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## Chapter XIV

# INTERNATIONAL HUMANITARIAN LAW (IHL)

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**Q. What is International Humanitarian Law?**

- A. International humanitarian law is a set of rules which seek, for humanitarian reasons, *to limit the effects of armed conflict*. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. (*ICRC Fact Sheet, What is International Humanitarian Law?*)

**Q. Where did IHL originate?**

- A. International humanitarian law is rooted in the rules of ancient civilizations and religions – warfare has always been subject to certain principles and customs. Universal codification of International Humanitarian Law began in the 19<sup>th</sup> century. Since then, States have agreed to a series of practical rules, based on the bitter experience of modern warfare. These rules strike a careful balance between humanitarian concerns and the military requirements of States.

As the international community has grown, an increasing number of States have contributed to the development of those rules. International humanitarian law forms today a universal body of law. (*Id.*)

**Q. What are the sources of IHL?**

- A. A major part of International Humanitarian Law is contained in the four ***Geneva Conventions of 1949***. Nearly every State in the world has agreed to be bound by them. The Conventions have been developed and supplemented by two further agreements: the ***Additional Protocols of 1977 relating to the protection of victims of armed conflicts***.

Other agreements prohibit the use of certain weapons and military tactics and protect certain categories of people and goods. These agreements include:

- a) the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, plus its two protocols;
- b) the 1972 Biological Weapons Convention;
- c) the 1980 Conventional Weapons Convention and its five protocols;
- d) the 1993 Chemical Weapons Convention;
- e) the 1997 Ottawa Convention on anti-personnel mines;
- f) the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

Many provisions of International Humanitarian Law are now accepted as customary law – that is, as general rules by which all States are bound. (*Id.*)

**Q. Does IHL concern itself with the legality of the commencement of hostilities or justification of war or of the armed conflict?**

**A.** No, the legality of the war or the justification for the commencement of the hostilities is irrelevant in IHL. IHL deals with *jus in bello* (*justice in war*), not with *jus ad bellum* (*justice of war*). The Preamble of Protocol I states that “the provisions of the Geneva Conventions and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.”

**Q. Distinguish IHL from International Human Rights Law.**

**A.** International humanitarian law and international human rights law are two distinct but complementary bodies of law. Both seek to

protect the individual from arbitrary action and abuse, with a view to safeguarding the fundamental rights of the individual.

Human rights law achieves this objective in a comprehensive way insofar as they cover almost all aspects of life. Their rules must be applied to all persons and be respected in all circumstances, except in emergency cases where derogation from rights is allowed.

Humanitarian law, however, is a specialized body of human rights law, fine tuned for times of armed conflict. Its provisions are formulated in such a way as to take into account the special circumstances of warfare. They may not be abrogated under any circumstances. Usually they apply “across the front line”, i.e. the armed forces have to respect humanitarian law in their dealings with the enemy (*and not in the relations with their own nationals*). Some of its provisions have no equivalent in human rights law, in particular the rules on the conduct of hostilities or on the use of weapons.

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## **A. THE GENEVA CONVENTIONS AND THE ADDITIONAL PROTOCOLS**

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### **Q. What are the Geneva Conventions?**

- A.** The Geneva Conventions are four treaties adopted in 1949 that set the standards for the humanitarian law in armed conflicts. They consist of the following:
- a) Geneva Convention I – “for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field”;
  - b) Geneva Convention II – “for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea”;
  - c) Geneva Convention III – “relative to the Treatment of Prisoners of War”; and

- d) Geneva Convention IV – “relative to the Protection of Civilian Persons in Time of War”

**Q. What are the 3 Protocols additional to the 1949 Geneva Conventions?**

- a) Protocol I of 1977 – relating to the Protection of Victims of International Armed Conflicts;
- b) Protocol II of 1977 – relating to the Protection of Victims of Non-International Armed Conflicts;
- c) Protocol III of 2005 – relating to the Adoption of an Additional Distinctive Emblem.

**Q. Give the seven fundamental rules which are the basis of the Geneva Conventions and the Additional Protocols.**

- a) Persons *hors de combat* (*out of combat / out of the fight*) and those who do not take a direct part in hostilities are entitled to respect for their lives and their moral and physical integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.
- b) It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat*.
- c) The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and equipment. The emblem of the Red Cross or the Red Crescent is the sign of such protection and must be respected
- d) Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.

