

Comments by the Government of Japan to the ILC's Draft Principles on Protection of the Environment in Relation to Armed Conflicts

28 of June, 2021

Japan appreciates the efforts of the Commission, in particular the previous Special Rapporteur, Ms. Marie Jacobsson, and the current Special Rapporteur, Ms. Marja Lehto, and is thankful for their work devoted to the topic of protection of the environment in relation to armed conflicts. Japan attaches utmost importance to this issue, as we expressed at the Sixth Committee of the 74th session of the United Nations General Assembly.

Japan has no doubt that protection of the environment in relation to armed conflicts has become an urgent issues and fully recognizes the need for a new approach for strengthening its protection. On the other hand, it should not be overlooked that the appropriate and effective protection of the environment cannot be achieved with the abstract content of norms and rules. Japan is of the view that there still remain rooms for discussions to clarify a concrete content of the new approach introduced by the Commission and the Special Rapporteur, in which they try to provide a way for the appropriate and effective protection of the environment. Against this backdrop, Japan has the honour to submit its comments to the draft principles on this subject as follows:

(Specific Comments)

Principle 1

- Regarding the introduction of a new approach, Japan proposed in 2019 that, taking into consideration the dynamics of the law governing armed conflict, and in order not to overload the task of the ILC, the protection of the environment during an armed conflict, as opposed to before or after an armed conflict, should be focused on.
- This does not mean that Japan denies the importance of the protection of the environment before or after an armed conflict. Rather, Japan fully appreciates, as

stated above, the introduction of a new approach in order to create a new foundation to strengthen the protection of the environment in relation to armed conflicts.

- In particular, Japan understands the intention and efforts of the Commission and the Special Rapporteur to bridge the two traditional distinctions. The one is between the law of armed conflict and the law of peace. The other is between international armed conflicts and non-international armed conflicts.
- Japan does not oppose that the ILC takes this progressive approach. However, it should be emphasized that the discussion about international law regulating international armed conflicts has been accumulated by taking a balance between military necessity and humanity. Distinctions of applicable rules in relation to international armed conflict as stated above have been developed as the result of such discussion. Therefore, these distinctions should be fully respected and considered if the ILC takes the integrative approach for the progressive development of international law in this subject.
- In addition, the draft principles should clarify how the law of armed conflict and other branches of international law, such as international environmental law and international human rights law, are applied to armed conflicts, whereas Japan understands that these draft principles do not alter the rights and obligations under existing international law.

Principle 4 and 17

- Japan is of the view that the concept of “protected zones” needs further discussion in order to strike an appropriate and effective balance between the two needs: the protection of environment and practical military operations.

- The ILC should clarify in the commentary how States should manage and operate “protected zones.” In particular, the risk of abuse should be taken into consideration. In this regard, a principle which prohibits States from locating military objectives within or near protected zones, such as those stipulated in Article 58 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) regarding ‘Precautions against the effects of attacks’, unless parties to armed conflict agree otherwise, should be added. Furthermore, it should be stipulated that the status of protected zones will be deprived if States violate such principle.
- If the ILC is to provide further clarification to the definition and the criteria of protected zones, the impact on military operations should be taken into account.
- It is understandable that environmental importance sometimes overlaps with cultural importance. However, the intention of the Commission to include the term “cultural” is not clear under the terms of the present Principle 4. In order to clarify the precise intention (as the commentary to this Principle stated that “[t]he draft principle does not extend to cultural objects *per se*.”), it should add before the term “cultural importance” such word as “related”.
- The phrase “as long as it does not contain a military objective” in Principle 17 could be interpreted as ruling out a situation in which parties to an armed conflict agree to designate an area which contains a military objective as a protected zone. If the intention is not to rule out such a situation but to provide that such area designated by agreement as a protected zone shall not be protected against an attack if a military objective that was not present nor made known when such agreement was made is newly introduced or found in the protected zone, a phrase such as “which was not

present nor made known when such agreement was made” should be added after the term “military objective”.

