

Major developments in international human rights law in 2007:  
adoption of the *Declaration on the Rights of Indigenous Peoples*

**An extract from ISHR's 2007 Human Rights Monitor<sup>1</sup>**

The adoption of the *Declaration on the Rights of Indigenous Peoples* by the General assembly in New York on 13 September 2007 marked an outcome that was twenty years in the making. Indigenous peoples were jubilant and relieved that the final text maintained the key provisions relating to self-determination, lands and territories, cultural identities and indigenous values and beliefs that had been adopted by consensus in the Council in June 2006. The evolution of the Declaration also demonstrated that although the standard-setting process is rarely linear, the opportunity for States to work along-side and develop a deeper understanding of the needs and aspirations of the group concerned can be a valuable process for all.

The significance of the adoption of the Declaration on the Rights of Indigenous Peoples (the Declaration) for the world's 370 million indigenous peoples cannot be underestimated.<sup>2</sup> They trace its roots back to a pivotal gathering of indigenous peoples at the UN in Geneva in 1977 which opened the ears of the international community to the need for additional, specifically defined forms of recognition for indigenous peoples that would bring an end to the normative protection gap in international human rights law.<sup>3</sup> What followed was more than 20 years of discussion and negotiation through five separate bodies within the UN human rights system to produce the Declaration.<sup>4</sup>

The end product owes much to the determination, patience and negotiating skill of indigenous peoples, who worked in partnership with Member States to develop the text.<sup>5</sup> At the time, this type of interaction by non-State actors in the development of a human rights standard-setting instrument was a rarity, and it helped to pave the way for new, more inclusive procedures and structures to be developed with the UN system, including

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<sup>1</sup> The full version of this chapter and the publication it appeared in, *2007 Human Rights Monitor*, are available at <http://www.ishr.ch>

<sup>2</sup> See A/61/L.67 available at

<http://daccessdds.un.org/doc/UNDOC/LTD/N07/498/30/PDF/N0749830.pdf?OpenElement>

<sup>3</sup> This was the view expressed by the Indigenous Peoples' Global Caucus (representing indigenous peoples in all regions of the world) upon the adoption of the Declaration by the HRC in June 2007. Statement available at [http://www.iwgia.org/graphics/Synkron-](http://www.iwgia.org/graphics/Synkron-Library/Documents/Noticeboard/News/International/IPclosingstatementHRC2006.htm)

[Library/Documents/Noticeboard/News/International/IPclosingstatementHRC2006.htm](http://www.iwgia.org/graphics/Synkron-Library/Documents/Noticeboard/News/International/IPclosingstatementHRC2006.htm) However some indigenous leaders, including the Chairperson of the UN PFII, Ms Vicki Tauli-Corpuz, go back further, pointing to the trip of Cayuga Chief Deskaheh to the League of Nations in 1923 and Maori leader W. T. Ratana in 1925, as the beginning of indigenous peoples' struggle to be heard at the international level.

<sup>4</sup> Between 1985 and 1993, the initial text was drafted by the five independent experts of the UN Working Group on Indigenous Populations (WGIP) with the participation of some 100 indigenous organizations. It was then approved by the Sub-Commission on the Protection and Promotion of Human Rights in 1994, and forwarded to the then Commission on Human Rights (CHR). In 1995, the CHR established an Inter-Sessional Working Group to consider the Draft Declaration in 1995. This Working Group met for 11 sessions between 1995 and 2006. In June that year the text was adopted by the Human Rights Council, and just over a year later, it was adopted by the General Assembly.

the UN Permanent Forum on Indigenous Issues (PFII). It also allowed indigenous voices to contribute valuable information and unique perspectives that helped Member States gain some normative clarity about the kind of instrument required. Along the way many States became important advocates for indigenous peoples, speaking on their behalf behind the scenes and in those fora that remain the exclusive domain of Member States.