- e) Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.
- f) Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.
- g) Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.

**Q. What is the Martens Clause?**

- A.** The Martens Clause was first included in The Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology.

A modern version of the clause is to be found in Article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows:

“In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of International Law derived from established custom, from the principles of humanity and from the dictates of public conscience.”

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**1. TYPES OF CONFLICTS COVERED**

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**Q. When do the Geneva Conventions apply?**

- A.** Common Article 2 of the Geneva Conventions provides that in addition to the provisions which shall be implemented in peacetime, the Conventions “shall apply to all cases of declared war or of any

other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”

The Conventions shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

**Q. What kind of armed conflicts are governed by IHL?**

**A.** International humanitarian law applies to two kinds of armed conflicts:

- a) **International armed conflicts** are those in which at least two States are involved. The Common Article 2 of the Geneva Conventions defines an international armed conflict as including all cases of declared war or of any other armed conflict which may arise between two or more states which are parties to the Conventions, even if the state of war is not recognized by one of them and all cases of partial or total occupation of the territory of a State Party, even if the said occupation meets with no armed resistance. International armed conflicts are governed by the Geneva Conventions and Additional Protocol I;
- b) **Non-international armed conflicts** are those restricted to the territory of a single State, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other. They are governed by the common Article 3 to the four Geneva Conventions as well as by the Additional Protocol II.

**Q. What is a war of national liberation?**

A. A war of national liberation is a conflict in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the U.N. Charter and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the U.N. Charter. (*Protocol I, Art. 1[4]*)

**Q. How would you classify a war of national liberation?**

A. Under Article 1(4) of Addition Protocol I of 8 June 1977, a war of national liberation must also be treated as a conflict of an international character.

**Q. Discuss the test for determining the existence of an internal armed conflict?**

A. The test for determining the existence of an internal armed conflict is whether there is “a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” (*Tadic Jurisdiction Decision, ICTY-IT-94-I-AR72, 2 October 1995*)

Under this test, in establishing the existence of an armed conflict of an internal character, two criteria must be assessed:

- a) *the intensity of the conflict* – consider factors such as the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilization and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the U.N. Security Council, and, whether any resolutions on the matter have been passed;
- b) *the organization of the parties*. – take into account factors including the existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms.

These criteria are used “solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to International Humanitarian Law.” (*Prosecutor v. Limaj, ICTY-IT-03-66-T, November 30, 2005*)

Article 8 of the Rome Statute of the International Criminal Court adopts a test similar to the test formulated in the *Tadic* Jurisdiction Decision. It defines an internal armed conflict by the same two characteristics, “protracted armed conflict” and “organized armed groups,” without including further conditions. The Rome Statute further clarifies that it does not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”

**Q. Does IHL govern non-international (*internal*) armed conflicts?**

- A. Yes. The common Article 3 to the four Geneva Conventions of 1949 enjoins the parties to an internal or a non-international armed conflict to apply certain minimum humanitarian principles which constitute the foundation of respect for the human person.

Common Article 3 is binding not only on governments but also on insurgents. However, it shall not affect the legal status of the Parties to the conflict.

Additional Protocol II of 1977 supplements the Common Article 3 with a number of more specific provisions.

**Q. Who are bound by IHL?**

- A. International humanitarian law lays down rules that are applicable to both state and non-state actors. It binds all actors to an armed conflict:
- a) in international conflicts, it binds the states involved; and
  - b) in internal conflicts, it binds the government, as well the groups fighting against it or among themselves.

**Q. Are individuals also bound by IHL?**

- A.** Yes, International Humanitarian Law imposes obligations on individuals. Individuals may be held criminally responsible for “grave breaches” of the Geneva Conventions and of Additional Protocol I, and for other serious violations of the laws and customs of war (*war crimes*). International humanitarian law further establishes universal jurisdiction over persons suspected of having committed all such acts. With the entry into force of the International Criminal Court, individuals will also be accountable for war crimes committed in non-international armed conflict.

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**2. PROTECTIONS**

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**Q. Who are “protected persons” in IHL?**

- A.** International humanitarian law is intended principally for the parties to the conflict and protects every individual or category of individuals not or no longer actively involved in the conflict, i.e.:
- a) Under Geneva Convention I, the wounded or sick military personnel in land warfare, and members of the armed forces’ medical services;
  - b) Under Geneva Convention II, the wounded, sick or shipwrecked military personnel in naval warfare, and members of the naval forces’ medical services;
  - c) Under Geneva Convention III, prisoners of war;
  - d) Under Geneva Convention IV, the civilian population, for example:
    - 1. foreign civilians on the territory of parties to the conflict, including refugees;
    - 2. civilians in occupied territories;
    - 3. civilian detainees and internees;

4. medical and religious personnel or civil defense units.

