

International Institute of Humanitarian Law



International Institute of Humanitarian Law
Institut International de Droit Humanitaire
Istituto Internazionale di Diritto Umanitario

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

STUDI



Politica



FrancoAngeli

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

40th Round Table on Current Issues
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Content and customary nature of Article 75 of Additional Protocol I

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1. Introduction

Article 75 is one of the longest in the 1977 Additional Protocol I to the 1949 Geneva Conventions. It ensures that no person in the power of a party to an international armed 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. On the fortieth anniversary of the 1977 Additional Protocols, it is worth analysing the provisions of Article 75 and assessing whether they have achieved the status of customary international law.

2. Personal Scope of Application of Article 75

Article 75 lists the fundamental guarantees that must be granted to all persons who are ‘in the power of a party to the conflict’ and do not benefit from more favourable treatment under the Geneva Conventions or Additional Protocol I, ‘in so far as they are affected’ by the conflict. In fact, 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. Actually, all those who are in the belligerents’ territory or in occupied territory are affected by the conflict in some way or another. The drafters’ intention, however, was probably to restrict the scope of Article 75 to persons who are affected by belligerents’ acts connected with the conflict. According to this interpretation, for example, persons accused of murder as an ordinary criminal offence in the framework of the belligerents’ normal administration of justice would not be covered by Article 75 and, consequently, could not invoke the judicial guarantees laid down in this article.¹

¹ See: Claude Pilloud, Jean Pictet, ‘Article 75 – Fundamental Guarantees’ in Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds), *Commentary on the Additional*

That said, the question arises: who is entitled to the fundamental guarantees set forth in Article 75, as he or she does not benefit from more favourable treatment under the Geneva Conventions or Additional Protocol I? Article 45, para. 3 of Additional Protocol I gives some indication in this regard. It stipulates that ‘any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75’. This means 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 Geneva Convention or Article 44, para. 3. of Additional Protocol I.²

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. Actually, the minimum humanitarian standard laid down in Article 75 is particularly relevant in the case where a civil war is connected with an international armed conflict and the nationals of the State where the civil war is raging are fighting on both sides as happened, for example, in Italy after the armistice of 8 September 1943.³

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 Geneva Convention. In fact, under Article 4 of the Fourth Geneva Convention, nationals of neutral States and nationals of co-belligerent States fall within the scope of this Convention only when the State of their nationality does not have normal diplomatic relations with the belligerent State in whose hands they are.

Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva, Nijhoff, 1987), 866 f.; Michael Bothe, Karl Josef Partsch, Waldemar A. Solf, *New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd ed. reprint revised by Michael Bothe, Leiden/Boston: Nijhoff, 2013), 516 f.

² On the unlawful combatants, see Knut Dörmann, ‘Combatants, Unlawful’ (2015) *Max Planck Encyclopedia of Public International Law*.

³ Bothe, Partsch, Solf, *New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 517.

3. Guarantees provided for in Article 75

Persons protected under Article 75 must 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' (para. 2). 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.

These provisions are clearly inspired by the text of Common Article 3 of the Geneva Conventions and Article 4, paras 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, although by a different committee.⁴

Article 75, however, 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.

Following the model of Article 6, para.2, of Additional Protocol II, Article 75, para. 4, of Additional Protocol I also 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 almost *verbatim* and some more are added. The list contained in Article 75, para. 4, includes *inter alia*:

⁴ *Ibid.*, 513.

- the principle of legality, that is to say, the principle *nullum crimen, nulla poena 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, such as (a) the right to defend oneself or to be assisted by a lawyer of one's own choice, (b) the right to free legal assistance if the interests of justice so require, (c) the right to sufficient time and facilities to prepare the defence, and (d) the right to communicate freely with counsel;
- 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*.