Despite the often frustrating and arduous journey, the integrity of the text withstood numerous and sustained efforts by a minority of States to weaken it. In the end, the Declaration was supported by 143 States in the General Assembly, as well as the Indigenous Peoples' Global Caucus, the PFII and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, to name only a few. This is a remarkable outcome, especially given the turn of events when the text was introduced into the General Assembly during its 61<sup>st</sup> session.

### **The passage of the Declaration from the Human Rights Council to the General Assembly**

Following its adoption in the Human Rights Council on 29 June 2006,<sup>6</sup> the Declaration was submitted to the 61<sup>st</sup> session of the General Assembly for adoption. From the beginning, the Declaration faced a multiplicity of obstacles. First it was caught in the cross-fire among Member States about what procedure should be used for the General Assembly to consider the reports sent by the then newly established Council.<sup>7</sup> After almost two months of arduous inter-governmental negotiations, it was agreed that although the Council's Report would be presented directly to the GA Plenary, the two decisions included in it (the Declaration on the Rights of Indigenous Peoples and the Convention on Forced Disappearances) would first have to be considered and approved by the Third Committee.

The next and more concerning obstacle arose when the Third Committee adopted a procedural resolution to take no-action which was introduced by Namibia, citing concerns regarding references to self-determination and the absence of a definition of indigenous peoples.<sup>8</sup> The resolution allowed 'more time for further considerations',

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<sup>5</sup> Indigenous peoples worked with the WGIP to develop the text, and were active participants in all 11 sessions of the CHR's Working Group on the Draft Declaration, which operated on a consensus basis to further refine the text.

<sup>6</sup> The vote in the Council was 30 in favour, 2 against (Canada and the Russian Federation), 12 abstentions, and 3 States did not vote. African States who voted in favour included South Africa, Cameroon and Zambia. Six African States abstained: Algeria, Ghana, Morocco, Nigeria, Senegal and Tunisia. The text is contained in A/HRC/1/L.3 available at [http://www.hreoc.gov.au/Social\\_Justice/declaration/DDRIPresolutionHRC.pdf](http://www.hreoc.gov.au/Social_Justice/declaration/DDRIPresolutionHRC.pdf)

<sup>7</sup> The debate, which is ongoing, is between those States who argue that the HRC Report should be presented directly to the GA Plenary given the status of the Council as a subsidiary body of the GA, and those who argue that it should be considered by the GA's Third Committee, which has human rights expertise, before being presented at the Plenary.

<sup>8</sup> The resolution, adopted 28 November 2007, is contained in A/C.3/61/L.57/Rev.1 available at <http://www.un.org/ga/61/third/proposalslist.shtml> It was co-sponsored by the Group of African States and adopted by a vote of 82 in favour, 67 against, with 25 abstentions.

requiring only that the GA 'conclude its consideration of the Declaration before the end of its sixty-first session.'<sup>9</sup> Shortly afterwards the African Group issued a Draft Aide Memoire<sup>10</sup> describing their concerns in more detail, which subsequently became the basis for a decision from the African Union Summit in January 2007.<sup>11</sup>

Not surprisingly, this development shocked and profoundly disappointed indigenous peoples. Although they knew the Declaration would encounter strong opposition from a minority of States that had been long-standing opponents to the Declaration in the Commission on Human Rights and the Council,<sup>12</sup> they had expected a positive outcome, not further delays. The Indigenous Peoples' Global Caucus pointed out that most African States had chosen not participate in the standard setting process that gave rise to the Declaration, and many of the concerns they were now raising had already been asked and answered. Its Chairperson also expressed concern that this action by the Third Committee 'delivered a huge blow' to the standing of the new Human Rights Council.<sup>13</sup>

On 8 May 2007, the Africa Group released proposed amendments to the text of the Declaration. The proposal made substantive changes to 36 provisions of the Declaration, including the deletion of the right to self-determination, the introduction of numerous references to 'national and territorial integrity', and the subordination of more than ten fundamental rights, including the right to own and develop land, to the applicable national legal system.<sup>14</sup> The release of this proposal coincided with the sixth session of the PFII, which afforded the Indigenous Peoples' Global Caucus a platform to resoundingly condemn it as inconsistent with international law, discriminatory and offensive to indigenous peoples.<sup>15</sup> Instead the Indigenous Caucus, and subsequently the PFII, appealed to States to approve the text of the Declaration as adopted by the Council.

