN Doc 19C Resolutions (26 November 1976) annex I 29; *UNESCO Universal Declaration of Cultural Diversity*, UNESCO Res 25, 20th plen mtg, 31st sess, UNESCO OR, UN Doc 31C/Res.25 (2 November 2001) annex 1 Preamble.

210 *Krstic* (Case No IT-98-33-T) [580].

211 Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc E/CN.4/Sub.2/384/Rev.1 (1979) 37–8 [223], 67 [380]–[381], annex II 107 [16]–[17].

212 Human Rights Committee, *Views: Communication No 197/1985*, UN GAOR, 43rd sess, Supp No 40, UN Doc A/43/40 (27 July 1988) ('*Kitok v Sweden*') 229 [9.2]; Human Rights Committee, *Views: Communication No 511/1992*, UN GAOR, 50th sess, Supp No 40, UN Doc A/50/40 (26 October 1994) ('*Ilmari Länsman v Finland'*) 74 [9.2]; Human Rights Committee, *Views: Communication No 760/1997*, 69th sess, UN Doc CCPR/C/69/D/760/1997 (6 September 2000) ('*Diergaardt v Namibia*'), 15 (Elizabeth Evatt and Cecelia Medina Quiroga).

213 Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford University Press, 1991) 187 (emphasis in original).

214 Human Rights Committee, *General Comment No 23 (50) Article 27*, 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (26 April 1994) 4 [7].

215 *Declaration* art 8.

to protect the rights included in the article and to prevent violations. This could be achieved through legislative means as well as education and their inclusion in government policies. It has been suggested that the use of the term 'effective mechanisms' 'presupposes that the form of redress granted must be perceived *by the community concerned* as adequate to feel actually repaired for the wrong suffered according to their own perspective'.[216] In order to be effective, redress mechanisms must be able to mitigate the effects of the wrong suffered.[217]

States must also introduce judicial, administrative and other remedies in relation to breaches of Article 8. This raises the issue of the means of redress for Indigenous peoples and individuals. The term 'redress' implies that reparations must be determined on a case-by-case basis.[218] Redress should not be limited to material reparations but may also include non-material reparations such as

> recognition of wrongs by the State or other perpetrators; guarantee of non-repetition; disclosure of truth; apology; punishment of the perpetrators; various kinds of psychosocial reparations, which allow victims to fully recuperate their place in the society to which they belong.[219]

Such measures should also take into account the preferences of Indigenous peoples in how their rights are protected and the means of redress in the event of a breach.[220] Australian examples of redress include Prime Minister Kevin Rudd's apology to Australia's Indigenous Peoples in 2008.[221] In Canada and the United States, redress options include the payment of monetary compensation to individuals as well as financing rehabilitation and healing.[222]

In essence, Article 8 ensures the survival of Indigenous cultures by guaranteeing that Indigenous peoples and individuals are not subjected to forced assimilations or

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216 Wiessner et al, above n 204, 40.

217 Ibid 52.

218 Ibid 40.

219 Ibid 39.

220 See also art 11(2) of the *Declaration*, which provides 'States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples'. In the context of state obligations under the *ICESCR*, see Committee on Economic, Social and Cultural Rights, *Report on the Fifth Session*, UN ESCOR, 5th sess, UN Doc E/1991/23 (26 November–14 December 1990) annex III; Committee on Economic, Social and Cultural Rights, *General Comment No 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Article 15, Paragraph 1 (c), of the Covenant)*, 35th sess, UN Doc E/C.12/GC/17 (12 January 2006).

221 Kevin Rudd, 'Apology to Australia's Indigenous Peoples' (Speech delivered at Parliament House, Canberra, 13 February 2008) <http://australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples>.

222 Graham, above n 188, 90, 102; *Indian Residential Schools Settlement Agreement*, [1.01], [3].

destruction of their culture. Once this is guaranteed, other cultural rights contained in the *Declaration* aim to protect Indigenous culture. This is evident in provisions which ensure Indigenous peoples have the right to engage freely in all traditional activities,[223] and can maintain, strengthen and protect their cultures, including distinct cultural institutions,[224] cultural traditions and customs,[225] cultural heritage, traditional knowledge and traditional cultural expressions.[226] Maintaining and strengthening these aspects of culture also requires the protection of past, present and future manifestations of Indigenous cultures, including visual arts.[227] To this end, states are under an obligation to take effective measures, in conjunction with Indigenous peoples, to recognise and protect the exercise of these rights.[228]

B *Is Article 8 Legally Binding?*

The *Declaration* is, as its name suggests, only a declaration and as such does not impose legal obligations on states. Only provisions of the *Declaration* that reflect customary international law (the general principles of law recognised by civilised nations) or *jus cogens* impose obligations on states.[229] Accordingly, art 7, as it relates to genocide, is a legally binding rule; genocide is clearly within the realm of *jus cogens*.[230] However, the answer is less clear in relation to the other articles of the *Declaration*, particularly a novel article such as Article 8.