**Q. What are the basic “protections” under IHL?**

- A.** International humanitarian law protects those who do not take part in the fighting, such as civilians and medical and religious military personnel. It also protects those who have ceased to take part, such as wounded, shipwrecked and sick combatants, and prisoners of war. These categories of person are entitled to respect for their lives and for their physical and mental integrity. They also enjoy legal guarantees. They must be protected and treated humanely in all circumstances, with no adverse distinction.

More specifically: it is forbidden to kill or wound an enemy who surrenders or is unable to fight; the sick and wounded must be collected and cared for by the party in whose power they find themselves. Medical personnel, supplies, hospitals and ambulances must all be protected. There are also detailed rules governing the conditions of detention for prisoners of war and the way in which civilians are to be treated when under the authority of an enemy power. This includes the provision of food, shelter and medical care, and the right to exchange messages with their families. (*ICRC Fact Sheet, What is International Humanitarian Law?*)

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**a. Combatants**

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**Q. Who are combatants?**

- A.** Combatants are individuals who are legally entitled to take part in hostilities. Combatants include not only members of the armed forces of a state involved in a conflict, but also citizens who rise in a *levee en masse* and members of organized resistance groups who fulfill the criteria of being commanded by a responsible superior, wearing some type of uniform, carrying firearm openly, and obeying the laws and customs of war. (*Malone, 155*)

**Q. Are combatants subject to attack?**

A. Yes. Under the law of armed conflict, an active combatant is subject to attack at any time.

**Q. What protections, if any, are afforded to combatants under IHL?**

A. The only protections given to combatants under International Humanitarian Law consist in the limitations on weapons and tactics. However, when a combatant is wounded, sick or has surrendered, they may not be subjected to further attack. Moreover, he must also be provided with medical care. These protections are covered by The Hague Convention IV, and the Geneva Conventions I and II.

**Q. When is a person considered *hors de combat* (“out of combat”)?**

A. A person is *hors de combat* if:

- a) he is in the power of an adverse Party;
- b) he clearly expresses an intention to surrender; or
- c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;

provided that in any of these cases he abstains from any hostile act and does not attempt to escape. (*Protocol I, Art. 41*)

**Q. What are the safeguards of an enemy *hors de combat*?**

A. A person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack. (*Protocol I, Art. 41[1]*)

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***b. Wounded, Sick and Shipwrecked***

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**Q. What does “wounded” and “sick” mean?**

A. “Wounded” and “sick” mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder

or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility. (*Protocol I, Art. 8[a]*)

**Q. What does “shipwrecked” mean?**

**A.** “Shipwrecked” means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or under Protocol I. (*Protocol I, Art. 8[b]*)

**Q. What are the basic protections given to the wounded, sick and shipwrecked?**

**A.** All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones. (*Protocol I, Art. 10*)

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***c. Prisoners of War***

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**Q. Who are prisoners of war?**

**A.** Prisoners of war are lawful combatants who have fallen into the power of the enemy.

**Q. Soldiers of an army in battle shed their uniforms, concealed their weapons, put on civilian clothes, mixed with the civilian population in the area occupied by the enemy, and once having**

succeeded in infiltrating across the enemy lines in numbers, suddenly produced their hidden weapons and attacked the enemy at the rear. When caught prisoners, will they be entitled to treatment as prisoners of war? May they be shot without trial? (*Bar 1950*)

- A. No, the soldiers will not be entitled to treatment as prisoners of war. While as a general rule, violations of the rules of International Law applicable in armed conflict shall not deprive combatants of their right to be combatants or, if they fall into the power of an adverse Party, of their right to be a prisoners of war. (*Protocol I, Art. 44[2]*) However, combatants who failed to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack will not be entitled to treatment as prisoners of war when they fall in enemy hands. (*Id., Art. 44[3]*)

