

The UN Declaration on the Rights of Indigenous Peoples: A major victory and challenge

by **Victoria Tauli-Corpuz**

The United Nations Declaration on the Rights of Indigenous Peoples finally cleared its last hurdle when it was adopted by the UN General Assembly on 13 September 2007.

It was a day of victory and joy for us, indigenous peoples, who spent more than two decades drafting, debating and negotiating in four different UN bodies. The Declaration was adopted through a vote shortly before the 61st session of the General Assembly ended. One hundred and forty-four states voted yes, four voted no (Australia, Canada, New Zealand and the United States), 11 abstained and 30 were absent. The Latin American states under the leadership of Mexico, Peru and Guatemala and the European Union and Norway were the ones who championed the adoption of this Declaration. They were the co-sponsors for the adoption of this at both the UN Human Rights Council and the General Assembly. Almost all of the Asian countries voted yes, with the exception of Bangladesh, Azerbaijan and Bhutan, which abstained. The majority of the African Group of states also voted yes.

As the Chair of the UN Permanent Forum on Indigenous Issues, I was given the privilege to address the General Assembly after the Declaration was adopted. I stated that 'the 13th of September 2007 will be remembered as a day when the United Nations and its Member States, together with indigenous peoples, reconciled with past painful histories and decided to march into the future on the path of human rights.'

This latest human rights instrument represents the minimum international standards which protect the rights of indigenous peoples. This means that laws and policies on indigenous peoples of states and UN bodies and agencies, and other multilateral bodies, cannot go below these standards. Les Malezer, the Chair of the Global Indigenous Peoples Caucus, also spoke and he emphasised that the Declaration '... contains no new provisions of human rights. It affirms many rights already contained in international human rights treaties but which have been denied to indigenous peoples.'

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Address: 131, Jalan Macalister, 10400 Penang, MALAYSIA
E-mail: twnet@po.jaring.my **Website:** www.twinside.org.sg

Tel: 60-4-2266728/2266159 **Fax:** 60-4-2264505

It is important that this be said because there is a view that special rights are being established for indigenous peoples. But our contention is that these are not special rights. This Declaration affirms the principles of equality and non-discrimination. It is simply an interpretation of how international human rights law should be applied to indigenous peoples considering the historical injustices we suffered through colonisation, the dispossession of our lands, territories and resources and the destruction of our cultures, our traditional socio-political and economic systems.

The negotiating process

The drafting process of this Declaration started with the UN Working Group on Indigenous Populations in 1985. This finished in 1993 and the draft was submitted to the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which subsequently adopted it the following year. As all UN declarations have to be negotiated by member states in an intergovernmental process, the draft was then submitted to the UN Commission on Human Rights. The Commission established the Open-ended Intersessional Working Group with the Sole Purpose of Elaborating a Draft Declaration in 1995.

When the negotiations started, a formation of governments called CANZUS (Canada, Australia, New Zealand and the US) said that the Working Group is an intergovernmental body and indigenous peoples are just observers to the process and therefore cannot be given a voice. We strongly opposed this and threatened to walk out from the whole process if this was the ruling. We asserted that a declaration on our rights cannot be negotiated without our full and effective participation and demanded that we should have an equal voice with the governments in negotiating the text. We won after we threatened to walk out of the whole process. This is what makes this Declaration unique. For the first time in the UN, the subject of the rights was allowed to have an equal voice with governments. But this is

also one factor why it took many years before the Declaration was finalised.

The negotiations took 11 annual sessions. The last session ended in February 2006, after which the final draft was submitted to the newly established UN Human Rights Council that replaced the Commission on Human Rights. On 29 June 2006, at the very first session of the Human Rights Council, the UN Declaration on the Rights of Indigenous Peoples was adopted. This was through a vote where 30 member states voted in favour, 12 abstained and two voted against.

The only countries that voted against the Declaration were Canada and Russia. Australia, New Zealand and the US were not members of the Human Rights Council and thus could not vote in support of Canada. When this was brought to the General Assembly for adoption, however, these four countries stuck together and were the only ones which voted no. It is so ironical that these countries, which project themselves as champions for human rights, voted against a historic human rights instrument for which their own indigenous peoples fought very hard.

Right of self-determination

The most difficult articles to negotiate were the ones on the right of self-determination (Article 3), the cluster on the rights to lands, territories and resources (Articles 25 to 30) and the articles which explicitly mentioned free, prior and informed consent (Articles 10, 11, 19, 28). It also took a long time to convince many states that collective rights of indigenous peoples are human rights.

For us, the right to self-determination is a foundational right and therefore we found it hard to agree to have this qualified. During the negotiations at the Working Group of the Commission on Human Rights, the US, the United Kingdom, Russia and France proposed that the right of self-determination be qualified as 'internal self-determination'. We rejected this and argued that qualifying and limiting what this right means when applied to us is discriminatory.

Common Article 1 of the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights states: 'All peoples have the right of self-determination...' Why is it that when this applies to indigenous peoples it has to be qualified?