Had the *Declaration* received unanimous support from states, it could constitute customary international law.[231] However, that Australia, Canada, the United States and New Zealand, all countries with significant Indigenous populations, voted against its adoption weighs heavily against this argument.[232] The precise objections of these states need to be considered in determining the significance of their votes against the *Declaration*. It must be noted that while these states voted against the *Declaration*

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223 *Declaration* art 20.

224 Ibid art 5.

225 Ibid art 11

226 Ibid art 31.

227 Ibid art 11.

228 Ibid art 31.

229 *Statute of the International Court of Justice* art 38; *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 53; Wiessner et al, above n 204, 43.

230 For authority on this point, see Jan Wouters and Sten Verhoeven, 'The Prohibition of Genocide as a Norm of *Ius Cogens* and Its Implications for the Enforcement of the Law of Genocide' (Working Paper No 69, Institute for International Law, January 2005) 5–6.

231 Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10 *Melbourne Journal of International Law* 27, 36.

232 See *North Sea Continental Shelf Cases (Germany v Denmark; Germany v The Netherlands)* (Judgment) [1969] ICJ Reports 3, 43–4 [73–4] in relation to the position of 'specially affected states'.

on the basis of the wording of specific articles and the process of adoption of the *Declaration*, they 'also expressed a general acceptance of the core principles and values advanced by the *Declaration*.'[233] However, even states that voted in favour of the *Declaration* expressed reservations about elements of the *Declaration*.[234]

Robert Hill, Australia's representative to the GA, was emphatic in limiting the impact of the *Declaration*, stating

> it is the clear intention of all States that it be an aspirational declaration with political and moral force but not legal force. It is not intended itself to be legally binding or reflective of international law. As this declaration does not describe current State practice or actions States consider themselves obliged to take as a matter of law, it cannot be cited as evidence of the evolution of customary international law. This declaration does not provide a proper basis for legal actions, complaints or other claims in any international, domestic or other proceedings. Nor does it provide a basis for the elaboration of other international instruments, whether binding or non-binding.[235]

The notion that the *Declaration* does not reflect customary international law is also reinforced by the language used in the *Declaration* itself — the Preamble refers to the *Declaration* 'as a standard of achievement to be pursued in a spirit of partnership and mutual respect'.[236]

Moves by all four states that voted against the *Declaration* to adopt it indicate 'a remarkable consensus among States'.[237] However, this consensus is not without limits. The non-binding nature of the *Declaration* was stressed by a number of states

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233 James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, S James Anaya*, 9th sess, Agenda Item 3, UN Doc A/HRC/9/9 (11 August 2008) 12 [35]; Claire Charters, 'Indigenous Peoples and International Law and Policy' (2007) 18 *Policy and Law Review* 22, 34.

234 Japan rejected the notion of collective rights for Indigenous peoples and limited rights over territories and resources with respect to third party interests (General Assembly, *107th Plenary Meeting*, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/61/PV.107 (13 September 2007) 20 ('*107th Plenary Meeting of the General Assembly*')), the United Kingdom rejected the notion of collective rights, beyond self-determination for Indigenous peoples (*107th Plenary Meeting of the General* Assembly, UN Doc A/61/PV.107, 21), Mexico limited rights over territories and resources with respect to third party interests (*107th Plenary Meeting of the General* Assembly, UN Doc A/61/PV.107, 23), Sweden rejected collective human rights (*107th Plenary Meeting of the General* Assembly, UN Doc A/61/PV.107, 24) Slovakia rejected collective human rights (General Assembly, *108th Plenary Meeting*, UN GAOR, 61st sess, 108th plen mtg, UN Doc A/61/PV.108 (13 September 2007) 5 ('*108th Plenary Meeting of the General Assembly*')).