However, the soldiers may not be shot without trial. Their failure to distinguish themselves from civilians during the attack and to carry their weapons openly results only in the forfeiture of their right to be prisoners of war, but they would still be given protections equivalent in all respects to those accorded to prisoners of war under the Third Geneva Convention and by the Additional Protocol I. These protections include those accorded to prisoners of war by the Third Geneva Convention in the case where such a person is tried and punished for any offences he has committed. (*Id., Art. 44[4]*)

**Q. Are members of militias or volunteer groups entitled to prisoner-of-war status when captured by the enemy?**

- A. Yes. Members of militias or volunteer corps are entitled to prisoner-of-war status when they fall in enemy hands if:
- a) they form part of such armed forces of the state; or
  - b) they fulfill the following conditions:
    1. they are being commanded by a person responsible superior;

2. they have a fixed distinctive sign recognizable at a distance;
3. they carry arms openly;
4. they conduct their operations in accordance with the laws and customs of war. (*Geneva Convention III, Art. 4(A.1, 2)*)

**Q. Is guerilla warfare recognized under International Law and may a captured guerilla demand treatment afforded a prisoner of war under the 1949 Geneva Convention? (*Bar 1982*)**

**A.** Yes, guerilla warfare is recognized under International Law and a captured guerilla or other members of organized resistance movement may demand treatment as a prisoner of war under the Geneva Conventions, provided that: they are being commanded by a person responsible superior; they have a fixed distinctive sign recognizable at a distance; they carry arms openly; and they conduct their operations in accordance with the laws and customs of war. (*Geneva Convention III, Art. 4(A.1, 2)*)

**Q. Are persons who accompany the armed forces without actually being members thereof entitled to prisoner-of-war status when they fall in enemy hands?**

**A.** Yes, persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, and war correspondents, shall be entitled to prisoner-of-war status when they fall in enemy hands. (*Geneva Convention III, Art. 4(A.4)*)

**Q. What is the status of journalists who are engaged in dangerous professional missions in areas of armed conflict under IHL?**

**A.** Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians. They shall be protected as such under the Convention IV and Protocol I, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited

to the armed forces to the prisoner-of-war status under the Convention III when they fall in enemy hands. (*Protocol I, Art. 79*)

**Q. A newspaper correspondent following an army was caught by the enemy while trying to send reports of a battle to his home office. Is he entitled to treatment as a prisoner of war or may he be treated as a spy? (*Bar 1950*)**

**A.** He is entitled to treatment as a prisoner of war. Under Article 4(A)(4) of the 3<sup>rd</sup> Geneva Convention, persons who accompany the armed forces without actually being members thereof, such as war correspondents, shall be entitled to prisoner-of-war status when they fall in enemy hands.

**Q. What is the status of the inhabitants of a non-occupied territory under IHL, who on the approach of the enemy spontaneously take up arms to resist the invading force?**

**A.** They shall be entitled to prisoner-of-war status, provided they carry arms openly and respect the laws and customs of war. (*Geneva Convention III, Art. 4(A.6)*)

**Q. Are spies entitled to prisoner-of-war status when captured by the enemy?**

**A.** No. Any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

However, the following acts of gathering or attempting to gather information shall not be considered as acts of espionage:

- a) When made by a member of the armed forces who is in uniform;
- b) When made by a member of the armed forces who is a resident of territory occupied by an adverse who does so but not through an act of false pretences or deliberately in a clandestine manner. (*Protocol I, Art. 46*)

**Q. Who is a mercenary? Do they have the right to be a combatant or a prisoner of war?**

**A.** A mercenary is any person who:

- a) is specially recruited locally or abroad in order to fight in an armed conflict;
- b) does, in fact, take a direct part in the hostilities;
- c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- e) is not a member of the armed forces of a Party to the conflict; and
- f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

A mercenary shall not have the right to be a combatant or a prisoner of war. (*Protocol I, Art. 47*)

**Q. What are the basic protections given to prisoners of war?**

**A.** Prisoners of war are entitled to the following basic protections:

- a) They may only be transferred by the Detaining Power to a Power which is also a party to the Geneva Convention III. (*Geneva Convention III, Art. 12*);
- b) They must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of Convention III. In particular, no prisoner of war may be

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subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest. (*Id.*, Art. 13)

- c) They must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited. (*Id.*)
- d) They shall be provided free of charge for their maintenance and for the medical attention required by their state of health. (*Id.*, Art. 15)
- e) They shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria. (*Id.*, Art. 16)
- f) Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favorable as that granted to men. (*Id.*, Art. 14)
- g) Women shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units. (*Protocol I*, Art. 75[5])