Furthermore, saying that only internal self-determination is allowed would make it difficult for indigenous peoples divided between two or more nation-states to link up together. The carving up of nation-states was a recent phenomenon which led to the artificial separation of indigenous peoples between these national borders. In addition, various indigenous peoples forged treaties with their former colonisers and these are international agreements, even if the US and Canada want to regard these as only domestic law. Internal self-determination will further undermine the international character of these treaties. In the end this suggestion was dropped by the proponents.

Compromise on territorial integrity

The other proposed change, which many governments agreed with, including the African Group of states, was that the Declaration clarify that the right to self-determination does not allow for the violation of the state's territorial integrity and political unity. We tried to resist this but in the end, we agreed to the inclusion of such a reference in Article 46. This states: 'Nothing in this Declaration may be ...construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.' This is a standard phrase which can be found in almost all international human rights instruments so in the end we agreed to it.

We also knew that if we could not bring the African Group of states on board, the risk that the Declaration would not be adopted was high. Their resolution which called for the deferment of the adoption of the Declaration by the General Assembly was passed on 28 November 2006. The issue of territorial integrity was one of their biggest concerns and was one of the subjects of

the 36 proposed amendments they wanted to make to the Declaration text as adopted by the Human Rights Council.

After the deferment, informal negotiations were held between the co-sponsors for the adoption (led by Mexico, Peru and Guatemala) and the African Group (led by Namibia and Botswana), to agree only on a few amendments. The number of amendments was eventually reduced from the original 36 to nine, which included the additional phrase in Article 46. The co-sponsors sought our position on whether we found these amendments acceptable. All of the regional caucuses of indigenous peoples had to agree to these changes before we could communicate that there was a consensus. The North American indigenous caucus had some reservations but they agreed not to block the consensus.

Lands, territories and resources and free, prior and informed consent

Canada, Australia, New Zealand and the US have consistently expressed difficulties with the articles on lands, territories and resources. Canada, in its statement before the adoption at the Human Rights Council in 2006, claimed that these articles can counter the land claims processes going on in Canada and '...these can be interpreted to support claims to broad ownership rights to traditional territories, even where rights to such territories were lawfully ceded by treaty.'

New Zealand said that four provisions were '... fundamentally incompatible with New Zealand's constitutional and legal arrangements, the Treaty of Waitangi...'. These articles were Article 26 on lands, territories and resources, Article 28 on redress, and Articles 19 and 32 on a right of veto over the state.

Article 26(1), which states that 'Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired', was the article which I had helped to formulate together with the Canadian delegation at the 11th session of the Working Group of the Commission

on Human Rights. Canada, at that time, agreed with this formulation. After the Conservative government led by Prime Minister Stephen Harper came to power, however, the position of the Canadian delegation changed.

The idea that free, prior and informed consent is a right which should be accorded to indigenous peoples is unacceptable to Canada, Australia and New Zealand. In the statements they made before the vote was taken at the General Assembly, they all said they could not accept a right that allowed a particular sub-group of the population to be able to veto legitimate decisions of a democratic and representative government. The articles which explicitly mention free, prior and informed consent are Articles 10, 11, 19, 28 and 32.

Australia, in its final statement at the General Assembly, said it could not support '...the inclusion of intellectual property rights for indigenous peoples'. It was referring to Article 31, which acknowledges that we can develop intellectual property rights over our cultural heritage, traditional knowledge and traditional cultural expressions.

Globalisation and the challenge of the Declaration

In a world which is fast globalising, with the rich countries preoccupied with changing international and national trade and investment laws to facilitate their exploitation of the world's remaining wealth, it is no surprise that the Declaration found its greatest resistance from some of these countries. The existence of such an instrument creates obstacles for faster globalisation. Canada, Australia and the US are eagerly facilitating the entry of their oil, gas and mining companies into indigenous peoples' territories both in the South and in the North. This is why they singled out articles which restrain them from extracting what remains in our territories.

But this is precisely why a UN Declaration on the Rights of Indigenous Peoples had to come into being. Grave and massive violations of our individual and collective human rights persist up to the present. The Declaration acknowledges that we have collective rights which have to be respected and protected, otherwise our individual human rights can be rendered meaningless and our continuing survival as distinct peoples and cultures will be compromised.

We went to the UN over the past 22 years to tell our stories about how our rights have been violated by states and corporations. Every article in this Declaration is a response to each of these problems. The final adoption of this by the UN General Assembly on 13 September 2007 is a recognition by the world community of nations of its historic and moral responsibility to us, indigenous peoples who are not only victims of injustice but also the main bearers of the world's cultural diversity and custodians of biological diversity.

According to Article 42, states and the UN Permanent Forum on Indigenous Issues and all other UN bodies and specialised agencies shall promote respect for and full application of this Declaration. The task now, therefore, is to ensure its widest dissemination, its translation into languages understood by indigenous peoples and the provision of technical, human and material resources to secure its implementation.

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Victoria Tauli-Corpuz is Chairperson of the UN Permanent Forum on Indigenous Issues and Executive Director of the Philippines-based Tebtebba Foundation (Indigenous Peoples' International Centre for Policy Research and Education).