235 *107th Plenary Meeting of the General Assembly*, UN Doc A/61/PV.107, 12. Similar comments were made by the Canadian and New Zealand representatives: at 13, 15.

236 *Declaration* art 4; Xanthaki, above n 231, 36.

237 Wiessner et al, above n 204, 2, 40.

in adopting the *Declaration*.[238] The Australian Minister for Indigenous Affairs stated that '[t]he Declaration is historic and aspirational. While it is non-binding and does not affect existing Australian law, it sets important international principles for nations to aspire to.'[239]

The International Law Association ('ILA') includes the right to be free from ethnocide as a right that is part of customary law.[240] This is based on general international law developments, regional developments, the practice of UN bodies and states. The ILA argues that

> it is not important to investigate whether the relevant rules of customary international law actually correspond, in their precise content, to the provisions of [the *Declaration*] in their actual formulation. By its own nature a declaration of principles, even when its content partially reproduces general international law, has in fact also a propulsive force, aimed at favouring further evolution of its subject matter for the future. What is really significant for the present enquiry is that the adoption of [the *Declaration*], after more than twenty years of negotiations, confirms that the international community has come to a consensus that indigenous peoples are a concern of international law, which translates into the existence of customary rules of binding force for all States irrespective of whether or not they have ratified the relevant treaties (which, on their part, taken together bind virtually all countries in the world).[241]

Despite this, there is no real consensus on the issue.[242] States have been very careful to limit the application of the *Declaration* and far more would be required to make a novel provision contained in the *Declaration* part of customary international law. The ILA cites the Australian cases of *Mabo*[243] and *Wik*[244] as part of the

> massive amount of highly significant international practice recognizing the rights of indigenous peoples, which is accompanied and confirmed by the practice developed at the domestic level by most countries in the territory of which a significant population of indigenous people live.[245]

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238 *107th Plenary Meeting of the General Assembly*, UN Doc A/61/PV.107, 22 (United Kingdom), 26 (Guyana), 27 (Suriname); *108th Plenary Meeting of the General Assembly*, UN Doc A/61/PV.108, 3 (Nepal), 5 (Turkey); United Kingdom Foreign and Commonwealth Office, 'Human Rights' (Annual Report, United Kingdom Foreign and Commonwealth Office, 2006) 299; Macklin, above n 49, 4.

239 Macklin, above n 49, 4.

240 Wiessner et al, above n 204, 51.

241 Ibid.

242 Donders, above n 207, 223.

243 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

244 *Wik Peoples v The State of Queensland* (1996) 187 CLR 1.

245 Wiessner et al, above n 204, 49–50.

While these cases are significant, neither supports the notion that forced assimilation or the destruction of Indigenous peoples' cultures comes within the general principles of law recognised by civilised nations.

It must be noted that there are theorists, such as Hans Kelsen, who suggest that unless a right is justiciable it is not a right per se.[246] A right will only be regarded as a legal right when there is recourse to a third party to determine that a violation of the right has occurred, that is, the right is justiciable and enforceable.[247] Article 8 is clearly not a right in this theoretical sense. However, it is still referred to as a right, consistent with the terminology used in the *Declaration* itself.

The fact that the *Declaration* is soft law and not binding as such does not mean that it is 'legally insignificant'.[248] In UN practice, a declaration is aspirational and ordinarily goes further than the existing practice of states, with the aim of encouraging all states to adopt more effective measures.[249] Evidently, the *Declaration* will be of political and moral force.[250] This is reflected in the attitude of states: the United Kingdom described the *Declaration* as an 'important policy tool'[251] and Nepal stated that it reflected the 'good intentions of the international community'.[252] The influential nature of the *Declaration* is evident in the fact that it has been referred to by New Zealand courts and the Waitangi Tribunal in its inquiry into the Indigenous Flora and Fauna and Cultural and Intellectual Property Claim,[253]

246 Hans Kelsen, *Pure Theory of Law* (Max Knight trans, Lawbook Exchange, 2002) 125–6 [trans of: *Reine Rechtslehre* (2nd ed, 1960)], cited in E W Vierdag, 'The Legal Nature of the Rights Granted by the *International Covenant on Economic, Social and Cultural Rights*' (1978) 9 *Netherlands Yearbook of International Law 69*, 73.

247 Asbjørn Eide, *The New International Economic Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Right*, 39th sess, UN Doc E/CN.4/Sub.2/1987/23 (7 July 1987) 13 [56]–[59].

