STATEMENT BY MR. TOMOYUKI HANAMI
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AT THE MEETING OF THE SIXTH COMMITTEE
ON THE REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS SIXTY-SEVENTH SESSION (PART THREE)

Protection of the environment in relation to armed conflict

Thank you, Mr. Chairman,

I would like to start by addressing the topic "Protection of the environment in relation to armed conflicts". The delegation of Japan welcomes the submission of the second report by the Special Rapporteur, Ms. Marie Jacobsson, which duly took into account the discussion at the Commission's Sixty-Sixth session as well as at the Sixth Committee last year.

The Japanese delegation recognises that, based on the second report, the Commission deliberated the topic of protection of the environment during armed conflicts (categorised as phase II under this project), based on draft principles proposed by the Special Rapporteur, aiming at clarification of specific and detailed norms concerning the rules of armed conflict enshrined in provisions of the Geneva Conventions.

As we stated last year, the Commission should clarify legal norms concerning protection of the natural environment which is applied in the peculiar situation of armed conflict based on the existing provisions of law of armed conflict. Furthermore, it should be noted that breaking balance between military necessity and humanitarian consideration by virtue of creating new norms could bring the result of a higher risk of incompliance of law of armed conflict.

Concretely speaking, the delegation of Japan recognises that the

Commission addressed this year to clarify specific and detailed norms concerning protection of natural environment during armed conflict enshrined in articles 35(3) and 55(1) of the 1977 Additional Protocol to the Geneva Conventions (namely, (i) prohibition on use of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment; (ii) obligation to care to protect the natural environment against widespread, long-term and severe damage in warfare; and (iii) prohibition on attacks against the natural environment by way of reprisals). The delegation of Japan has an impression that basically the draft principles which are provisionally adopted by the drafting committee seem to be identified taking into account of basic principles of law of armed conflict such as principle of distinction and principle of proportionality. On the other hand, for example, draft principle II-5 which provides protected zones is a procedural provision which prescribes a measure to implement the existing norms of the law of armed conflict. The Commission should further discuss, in the sense of effectiveness, the significance to establish such a new procedure even though the basic norm remains unchanged. The delegation of Japan considers that while the analysis contained in the second report is mostly consistent with existing law of armed conflict, the scope of the analysis of this project must be focused on the protection of natural environment during armed conflict.

At any rate, the delegation of Japan considers that the Commission should carry on its study to clarify the detailed norms on this topic, on the basis of profound analysis of state practice of each state.

The delegation of Japan looks forward to seeing fruitful discussion taking place in the next session much like this year.

Immunity of State Officials from Foreign Criminal Jurisdiction

Mr. Chairman,

Turning to the topic of "Immunity of State Officials from Foreign Criminal Jurisdiction", allow me to first express our warm appreciation to the Special

Rapporteur of this topic, Ms. Concepción Escobar Hernández, and the members of the Commission on the progress so far on this complex and challenging subject.

After adopting draft articles on the scope of immunity *ratione personae*, the Commission has now shifted to a more challenging task of defining the material scope of immunity *ratione materiae* since last year. Japan supports the ILC's efforts to provide a clear definition to the scope of immunity *ratione materiae.* The resulting products from the last two sessions, however, provide a rather vague picture as to the exact scope of immunity *ratione materiae* in our view.

Last year, the Commission concluded that "state officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction" and "state official" was defined as "any individual who represents the State or who exercises State functions". The commentary to the draft articles adopted last year noted that a hierarchical position of an individual was irrelevant in defining such an individual as a "state official". This year, the tentative draft articles presented by the Drafting Committee stipulate that state officials enjoy immunity *ratione materiae* "only with respect to acts performed in an official capacity" and define an "act performed in an official capacity" as "any act performed by a state official in the exercise of State authority". If read together, these draft articles suggest that immunity *ratione materiae* captures almost all official acts performed by state officials, regardless of whether they are senior officials, lower-rank officials, or in some cases maybe, private contractors as "de facto" officials.

Japan is of the view that the current definition of "act performed in an official capacity" lacks clarity as to its outer limits and, if left unlimited, runs the risk of abuse with respect to the notion of immunity *ratione materiae.* We hope that the commentary to be considered and adopted next year will provide clarity on some of the questions resulting from the current draft articles possibly with non-exhaustive list of examples. Our questions are as follows.

Firstly, what kind of acts would qualify as "exercise of state authority"? We note that the definition of "state officials" adopted last year uses the term

"state functions". Is the use of the term "state authority" in the definition of "act performed in an official capacity" supposed to be more limiting than "state functions"? In a contemporary world, states assume a variety of functions, varying from national security and diplomatic relations to economic regulation and social welfare. Do all these functions *ipso facto* fall under the definition of "state authority"? We would welcome further explanation in the commentary.

Secondly, does the current definition of an "act performed in an official capacity" make a distinction between acts performed by state officials as an exercise of state authority and acts performed by state officials in the course of their exercise of state authority? There is ambiguity as to whether acts incidental to the exercise of state function which cannot be classified as purely "private acts" in nature may be covered under immunity *ratione materiae.* As an simple example, a state official on a visit abroad to attend international conferences as a representative of the state may enjoy immunity *ratione materiae* as to her/his conducts during the conference, but does s/he also enjoy immunity as to her/his infraction of traffic regulations on the way to the conference venue?

Thirdly, if the exercise of state authority by state officials on a foreign territory was not based on the consent of the territorial state, should such act be protected by immunity? It should be recalled that the special regime of immunity from foreign criminal jurisdiction applicable to individuals in relation to diplomatic missions, consular posts, special missions or military forces abroad are all premised on the consent of the territorial state on their entry into the territory as well as their stated function to be carried out therein. Granting immunity to the official acts of foreign state officials when the receiving state has not given any consent to the exercise of foreign state authority on its territory would be pushing the limit too far of the current state of international law. It would be irrational to think that the territorial state's only recourse in such a case is to resort to state responsibility of the sending state especially as there may well be situations where the international wrongfulness of the act in question is disputed although it is clearly a violation of the domestic law of the territorial state. Japan believes that the contours of immunity *ratione materiae* should be strictly defined so as not to unduly limit states' territorial sovereignty.

The law of immunity is one of the fundamental principles of international law underpinning equality of sovereign states and stable inter-state relationships, and Japan finds a great practical value in the ongoing work of the Commission on this topic. A clear and well-defined scope of immunity *ratione materiae* will be all the more necessary to uphold the integrity of this concept. We also note that, when discussing this topic, we as member states tend to lean toward the perspective of the beneficiaries of immunity, while on the other hand, there is an equal value in putting our shoes in the perspective of the state receiving foreign state officials.

Next year, we hope that the Commission discusses these inherent limitations to the scope of immunity *ratione materiae* which have not been clearly spelled out so far. The potential limitations to immunity should not be equated with exceptions to immunity, as limitation should be considered together with the definition of the outer scope of the concept of *immunity ratione materiae*, while exception is a subsequent consideration that comes after we confirm the material scope of *immunity ratione materiae*. We also look forward to the discussion on the exceptions to immunity next year. Our national judicial practice concerning exceptions to immunity is limited to those under special arrangements concerning diplomatic and consular officials as well as officials of visiting forces. We therefore will follow the Commission's analysis of state practice on this aspect with great interests.

Thank you, Mr. Chairman.