- Furthermore, as below-mentioned in the comment on Principle 13 paragraph 3, a sentence such as “Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” (Article 52, paragraph 2 of the Additional Protocol I) should be added in Principle 17 for clarification.

Principle 7

- Japan considers that the contents of this Principle should not be regarded as normative in view of past practice of relevant actors in peace operations. Therefore, the term “shall” should be changed to “are encouraged to”.
- Multiple actors, not limited to states and international organizations, may be involved in armed conflict and have some effect on the environment. Therefore, the phrase “States and international organizations” should be modified to “States, international organizations and other relevant actors”.

Principle 13

- While Principle 13, paragraph 3, states that “No part of the natural environment may be attacked, unless it has become a military objective”, the principle by itself does not provide that the natural environment corresponds to civilian objects (Article 52, paragraph 2, of the Additional Protocol I). Hence, a sentence such as “Military objectives are limited to those objects which by their nature, location,

purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” should be added to Principle 13, paragraph 3, for further clarification, although the commentary to that Principle refers to Article 52, paragraph 2, of the Additional Protocol I.

Principle 19

- Japan considers that it should be clarified that the term "environmental modification techniques" has the same meaning as what is stipulated in Article 2 of the Convention on the prohibition of military or any other hostile use of environmental modification techniques. Therefore, the phrase “as defined in Article 2 of the Convention on the prohibition of military or any other hostile use of environmental modification techniques” should be added after the term “environmental modification techniques”.

(Other Comments)

Principle 6

- For the reference of the ILC, Japan would like to inform the Committee that Japan and the United States concluded the Supplementary Agreement on cooperation in the field of environmental stewardship relating to the United States Armed Forces in Japan¹ on 28 September, 2015. In this agreement, both parties acknowledged the importance of environmental stewardship and its contribution to managing risks to public safety in relation to the presence of the United States armed forces, including

¹ Agreement between Japan and the United States on cooperation in the field of environmental stewardship relating to the United States Armed Forces in Japan, Supplementary to the Agreement under Article VI of the Treaty of Mutual Cooperation and Security between Japan and the United States, regarding Facilities and Areas and the Status of United States Armed Forces in Japan

the prevention of pollution in, adjacent to, or in the vicinity of the facilities and areas in Japan the use of which is granted to the United States (hereinafter referred to as “the facilities and areas”)². This agreement also has provisions on cooperation to provide available and appropriate information between Japan and the United States regarding situations that could affect public safety, including human health and safety, in adjacent to or in the vicinity of the facilities and areas³ as well as on the commitment of the United States to issue and maintain governing standards for the environment that provide environmental compliance standards, including provisions for spill response and prevention, for the activities of the United States armed forces within the facilities and areas.⁴ It also stipulates that such standards generally adopt the more protective of applicable United States standards, Japan standards, or international agreement standards.⁵

Additionally, this agreement also provides the parties’ obligation to establish and maintain procedures so that specified Japan authorities have appropriate access to the facilities and areas following a contemporaneous environmental incident, i.e., a spill.

Principle 10 and 11

- Principle 10 concerns corporate due diligence. However, the relationship between this duty and the law of armed conflict is not clear. Japan would like to invite the Commission to clarify the differences from other frameworks mentioned in the commentary.
- The term “environment” used in Principles 10 and 11 appears to include human

² Preamble of the Supplementary Agreement.

³ Article 2 of the Supplementary Agreement.

⁴ Article 3 (1) of the Supplementary Agreement.

⁵ Article 3 (2) of the Supplementary Agreement.

health, whereas this notion does not seem to be embraced in Article 55 of the Additional Protocol I stipulating the “Protection of the natural environment”. Therefore, the ILC should clarify why only these principles explicitly refer to “human health” with regard to corporate due diligence and liability.

Principle 14 and 15

- In order to avoid repetition and redundancy, Principle 14 and Principle 15 could be rephrased and integrated.

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