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"The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives"

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Content and Customary Nature of Article 75 of Additional Protocol I

Article 75 is one of the longest in the entire Additional Protocol I. It lists the fundamental guarantees that must be granted to all persons (1) who are in the power of a party to an international armed conflict, and (2) who do not benefit from more favourable treatment under the Geneva Conventions or Additional Protocol I, (3) in so far as such persons are affected by the conflict.

Article 75 ensures that no person in the power of a party to the conflict is outside the protection of international humanitarian law. It lays down a minimum standard of protection, providing a "safety net" for all those who are not entitled to more favourable treatment under the Geneva Conventions or Additional Protocol I.

Article 75 stipulates that such minimum standard of protection must be accorded to all persons who are «in the power of a party to the conflict», «in so far as they are affected» by the conflict. Actually, all persons who are in a territory under the control of one of the belligerent States can be considered «in the power of a party to the conflict». However, those persons are covered by Article 75 only to the extent that they are affected by the conflict. Using this phrase, the drafters intended to restrict the scope of the article to persons who are affected by belligerents' acts connected with the conflict.

That said, the question arises: who is entitled to the fundamental guarantees set forth in Article 75, as he does not benefit from more favourable treatment under the Geneva Conventions or Additional Protocol I? Article 45, para. 3, of the Protocol gives some indication in this regard. It stipulates that the minimum guarantees provided for in Article 75 apply to all persons who have participated in the hostilities and have fallen into the hands of the enemy, without being entitled to prisoner-of-war-status. In other words, the protection of Article 75 must be accorded to the so-called "unlawful combatants", that is to say mercenaries, spies, civilians, taking a direct part in hostilities and members of militias belonging to a party to the conflict who do not comply with the requirements of Article 4 (A) (2) of the Third Convention or Article 44, para. 3 of Additional Protocol I.

As to the nationality of the beneficiaries of the protection, belligerent States are required to grant the fundamental guarantees set forth in Article 75 not only to enemy nationals, but also to their own nationals who have acted in favour of the enemy, such as the deserters who have joined the adverse forces or the collaborators who have passed information to the other side.

The protection of Article 75 must also be granted to nationals of neutral States and nationals of co-belligerent States who are in the power of a party to the conflict with which the State of their nationality has normal diplomatic relations, since such persons are not covered by the Fourth Convention.

As regards the content of the guarantees provided for by Article 75, persons protected under this article must first of all be treated humanely in all circumstances, without any adverse distinction. Their persons, honour, convictions, and religious practices must be respected (para. 1).

Several acts are listed which are prohibited «at any time and in any place whatsoever». They include:

- violence to the life, health, or physical or mental well-being of persons, such as murder, torture or mutilation;
- outrages upon personal dignity, such as humiliating and degrading treatment;
- taking of hostages;
- collective punishments (para. 2).

These provisions are clearly inspired by the text of common Article 3 of the Geneva Conventions and Article 4, para.s 1 and 2, of Additional Protocol II. In fact, Article 75 was drafted after and on the model of Articles 4 and 6 of Additional Protocol II.

But Article 75 does not end here. It also lays down minimum guarantees for persons who are deprived of their liberty for actions related to the conflict and for those who are subject to criminal prosecution for offences connected with the conflict. Under para. 3, persons arrested, detained or interned for actions related to the conflict must be informed of the reason for these measures promptly and in a language which they understand. Unless the arrest or detention is for criminal offences, they must be released «with the minimum delay possible».

According to para. 4, a judgment of a court is required before penalties can be imposed for criminal offences related to the conflict. Such court must be impartial and constituted regularly and it must respect «the generally recognized principles of regular judicial procedure». This provision is directly inspired by the text of common Article 3 of the Geneva Conventions and Article 6, para. 2, of Additional Protocol II.

Article 75 follows the model of Article 6, para. 2, of Additional Protocol II, it contains a non-exhaustive list of generally recognized principles of judicial procedure which must be abided by in proceedings for criminal offences related to the conflict. The principles listed in Article 6 of Additional Protocol II are reproduced in Article 75 almost word for word and some more are added.

The list includes *inter alia*:

- the principle of legality, that is to say the principle "nullum crimen, nulla pena sine lege",
- the obligation to inform the accused of the nature and cause of the charges against him;
- the obligation to grant the accused the necessary rights and means of defence;
- the presumption of innocence;
- the right of the accused to be tried in his presence;
- the right of the accused not to be compelled to confess guilt or to testify against himself;
- the right of the accused to have the judgement pronounced publicly;
- the right of the convict to be advised of the available remedies and of their time-limits;
- the principle "non bis in idem".

The judicial guarantees laid down in Article 75 must be granted to persons accused of ordinary criminal offences as well as to persons accused of international crimes. Para. 7 makes it clear that persons accused of war crimes and crimes against humanity must be accorded the treatment provided by Article 75 as long as they do not benefit from more favourable treatment under the Geneva Conventions or Additional Protocol I. Actually, in the light of the Statutes and the practice of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and of the International Criminal Court, nowadays also persons accused of genocide are to be granted the minimum guarantees set forth in Article 75.

In the fortieth anniversary of the adoption of Additional Protocol I, it is worth assessing whether Article 75 reflects customary international law, so that it can be regarded as binding also States not parties. About twenty States are not yet parties to Additional Protocol I. They include the United States, Israel, Turkey, Iran, India, Pakistan and Eritrea.