These developments prompted States who were supportive of the text as adopted by the Council to engage in discussions with the African Group in an effort to reach an acceptable agreement that would allow for the adoption of the Declaration. These States, subsequently referred to as 'the Co-sponsors', were led by Guatemala, Mexico and Peru.

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<sup>9</sup> The 61st session was scheduled to conclude by mid September 2007.

<sup>10</sup> Available at <http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/AfricanGroupAideMemoireOnDeclaration.pdf>

<sup>11</sup> Available at [http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/AUDecisionOnUNDeclarationDec\\_2006.doc](http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/AUDecisionOnUNDeclarationDec_2006.doc)  
The decision of the AU welcomes the GA's decision to allow further time for consideration of the Declaration and affirms that the AU has concerns in relation to: self-determination, definition of indigenous peoples; land ownership and exploitation of resources; the establishment of distinct political and economic institutions; and national and territorial integrity.

<sup>12</sup> These included Australia, Canada, New Zealand and the US.

<sup>13</sup> Malezer, L. (Chairperson, Indigenous Peoples' Global Caucus) 'UN affirms Indigenous Peoples are not equal to all other Peoples', press release, 28 November 2006. Available at <http://www.iwgia.org/graphics/Synkron-Library/Documents/Noticeboard/News/International/06-11-28%20INDIGENOUS%20PEOPLES%20CAUCUS%20STATEMENT.doc>

<sup>14</sup> The proposal is available at [http://www.hreoc.gov.au/Social\\_Justice/declaration/screport\\_070831.pdf](http://www.hreoc.gov.au/Social_Justice/declaration/screport_070831.pdf)

<sup>15</sup> Available at [http://www.ishr.ch/hrm/nymonitor/new\\_york\\_updates/nyu\\_indig\\_peoples\\_progress\\_report\\_2.pdf](http://www.ishr.ch/hrm/nymonitor/new_york_updates/nyu_indig_peoples_progress_report_2.pdf)

Also around this time, a number of influential documents were developed by African human rights experts to respond to the AU's concerns about the Declaration.<sup>16</sup> One of these was an advisory opinion on the Declaration, prepared by the African Commission on Human and Peoples' Rights.<sup>17</sup> It addressed each of the AU's concerns and provided an assurance that the text was consistent with the Constitutive Act of the AU, the African Charter on Human and Peoples' Rights and the UN Charter. This advisory opinion was submitted for discussion at the AU Summit in early July 2007, and together with the other expert documents, it helped to allay many of the genuine concerns African States held about the potential impact of the Declaration, particularly in relation to their sovereignty.

To help progress matters in the GA, on 6 June 2007 the President of the 61<sup>st</sup> session appointed Ambassador Davide of the Philippines as an independent facilitator to undertake consultations with the African Group, the Indigenous Peoples' Global Caucus and eight States who had 'expressed strong positions on the draft Declaration'.<sup>18</sup> Given the entrenched positions of the various parties, the facilitator's task of achieving a consensus outcome was not possible in the time available. However he developed a five-point test to assist Member States and others to identify consensus proposals. For example, he recommended that States ask themselves whether the proposal preserves the purpose of the Declaration; ensures that the Declaration does not fall below existing human rights standards; and represents a genuine effort to address the various concerns.<sup>19</sup> This proved a useful yardstick for States, as well as an important lobbying tool for indigenous peoples and NGOs.