**Q. In 2004, allegations regarding the mistreatment of Iraqi detainees by U.S. Coalition Forces particularly as regards the Abu Ghraib prison in Baghdad began to be reported in the media. Graphic photos depicting U.S. soldiers abusing Iraqi prisoners in various ways were aired by CBS on 60 Minutes II on Wednesday, April 28, 2004. Major General Antonio Taguba was appointed to conduct an “informal investigation.” The Taguba report describes incidents of “sadistic, blatant, and wanton criminal abuses... inflicted on several detainees... which were**

systemic and illegal.” The report presents a catalog of offenses including, *inter alia*, physical abuse, videotaping and photographing naked male and female detainees, posing detainees in various sexually explicit positions for photographing, forcing detainees to remove their clothing and remain naked for several days at a time, a male MP guard having sex with a female detainee and using military working dogs, without muzzles, to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee.

- a) Are the U.S. Coalition Forces subject to International Humanitarian Law?
- b) Are the Geneva Conventions of 1949 applicable to the conflict? If yes, then cite some specific rules of the Geneva Conventions that apply.

- A. a) Yes, the U.S. Coalition Forces in Iraq are subject to International Humanitarian Law. U.N. Security Council Resolution 1483 (*May 22, 2003*) called upon all States to observe their obligations under the Geneva Conventions of 1949 and the Hague Regulations of 1907, and the Taguba Report notes that all Enemy Prisoners of War (*EPWs*) and Civilian Internees should receive the “full protection of the Geneva Conventions, unless the denial of these protections is due to specifically articulated military necessity.”
- b) Yes, both Geneva Convention III (*Relative to Prisoners of War*) and Geneva Convention IV (*Relative to the Protection of Civilian Persons in Time of War*) are applicable to the conflict.

The following principles of the *Geneva Conventions III* shall apply:

- a) Prisoners of war must at all times be humanely treated... Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. (*Art. 13*)

- b) Outrages upon personal dignity, and humiliating and degrading treatment are prohibited. (*Common Article 3*)

The following principles of the *Geneva Convention IV* shall apply:

- a) Civilians are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. (*Art. 27*)
- b) In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be. (*Art. 5*)
- c) No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties. (*Art. 31*)
- d) Murder, torture, corporal punishments, mutilation and medical or scientific experiments, and any other measures of brutality whether applied by civilian or military agents are prohibited. (*Art. 32*)

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#### ***d. Civilians***

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**Q. Who is a civilian?**

- A. A civilian is any person who does not belong to armed force and who is not a combatant. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian. (*Protocol I, Art. 50*)

**Q. What does the civilian population comprise?**

**A.** The civilian population comprises all persons who are civilians. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character. (*Id.*)

**Q. What are the basic protections for civilians and the civilian population?**

**A.** The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of International Law, shall be observed in all circumstances.

a) The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited;

b) Attacks against the civilian population or civilians by way of reprisals are prohibited. (*Protocol I, Art. 51*)

**Q. Reden, Jolan and Andy, Filipino tourists, were in Bosnia-Herzegovina when hostilities erupted between the Serbs and the Moslems. Penniless and caught in the crossfire, Reden, Jolan and Andy, being retired generals, offered their services to the Moslems for a handsome salary, which offer was accepted. When the Serbian National Guard approached Sarajevo, the Moslem civilian population spontaneously took up arms to resist the invading troops. Not finding time to organize, the Moslems wore armbands to identify themselves, vowing to observe the laws and customs of war. The three Filipinos fought side by side with the Moslems. The Serbs prevailed resulting to the capture of Reden, Jolan and Andy, and part of the civilian fighting force.**

**c) Are Reden, Jolan and Andy considered to be combatants thus entitled to treatment as prisoners of war?**

**d) Are the captured civilians likewise prisoners of war? (*Bar 1993*)**

- A. a) No, Reden, Jolan and Andy are mercenaries. Therefore, they shall not have the right to be a combatant or a prisoner of war. (*Protocol I, Art. 47*)

Reden, Jolan and Andy are mercenaries because they are neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict as they were mere tourists, they are not a member of the armed forces of a Party to the conflict, they actually took a direct part in the hostilities after having been recruited to fight in the armed conflict, and they were motivated to take part therein essentially by the desire for private gain.