248 Peter Billings and Anthony E Cassimatis, 'Redesigning the Northern Territory Emergency Response: Social Welfare Reform and Non-Discrimination' (2009) 27(2) *Law in Context* 58, 78.

249 Erica-Irene Daes, *Discrimination Against Indigenous Peoples: Protection of the Heritage of Indigenous People: Final Report*, 47th sess, UN Doc E/CN.4/Sub.2/1995/26 (21 June 1995) 5 [19].

250 Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995: Organization of the Work of the Session*, 52nd sess, UN Doc E/CN.4/1996/84 (4 January 1996) 5 [22]; Donders, above n 207, 223.

251 *107th Plenary Meeting of the General Assembly*, UN Doc A/61/PV.107, 22.

252 *108th Plenary Meeting of the General Assembly*, UN Doc A/61/PV.108, 3.

253 Charters, above n 233, 34; *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 560 (It must be noted that the case merely states that 'A right of development of indigenous rights is indeed coming to be recognised in international jurisprudence, but any such right is not necessarily exclusive of other persons or other interests.'); *Takamore v Clarke* [2012] NZSC 116; Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Wai 262 Waitangi Tribunal Report (2011).

addressed by the Supreme Court of Belize,[254] and incorporated into domestic law in Bolivia, Ecuador and Nepal.[255] In Australia, the *Declaration* has been referred to in the High Court cases of *Maloney v The Queen*[256] and *Wurridjal v Commonwealth*[257] and in the Queensland Supreme Court in *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury*.[258] Despite the fact that it is soft law, the *Declaration* can also be influential in the interpretation of other laws.[259] In cases where a statute is ambiguous, courts should favour an interpretation that is in conformity with international law.[260]

The *Declaration* can be used by states as a guide in the adoption of laws, policies and programs relating to Indigenous peoples.[261] Indigenous peoples can use the provisions of the *Declaration* in their political advocacy and discussions with all

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254 Willem van Genugten, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems' (2010) 104 *The American Journal of International Law* 29, 52.

255 Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the *United Nations Declaration on the Rights of Indigenous Peoples*' (2009) 58 *International and Comparative Law Quarterly* 957, 982; Clive Baldwin and Cynthia Morel, 'Using the United Nations *Declaration on the Rights of Indigenous Peoples in Litigation*' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 121, 124.

256 [2013] HCA 28. In this case, the appellant argued that the provisions of the *Racial Discrimination Act 1975* (Cth) should be interpreted in light of art 19 of the *Declaration*: Joan Monica Maloney, 'Appellant's Submissions', Submission in *Maloney v The Queen*, No B57 of 2012, 26 October 2012, [56]–[57]. Justice Keifel rejected this argument, stating that 'non-binding extraneous materials' cannot be elevated over the language of the text of an international convention and incorporated into domestic legislation: [2013] HCA 28, [134] (Keifel J).

257 [2009] 237 CLR 309, [269].

258 *Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1, 37 [33].

259 See Megan Davis, 'To Bind or Not to Bind: The United Nations *Declaration on the Rights of Indigenous Peoples* Five Years On' (2012) 19 *Australian International Law Journal* 17, 38–9 in relation to cases in Australia and internationally. See also Barelli, above n 255, 982, 987 and van Genugten, above n 254, 52 in relation to a case dealing with Indigenous land rights in Belize.

260 *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); Stephen Norrish, 'Are Indigenous People Likely to Receive Greater Penalties than Non-Indigenous People in the Courts? What Should be Done About it?' (Paper presented at AIJA Indigenous Justice Conference — Current Issues in Delivering Indigenous Justice — Challenges for the Courts, Adelaide, 18–19 July 2013) 32.

