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TR-21

Statement of Maivân C. Lâm

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School of Law, 7/21/93

Madam Chairperson,

I. Two years ago, I first assisted at a session of this Working Group. I considered it an honour to do so then, both because of the bold ideas on the rights of Indigenous Peoples which your Working Group uniquely entertained in the U.N. System, and because of the respectful procedures that your Working Group adopted to facilitate the participation of all parties, be they indigenous spokespersons, state representatives, or simple academics like myself with neither indigenous nor statist standing. As you may know, I have published my favourable impressions of that 1991 session, and look forward to being able to do the same for this session.

With your permission, I would like today to comment briefly on two matters :
the wording of the provision on self-determination in the Draft Declaration, and its general tenor.

II. I agree with the position of the significant majority of the Indigenous Groups represented here that the right of self-determination of Indigenous Peoples must be recognised as equivalent in all respects with the right of self-determination of all other peoples, and that the right in fact constitutes a *sine qua non* context for the enjoyment of all the other rights that the Draft Declaration would recognise and enumerate.

I also agree that the best way to assert and preserve the right to self-determination of Indigenous Peoples is to express it, as Article I of the Draft Declaration, using the exact language in which it is expressed in Article I of each of the two International Covenants on Human Rights.

The reasons for doing so are compelling:
The Covenants' language on self-determination has now been in place some four decades and remains the classic U.N. statement of the right. In my opinion, it would be a matter of the utmost shame if this Working Group, with its admirable record to date,

went down in history as that international body which, for the petty expediency of a mere moment, set in motion the vandalizing of this most profound, and universal, of principles of international law, with consequences injurious not just to Indigenous Peoples, but to all other peoples as well.

Indeed, so profound and universal is this principle that international jurists increasingly hold that it has achieved *jus cogens* status, such that states are no longer free to derogate from it.

Furthermore, the I.C.J., in its 1975 Western Sahara decision, made it clear that the subjects of the right to self-determination are peoples, not states.

Indeed, it held, in that case, that an essentially nomadic, tribal people — defined by their subjective sense of collective identity, political self-regulation, and traditional area of economic activity, though not exhibiting evidence of a formal government, stable population, or clearly demarcated territory — nevertheless detained self-determination.

I might note that the court made it very clear that it was talking, in that case, about what some today are calling external self-determination.

Finally, the Sahara decision not only invalidated Spain's "blue-water" claim over Western Sahara; it also invalidated the would-be domination of its peoples asserted by contiguous states.

There is thus, Madam Chairperson, no instrument of international law that specifically prohibits the recognition of the full right of self-determination of Indigenous Peoples. Your Working Group, in this the year and Decade of Indigenous Peoples, should not now make up such a prohibition. The Declaration on Friendly Relations and Cooperation among States, for example, prohibits a **state** from infringing the territorial integrity of another. It does not, and could not, without gutting the democratic political process itself, prohibit **peoples** who live within a state from modifying the latter's structures, or even boundaries as need be. Witness the separation of Bangladesh from Pakistan.

While I sympathise with the desire that some have expressed, Madam Chairperson, of completing a draft this year that will receive the General Assembly's approval, I believe that neither prophecies regarding eventual State behaviour, nor the artificial

constraint of a schedule, should dictate the content of the Draft Declaration.

For one thing, we all, in our lives, complete the works begun by our ancestors, and simultaneously launch other works that our children will complete.
There is honour in both activities.

For another, the Working Group is constituted as a body of independent experts, not state representatives. As such, it ought to, and has to date — in a most admirable manner — represented the most progressive elements of international civil and not statist society. That internatioanal civil society is now in the process of fundamentally re-thinking the role of states, in their internal as well as external aspects.

Internally, this re-thinking is reminding states that they are nothing more, nor less, than the marriages or partnerships of their constituent peoples. And as we know, progressive thinking today clearly admits that divorce and dissolution are legitimate ways of ending such relationships, when all else fails. The possibility of divorce and dissolution, however, does not mean that parties enter into a marriage or a partnership with the primary goal of ending them. On the contrary — we all seek something like permanency in our associations.
On the other hand, it is precisely the right that each spouse or partner possesses to end a relationship that motivates the other to accord the first the respect that makes the relationship mutually beneficial. It goes without saying, of course, that the modification, or termination, of any relationship needs to proceed in a fair and orderly manner. This rule should be observed in the case of the Indigenous/State relationships as well. But that, Madam Chairperson, belongs in the realm of procedure, which **will** have to be worked out in the U.N. system. It does **not** belong in the Declaration of Rights which, as you wisely reminded us earlier this week, should remain simple, general and principled.

Madam Chairperson, I hear the Indigenous Peoples assembled here proposing, as Mr Moana Jackson earlier said, a tender yet serious, thoughtful, respectful and, if we could only recognise it, most timely new conception of the relationship between states and their constituent peoples.

This new conception casts states and their constituent peoples as real, not feigned, partners. It rejects the old conception that

would cast indigenous peoples as the objects, victims, or at best wards of exploitative paternalistic states.

Madam Chairperson, I implore the Working Group to remain true to its enlightened record in elaborating International Law in the progressive direction pointed to us by Indigenous Peoples. If states insist on remaining backward-looking, let them do that in their own name in the General Assembly. But let the Draft Declaration that emanates from this Working Group, instead, reflect the most generous and forward-looking consensus of those assembled here, whether they represent Indigenous Peoples, States, or their own most careful thoughts and sincere sentiments, as is the situation in my own case.

Thank you Madam Chairperson.