As the facilitator's mandate was coming to an end in early July, the eight States opposed to the Declaration wrote him a joint letter. They advised that they required amendments to 16 Articles, and 'only through amendments to the text of the Declaration ... will it be possible for us to consider supporting [it]'. The eight thematic areas that remained of concern to them were: self-determination, self-government and indigenous institutions; lands, territories and natural resources; redress; free, prior and informed consent; rights of third parties; intellectual property rights; military issues; and education.<sup>20</sup>

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<sup>16</sup> A group of respected African human rights experts prepared a written response note to the AU's Aide Memoire, and with the support of the International Work Group on Indigenous Affairs (IWGIA) a group of 6 African experts visited New York in April 2007 to discuss the Declaration with 19 African Embassies. IWGIA in collaboration with PFII also organized a roundtable discussion on the Declaration involving African and other Permanent Missions. A second document was written by the African indigenous umbrella organization 'Indigenous Peoples of Africa Coordinating Committee' (IPACC) which responded to the Aide Memoire. For more detail see: <http://www.iwgia.org/sw21505.asp>

<sup>17</sup> Available at <http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/07-08-08AdvisoryOpinionENG.pdf>

<sup>18</sup> These States were Australia, Canada, New Zealand, US, Columbia, Guyana, Suriname and Russia.

<sup>19</sup> Other elements of the five-point test included whether the proposal: builds on and does not undermine the efforts and achievements of the process at the CHR and HRC; and is specific enough to allow the GA to determine the particular amendments to be made to the current text in the time remaining.

<sup>20</sup> Available at: [http://www.hreoc.gov.au/Social\\_Justice/declaration/govt\\_declaration.pdf](http://www.hreoc.gov.au/Social_Justice/declaration/govt_declaration.pdf) Note also, Canada, New Zealand, Russian Federation and Columbia released an alternative text for the Declaration on 13 August 2007 which addressed these eight thematic concerns and proposed changes to 20 provisions.

In August, the Co-sponsors intensified their discussions with the African Group. Indigenous peoples were not included in these discussions, but became aware towards the end of the month that the Co-sponsors were close to an agreement. The Co-sponsors advised that the dynamics of the GA were such that the support of the African Group would be essential if the Declaration was to be adopted, and time was of the essence.

A key element of the agreement that the Co-sponsors negotiated with the African Group was a pact that African States would vote down any amendments to the Declaration proposed on the floor of the GA, so long as the Indigenous Caucus agreed to nine amendments to the Declaration.<sup>21</sup> Most of the proposed amendments were non-controversial, but some indigenous peoples were concerned about the inclusion of a reference to territorial integrity in Article 46; something indigenous peoples had argued against including in the Declaration over many years. This was a critical inclusion for the African Group, as well as a number of Asian States, and proved to be non-negotiable.<sup>22</sup>

Following regional indigenous consultations, the Steering Committee of the Indigenous Peoples' Global Caucus ultimately endorsed the text proposed by the African Group.<sup>23</sup> As the Co-sponsors argued, this was a dramatic improvement on the initial proposal from the African Group, and left in tact hard-won language in relation to self-determination, lands, territories and natural resources; free prior and informed consent; treaties; and preambular paragraphs recognising the inherent and equal rights of indigenous peoples.

This agreement, and negotiations by the Co-sponsors and others to secure the support of Asian and Eastern European States, ensured the Declaration had a smooth passage in the General Assembly on 13 September 2007. The outcome of the vote was 143 in favour, 4 against<sup>24</sup> and 11 abstentions.<sup>25</sup>

### **Looking forward to the implementation of the Declaration**

The rights contained in the Declaration are not new, but draw together in one instrument existing international human rights norms, principles and jurisprudence as they apply to indigenous peoples. This is an extremely useful tool for indigenous peoples as well as States because it provides a clear articulation of the nature of the obligations and

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<sup>21</sup> The text is available at [http://www.hreoc.gov.au/Social\\_Justice/declaration/screport\\_070831.pdf](http://www.hreoc.gov.au/Social_Justice/declaration/screport_070831.pdf)

<sup>22</sup> The Co-sponsors advised the Indigenous Caucus that if it insisted on opening up the language about territorial integrity, the African Group would then insist on opening up language about lands, territories and resources, and the chances of adoption of the Declaration would dwindle.