- b) Yes, the captured civilians are prisoner of war and they should be treated as such Article 4(A)(6) of the Vienna Convention III states that inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, and who carry arms openly and respect the laws and customs of war shall be considered as prisoners of war when they fall in the power of the enemy.

**Q. What are civilian objects?**

- A. Civilian objects are all objects which are not military objectives. In so far as objects are concerned, 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.

In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used. (*Protocol I, Art. 52*)

**Q. What protections are provided, if any, to the natural environment?**

A. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. Attacks against the natural environment by way of reprisals are also prohibited. (*Protocol I, Art. 55*)

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### **3. COMMON ARTICLE 3**

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**Q. What is Common Article 3 of the Geneva Conventions of 1949?**

A. Common Article 3 to the Geneva Conventions of 1949 enjoins the parties to an internal or a non-international armed conflict to apply certain minimum humanitarian principles which constitute the foundation of respect for the human person in cases of armed conflict not of an international character.

**Q. What is the scope of the Common Article 3?**

A. Article 3, which is common to all the four Geneva Conventions of 1949, is applicable in case of armed conflict not of international character occurring in the territory of one of the contracting parties to the 1949 Conventions. It also applies to a situation where the conflict is within the State, between the Government and the rebel forces or between the rebel forces themselves. Article 3 offers an international minimum protection to persons taking no active part in hostilities, including members of armed forces in certain situations specifically stated in the article.

**Q. How is Protocol II related to Common Article 3?**

A. Protocol II is supplementary to Common Article 3. It expands the material field of application of the Common Article 3 to all armed conflicts which are not of an international character and which take

place in the territory of a State Party to the Geneva Conventions between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol. (*Protocol II, Art. 1[1]*)

**Q. Are the provisions of Common Article 3 and Protocol II applicable to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature?**

**A.** No. Article 1(2) of Additional Protocol II of 1977 to the Geneva Conventions of 1949, which applies to non-international armed conflict, states its provisions shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

**Q. Are terrorist activities subject to IHL?**

**A.** No. Banditry, unorganized and short-lived insurrections, and terrorist activities are not subject to International Humanitarian Law. (*Prosecutor v. Limaj, et al., ICTY- IT-03-66-T, November 30, 2005*)

**Q. What are the minimum protections that each party to an internal armed conflict has to observe under the Common Article 3?**

**A.** Article 3 provides that in the case of armed conflict not of an international character, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

- a) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- b) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- c) taking of hostages;
- d) outrages upon personal dignity, in particular humiliating and degrading treatment;
- e) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- f) The wounded and sick shall be collected and cared for.

**Q. Does Common Article 3 impose individual criminal responsibility?**

**A.** Yes, violations of Common Article 3 entails individual criminal responsibility for war crimes. Principles and rules of humanitarian law reflect “elementary considerations of humanity” widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue or the interest of the international community in their prohibition. While the Common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. (*ICTY Judgement, Prosecutor v. Tadic, Appeals Chamber, October 2, 1995, pars. 128-129*)

**Q. Has Common Article 3 acquired the status of customary law?**

- A. Yes, it is now well established that Common Article 3 has acquired the status of customary international law. (*Prosecutor v. Naletilic, ICTY-IT-98-34-T, March 31, 2003*)
- Q. Is Common Article 3 applicable to international armed conflicts?**
- A. Yes. It is both legally and morally untenable that the rules contained in Common Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character. It is logical that this minimum be applicable to international conflicts as the substance of these core rules is identical. Something which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader. (*ICTY Judgement, Prosecutor v. Mucic et al., Appeals Chamber, February 20, 2001, pars. 140-150*)

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#### **4. LIMITATIONS ON THE MEANS AND METHODS OF WARFARE**

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- Q. Give the basic rules on the means and methods of warfare.**
- A. The Basic rules on the means and methods of warfare are:
- a) In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
  - b) It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
  - c) It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. (*Protocol I, Art. 35*)

Humanitarian law therefore bans the use of many weapons, including exploding bullets, chemical and biological weapons, blinding laser weapons and anti-personnel mines.