261 *Declaration* art 42; Victoria Tauli-Corpuz, *Statement of Victoria Tauli-Corpuz Chair of the UN Permanent Forum on Indigenous Issues on the Occasion of the Adoption of the UN Declaration on the Rights of Indigenous Peoples* (13 September 2007) United Nations Permanent Forum on Indigenous Issues <http://www.un.org/esa/socdev/unpfii/en/news.html> 3.

levels of government.[262] People should use the *Declaration* in policy statements and guidelines, in law reform submissions to governments, in court matters and media campaigns.[263] As Social Justice and Native Title Commissioner Mick Dodson stated:

> I think people should use the Declaration at every opportunity. If you are writing to government quote articles of the Declaration. If you're involved in health quote the health articles, if you are involved in native title or land rights quote the lands, territories and resources articles, if you are in education quote the articles about education and language. If you are on about political organisation talk about self-determination and our right to be autonomous and govern ourselves. For any aspect of Aboriginal or Torres Strait Islander life there is something in the Declaration that you can use and utilise to reinforce your arguments and what you and your mob are trying to do.[264]

C *Enforcement of the Right*

The Special Rapporteur on the rights of Indigenous peoples has stated that the *Declaration* 'represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples'.[265] This amounts to a willingness to measure state conduct against the rights contained in the *Declaration*.[266] This is reflected in the Special Rapporteur's report on Australia where he focused on the need to

> incorporate into government programmes a more holistic approach to addressing indigenous disadvantage across the country, one that is compatible with the objective of the United Nations Declaration of securing for indigenous peoples, not just social and economic wellbeing, but also the integrity of indigenous communities and cultures, and their self-determination.[267]

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262 Megan Davis, 'The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 6(3) *Indigenous Law Bulletin* 6, 6; Australian Human Rights Commission, above n 21, 66.

263 Australian Human Rights Commission, above n 21, 66.

264 Ibid 65.

265 James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, S James Anaya*, 9th sess, Agenda Item 3, UN Doc A/HRC/9/9 (11 August 2008) 24 [85].

266 Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22(1) *European Journal of International Law* 121, 130. This position was also adopted by the International Law Association: Wiessner et al, above n 204, 5.

267 James Anaya, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya, Preliminary Note on the Situation of Indigenous Peoples in Australia*, 12th sess, Agenda Item 3, UN Doc A/HRC/12/34/Add.10 (24 September 2009) 3 [10].

He also reiterated the importance of the *Declaration* in

> framing and evaluating legislation, policies, and actions that affect the Aboriginal and Torres Strait Islander peoples. The Declaration expresses the global consensus on the rights of indigenous peoples and corresponding state obligations on the basis of universal human rights. The Special Rapporteur recommends that the Government undertake a comprehensive review of all its legislation, policies, and programmes that affect Aboriginal and Torres Strait Islanders in light of the Declaration.[268]

VI Conclusions

Whilst the *Declaration* is not legally binding, it represents a significant advance for Indigenous peoples in protecting their cultures. Article 8 contains a novel individual and collective right to be free from forced assimilation and destruction of culture. In addition, states are to provide effective mechanisms for prevention and redress in relation to their integrity as distinct peoples, dispossession of land, forced population transfers, assimilation or integration or propaganda designed to promote or incite discrimination.

Article 8 is also significant as it makes an explicit connection between Indigenous peoples' cultures and their continued possession of land, territories and resources. Further, Article 8 lowers the bar for proving instances of forced population transfers, forced assimilation or integration, as there is no requirement that action is taken with the intent of destroying the group. Moreover, the Special Rapporteur has stated that he will use the *Declaration* to measure states' conduct.

Article 8 is inextricably linked with the concepts of ethnocide and cultural genocide, which appeared in the initial drafts and were the subject of considerable debate in the drafting of the *Genocide Convention*. Ethnocide and cultural genocide are understood as the loss of cultural identity through forced relocations, assimilation into a dominant society and dispossession of land. The concepts also extend to the use of language, evident in policies that prohibit the use of language in private, in schools and in publications, together with systematic destruction of books in that language.[269] A third aspect of the concept relates to historical, cultural and religious heritage. This is seen in the destruction of cultural material such as documents, objects or monuments of cultural, historical or religious significance. It is also reflected in descriptions of the destruction or restrictions on use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions of a group as ethnocide or cultural genocide. Such measures amount to an attack on the continued enjoyment of a group of their cultural life. In essence, Article 8 seeks to ensure that Indigenous peoples are free to enjoy, develop and transmit their own cultures and languages.

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268 Ibid 5 [18].

269 In relation to Indigenous peoples and language policies, see Fernand de Varennes, *Language, Rights and Opportunities: The Role of Languages in the Inclusion and Exclusion of Indigenous Peoples*, Submission to the UN Expert Mechanism on the Rights of Indigenous Peoples, 17 February 2012 <www.ohchr.org/Documents/Issues/IPeoples/EMRIP/StudyLanguages/FernandDeVarennes.doc>.