<sup>23</sup> In the Steering Committee's public statement announcing its decision (4 September 2007), it acknowledged that indigenous support was not unanimous. Although regional consultations indicated that 'many' indigenous peoples supported the adoption of the amended text, '[m]any others took the position not to oppose the adoption of the Declaration. Some felt strongly that they should not be bound by the process and emphasized the right of Indigenous Peoples to decide our own arrangements in our own time'.

Available at <http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/07-09-04CaucusDecisionSupportDeclaration.pdf>

<sup>24</sup> Australia, Canada, New Zealand and the US.

<sup>25</sup> States abstaining included the Russian Federation, Columbia, Burundi, Kenya and Nigeria.

entitlements that attach to the rights of indigenous peoples. Therefore, even though the Declaration is not a legally binding instrument, it is not surprising that it is already being used by some States as a guide to the minimum human rights standards and obligations they are required to uphold at the national level to ensure indigenous peoples can fully enjoy their human rights.<sup>26</sup> Whether this recognition translates into the world's indigenous peoples being able to more fully enjoy and exercise their human rights, remains to be seen.

There are a range of mechanisms in place to encourage the implementation of the Declaration. These include the PFII, which sees the Declaration as 'the major foundation and framework in implementing its mandate [and]...a key instrument and tool for raising awareness on and monitoring progress of indigenous peoples' situations.<sup>27</sup> They also include the recently revised mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples,<sup>28</sup> who is now authorised to promote the Declaration and other relevant instruments 'where appropriate'. Finally, the universal periodic review mechanism of the Council and the UN treaty body system are expected to pay close attention to the implementation of the Declaration by individual States when their human rights situations are reviewed.

Despite this willingness on the part of many different entities to give effect to the Declaration, a number of influential States are likely to remain defiant objectors. The US has been particularly strong in its ongoing opposition, taking the floor in recent sessions of both the Council and the Third Committee to express the view to the Special Rapporteur that the new mandate afforded him by the Council only authorises his promotion of the Declaration in countries that voted in favour of its adoption in the General Assembly.<sup>29</sup> This is a clear sign that the challenge to ensure the respect, protection and fulfilment of indigenous peoples' rights has just begun.

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<sup>26</sup> See for example the decision of the Supreme Court of Belize (Central America) on 19 October 2007 which affirmed that Belize is obligated not only by its Constitution, but also by international instruments and customary law – including the UN Declaration on the Rights of Indigenous Peoples – to respect and protect Maya customary land rights. This is the first judgment to rely on the Declaration as evidence of general principles of international law. For more information see [http://www.law.arizona.edu/depts/iplp/advocacy/maya\\_belize/index.cfm?page=advoc](http://www.law.arizona.edu/depts/iplp/advocacy/maya_belize/index.cfm?page=advoc)

<sup>27</sup> Tauli-Corpuz, V. (Chairperson of PFII), Statement on the occasion of the adoption of the UN Declaration on the Rights of Indigenous Peoples', 13 September 2007. Available at <http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/07-09-13StatementChairofUNPFIIDeclarationAdoption.pdf> Importantly, Article 42 of the Declaration also explicitly asks the PFII to promote respect for and full application of the provisions of the Declaration.

<sup>28</sup> See HRC *Resolution 6/12* available at [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_6\\_12.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_6_12.pdf)

<sup>29</sup> The US made these remarks at the time of the renewal of the mandate of the Special Rapporteur during the Council's sixth session, and during the Special Rapporteur's interactive dialogue with the 62<sup>nd</sup> session of the GA's Third Committee.