**Q. What is the principle of discrimination?**

- A. Article 48 of Protocol I embodies the basic on discrimination. It states that “in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”

The civilian population as such, as well as individual civilians, shall not be the object of attack. (*Protocol I, Art. 51[2]*)

**Q. What are indiscriminate attacks? Are they prohibited?**

- A. Yes, International Humanitarian Law prohibits indiscriminate attacks. Indiscriminate attacks strike military objectives and civilians or civilian objects without distinction. They are not directed at a specific military objective or they employ a method or means of combat which cannot be directed at a specific military objective. (*Protocol I, Art. 51[2]*)

Among others, the following types of attacks are to be considered as indiscriminate:

- a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
- b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to

the concrete and direct military advantage anticipated. (*Id.*, Art. 51[5])

**Q. Will the presence of civilians render a military target immune from attack?**

A. No. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations. (*Protocol I, Art. 51[7]*)

**Q. Define military objective?**

A. Article 52(2) of Protocol I defines military objectives, incorporating the principle of necessity:

“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.”

**Q. What is the Principle of Proportionality?**

A. The principle of proportionality prohibits attacking a military objective if doing so will result in a loss of civilian life, damage to civilian property or damage to the natural environment that outweighs the value of the objective. Any use of force, to be lawful, must be proportionate.

The principle is a sub-component of the broader prohibition against indiscriminate attacks. It is embodied in Article 51(5)(b) of the 1977 Protocol I to the 1949 Geneva Conventions and it is actually one type of prohibited indiscriminate attacks. An indiscriminate violating the principle of proportionality is one “which may be expected to

cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

“Proportionality” is best understood as an “imputed” indiscriminate attack. When an attack on an otherwise lawful military objective inflicts excessive collateral damage or incidental injury, it is treated for purposes of the law of armed conflict as indiscriminate, and therefore prohibited. Note that the key term in this analysis is not disproportionate, but instead excessive. (*Corn*)

**Q. Cite some prohibited methods and tactics of warfare.**

**A.** The *Hague Regulations Respecting the Laws and Customs of War on Land (Annex to Hague Convention IV, October 18, 1907)* provides that the following methods and tactics are forbidden:

- a) To kill or wound treacherously individuals belonging to the hostile nation or army;
- b) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
- c) To declare that no quarter will be given;
- d) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
- e) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;
- f) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- g) To compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if

they were in the belligerent's service before the commencement of the war. (*Art. 23*)

**Q. What constitutes perfidy? Is it prohibited? Give examples.**

**A.** Perfidy consists of acts is inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of International Law applicable in armed conflict, with intent to betray that confidence. (*Protocol I, Art. 37[1]*)

Yes, it is prohibited to kill, injure or capture an adversary by resort to perfidy. (*Id.*)

The following acts are examples of perfidy:

- a) The feigning of an intent to negotiate under a flag of truce or of a surrender;
- b) The feigning of an incapacitation by wounds or sickness;
- c) The feigning of civilian, non-combatant status; and
- d) The feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

**Q. What are ruses of war? Are they prohibited? Give examples.**

**A.** Ruses of war are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of International Law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. (*Protocol I, Art. 37[2]*)

No, ruses of war are not prohibited. (*Id.*)

The following are examples of ruses of war:

- a) The use of camouflage;
- b) Decoys;

- c) Mock operations;
- d) Misinformation.

**Q. Cite some prohibitions on the types of weaponry.**

**A.** The following are some of the prohibited types of weaponry:

- a) Explosive Projectiles under 400 grams (*St. Petersburg Treaty of 1868*)
- b) Poison or poisoned weapons (*Hague Regulations of 1907, Annex to Hague IV, Art. 23[a]*)
- c) Arms, projectiles, or material calculated to cause unnecessary suffering (*Id., Art. 23[e]*)
- d) Expanding (“*dum-dum*”) bullets or projectiles (*Third Hague Declarations of 1899*)
- e) Chemical and bacteriological weapons, including poisonous and asphyxiating gases (*Geneva Protocol of 1925*);
- f) Nuclear weapons (*Treaty on the Non-Proliferation of Nuclear Weapons (NPT), extended indefinitely in 1995*)

**Q. What are the three pillars of the Nuclear Non-Proliferation Treaty (NPT or NNPT)?**

**A.** The *Nuclear Non-Proliferation Treaty* which entered into force in 1970 is often summarized in three pillars:

a) **Non-proliferation,**

“Art. I. Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear

explosive devices, or control over such weapons or explosive devices.”

“Art. II. Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.”

b) **Disarmament**, and

“Art. VI. Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”

c) **The right to peacefully use nuclear technology**,

“Art. IV. Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty.”