Indeed, Article 75 is widely recognized as reflecting customary international law by now. It builds on common Article 3 of the Geneva Conventions. Article 75 embodies and develops the principles contained in common Article 3, that is to say the principle of humane treatment and its corollaries. Actually, the rules contained in common Article 3 were formulated to apply to non-international armed conflicts. However, in the 1986 *Nicaragua* judgement, the International Court of Justice authoritatively held that such rules also constitute «a minimum yardstick» applicable to international armed conflicts (para. 218).

This view was also expressed by the International Criminal Tribunal for the Former Yugoslavia in the 1995 *Tadic* jurisdiction decision (para. 102) and subsequent decisions. Nowadays, the principle of humane treatment and its corollaries are generally regarded as the core principles to be applied in any conflict, either internal or international. From all this one can infer the customary character of the provisions of Article 75 on humane treatment.

With particular regard to the judicial guarantees listed in Article 75, most of them are also enshrined in the UN Covenant on Civil and Political Rights, the European Convention on Human Rrights and other human rights treaties, the Statutes of the ICTY and ICTR, and the ICC Statute. They are also are part of the domestic law of most States.

In the 2005 ICRC Study on customary international humanitarian law, the fundamental guarantees laid down in Article 75, including the right to fair trial and the principle "*nullum crimen, nulla poena sine lege*", are classified as norms of customary international law applicable in both international and non-international conflicts.

As to the international case law confirming the customary character of the minimum guarantees set forth in Article 75, in 1998 in the *Delalic* trial judgement the ICTY cautiously stated that the provisions of Article 75 «may also constitute customary international law» (para. 314).

By contrast, in 2004 the view that the rules contained in Article 75 were part of customary international law was firmly expressed by the Eritrea Ethiopia Claims Commission, in two partial awards rendered on the civilians claims brought by Eritrea and Ethiopia with respect to the armed conflict which took place from 1998 to 2000. The Claims Commission emphasized the fundamental humanitarian nature of these rules and their correspondence with generally accepted human rights principles (Eritrea Ethiopia Claims Commission, Partial Award, Civilian Claims, Eritrea's Claims 15, 16, 23 & 27-32, para. 30. See also Eritrea Ethiopia Claims Commission, Partial Award, Civilian Claims, Ethiopia's Claim 5, para. 29). The Commission's finding that the provisions of Article 75 were part of customary international law was extremely important, as they did not apply to the conflict as a matter of treaty law, because Eritrea was not a party to Additional Protocol I. The Commission held that Eritrea breached the customary rules embodied in Article 75, detaining Ethiopians in prisons, without charge or trial and therefore without according them the minimum procedural rights due to persons in the power of a party to the conflict (Eritrea Ethiopia Claims Commission, Partial Award, Civilian Claims, Ethiopia's Claim 5, para. 75).

Finally, when assessing whether a treaty provision has become a customary rule, the practice of States not parties to the treaty is particularly relevant. With regard to the rules contained in Article 75, the practice of Israel and the United States is to be considered carefully. As to Israel, the decision of the Israeli Supreme Court of 2006 in the *Targeted killings* case is worth mentioning. The Court referred to Article 75, when considering the

protection to be granted to terrorists and suspected terrorists, who qualify as unlawful combatants under the Israeli law on the imprisonment of unlawful combatants (Incarceration of Unlawful Combatants Law, 5762-2002). The Israeli Supreme Court held that «unlawful combatants are not beyond the law»; «they ... are entitled to protection, even if most minimal, by customary international law». The Court mentioned as an example the case where they are detained or brought to justice and it referred to Article 75, which it considered as reflective of customary international law (para. 25).

Let's turn now to the United States. Here, the question of the application of the fundamental guarantees enshrined in Article 75 arose with respect to persons captured in the context of the so-called "war on terror" and detained at Guantanamo. The US Supreme Court expressly referred to Article 75 in the decision rendered in 2006 in the *Hamdan* case. Hamdan was a Yemeni national detained at Guantanamo, who was being tried before one of the military commissions created pursuant to an executive order issued by President G.W. Bush in November 2001. The US Supreme Court unanimously held that such military commission did not meet the requirements to be considered «a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples» under common Article 3 of the Geneva Conventions (pp. 69, 72). A majority of four judges made it clear that the judicial guarantees to which common Article 3 referred include at least the minimum guarantees that are recognized by customary international law and it specified that «many of these are described in Article 75». The same majority of four judges found that the military commission procedures were not consistent with at least two principles that are spelled out in Article 75 and are embodied in customary international law, namely the principle that the accused has the right to be tried in his presence and the principle that he must be privy to the evidence against him (p. 71).

In March 2011, the Obama Administration issued an important statement on Article 75. In a fact sheet on Guantanamo and the detainee policy, the White House reaffirmed the US long-standing support for Article 75, it declared that the current US military policies and practices are consistent with the requirements of this article and, most importantly, it stated that «the US Government will ... choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict».

Three months later, in June 2011, the then legal adviser of the Department of State, Harold Koh, clarified the meaning of this statement. He said that «the US will choose to abide by the principles set forth in Article 75 applicable to detainees in international armed conflicts out of a sense of legal obligation». He also added that the statement was to be interpreted as «a significant contribution to the crystallization of the principles contained in Article 75 as rules of customary international law applicable in international armed conflict» (p. 57).

To be honest, the US statement and the legal adviser's clarification are perplexing as they assume that the rules contained in Article 75 are not yet part of customary international law. In my humble view, in the light of the overall State pratice and *opinio juris*, the minimum guarantees laid down by Article 75 are already recognized by customary international law without a shadow of doubt.