**Q. Name the Nuclear-Weapon States under the NPT?**

- A.** The nuclear-weapon states (*NWS*) are those which have manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967. They are permitted under the NPT to own nuclear weapons, but they undertake not to transfer nuclear weapons to non-nuclear weapons states (*non-NWS*), not to help non-NWS acquire them, and to pursue nuclear disarmament.

The NWS are also the five permanent members of the U.N. Security Council: France (*signed 1992*), the People's Republic of China (*1992*), the Soviet Union (*1968; obligations and rights now assumed by Russia*), the United Kingdom (*1968*), and the United States (*1968*).

**Q. Discuss whether the threat or use of nuclear weapons in any circumstances is prohibited under International Law?**

**A.** In the *Legality of the Threat or Use of Nuclear Weapons (ICJ Advisory Opinion, July 8, 1996)*, the following arguments were raised to establish that the use of nuclear weapons is prohibited under International Law:

a) **The use of nuclear weapons violates the right to life** as guaranteed in Article 6 of the International Covenant on Civil and Political Rights (*ICCPR*), which provides as follows:

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

b) **The use of nuclear weapons constitutes genocide** because the number of deaths occasioned by the use of nuclear weapons would be enormous; that the victims could, in certain cases, include persons of a particular national, ethnic, racial or religious group; and that the intention to destroy such groups could be inferred from the fact that the user of the nuclear weapon would have omitted to take account of the well-known effects of the use of such weapons;

c) **The use of nuclear weapons constitutes a violation of the several treaties and instruments that protect the environment.** These include:

1. Article 35 of Additional Protocol I of 1977, which prohibits the employment 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”;

2. Article 1 of the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which prohibits the use of weapons which have “widespread, long-lasting or severe effects” on the environment.
  3. Principle 21 of the 1972 Stockholm Declaration on the Human Environment and Principle 2 of the Rio Declaration of 1992 which express the common conviction of the States concerned that they have a duty “to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”
- d) **The use of nuclear weapons violates the U.N. Charter’s provisions relating to the threat and use of force**, particularly Art. II, paragraph 4 which states:
- “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”
- e) **Nuclear weapons should be treated in the same way as poisoned weapons**, which should be prohibited under several treaties limiting the types of weaponry, particularly:
- a) The Second Hague Declaration of 1899, which prohibits “the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases”
  - b) Article 23 (a) of the Regulations respecting the laws and customs of war on land annexed to The Hague Convention IV of 18 October 1907, whereby “t is especially forbidden: ...to employ poison or poisoned weapons” and

- c) The Geneva Protocol of 1925 which prohibits “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices”.
- f) **The use of nuclear weapons violates IHL** because:
  - 1. IHL is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants;
  - 2. States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.

As to the above arguments, the International Court of Justice made the following observations and rendered its Opinion as follows:

- a) **As to whether the use of nuclear weapons violates Art. 6 of the ICCPR**, the Court observes that whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.
- b) **As to whether the use of nuclear weapons would constitute genocide**, the Court pointed out that the prohibition of genocide would be pertinent if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by the provision quoted above. In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.
- c) **As to whether the use of nuclear weapons would constitute a violation of the several treaties and instruments that protect the environment**, the Court recognized that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment.

However, the issue is whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defense under International Law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.

- d) **As to whether the use of nuclear weapons violates the U.N. Charter's provisions relating to the threat or use of force**, the Court noted that these provisions do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful *per se*, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter.
- e) **As to whether nuclear weapons should be treated as poisoned weapons** which are prohibited under certain treaties limiting the types of weaponry, the Court observed said treaties neither define "poisoned weapons" nor specify the meaning of the term "analogous materials or devices". The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.
- f) **As to whether the use of nuclear weapons violates IHL**, the Court noted that in conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the

unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.

**Q. Cite some areas with special protections.**

**A.** Attacks or bombardment, by whatever means, of the following is prohibited:

- a) undefended towns, villages, dwellings, or buildings. (*Hague Regulations of 1907, Annex to Hague IV, Art. 25*)
- b) Buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. (*Id., Art. 27*)
- c) Hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven. (*Geneva Convention IV, Art. 14*)
- d) Neutralized zones intended to shelter from the effects of war the following persons, without distinction: (a) wounded and sick combatants or non-combatants; (b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character. (*Id., Art. 15*)