As to the principle *nullum crimen, nulla poena sine lege*, in Article 75 the word 'lex' comprises not only domestic law, but also international law. According to para.4 (c), no one may be tried for acts that were not criminal offences 'under the national or international law' at the time when they were committed. It ensures that a trial for an act that, at the time of its commission, was not a criminal offence under domestic law is allowed if, at that time, such act was already criminalized by international law.⁵

As for the principle *non bis in idem*, in Article 75 this principle is restricted to prosecutions by the same belligerent State. According to para.4 (h), no one shall be prosecuted or punished by the same party to the conflict for an offence in respect of which a final judgment has already been pronounced. It follows that a subsequent prosecution for the same offence by the adverse party is not forbidden.⁶

Most of the principles of judicial procedure listed in Article 75 are also spelt out in the UN Covenant on Civil and Political Rights of 1966, in Articles 14 and 15 to be precise. However, the principles set forth in Article 14 of the Covenant, such as the presumption of innocence, the right of the accused to be tried in his presence and the prohibition on compelling the

⁵ This provision is consistent with the Nuremberg Principle II, under which 'the fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law'. See Pilloud, Pictet, 'Article 75 – Fundamental Guarantees', 881 f.

⁶ See Bothe, Partsch, Solf, *New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 522, 745.

accused to testify against himself or to confess guilt, may be derogated from in time of armed conflict, as per Article 4 of the Covenant. No derogation may be made only to the principle *nullum crimen, nulla poena sine lege*, which is enshrined in Article 15 of the Covenant. On the contrary, the provisions of Article 75 of Additional Protocol I are not subject to any possibility of derogation.

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, persons accused of genocide and aggression are also to be granted the minimum guarantees set forth in Article 75.

Persons arrested, detained or interned for actions related to the conflict must benefit from the protection of Article 75 until their final release, repatriation or re-establishment (para. 6). The word 're-establishment' refers to persons who cannot be repatriated or simply released where they are and for whom a State of residence must be found.⁷

Finally, Article 75 takes care to specify that it does not prejudice the application of other rules of international law granting greater protection to persons falling within its scope of application (para.8). Therefore, wherever other rules of international law, including human rights law rules, accord a more favourable treatment to persons covered by Article 75, such rules must be applied and take the place of the minimum protection given by the latter.⁸

4. Customary International Law

Article 75 embodies and develops the principles contained in Common Article 3, that is to say, the principle of humane treatment and its corollaries, namely the prohibitions on violence to life and person, taking of hostages, outrages upon personal dignity, and passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court.

Actually, the rules contained in Common Article 3 were formulated to apply to non-international armed conflicts. However, in the 1986

⁷ Pilloud, Pictet, 'Article 75 – Fundamental Guarantees', 886.

⁸ See Bothe, Partsch, Solf, *New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 523 f.

Nicaragua judgement, the International Court of Justice authoritatively held that such rules also constitute ‘a minimum yardstick’ applicable to international armed conflicts.⁹ This view was also expressed by the International Criminal Tribunal for the Former Yugoslavia in the 1995 *Tadić* jurisdiction decision¹⁰ and in subsequent decisions, such as the *Delalić* appeal judgement.¹¹

Nowadays, the principle of humane treatment and its corollaries are generally regarded as the core principles to be applied in any conflict, whether it is of an internal or international character. From all this, one can infer the customary character of the provisions of Article 75 on humane treatment.

With particular regard to the principles of judicial procedure listed in Article 75, most of them are also enshrined in the UN Covenant on Civil and Political Rights, the European Convention on Human Rights and other human rights treaties, the Statutes of the ICTY and ICTR and the ICC Statute. Furthermore, they 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, to all civilians in the power of a party to the conflict and who do not take a direct part in hostilities, as well as to all persons *hors de combat*.¹²

As to the international case law confirming the customary character of the minimum guarantees set forth in Article 75, in 1998, in the *Delalić* trial judgement, the ICTY cautiously stated that the provisions of Article 75 ‘are clearly based upon the prohibitions contained in Common Article 3 and may also constitute customary international law’.¹³

The view that the rules contained in Article 75 are part of customary international law was firmly expressed by the Eritrea Ethiopia Claims Commission, in the partial awards rendered in 2004 on the claims relating

⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ.Reports 1986, 14, 114, para. 218.

¹⁰ ICTY Appeals Chamber, *Prosecutor v. Dusko Tadić a/k/a ‘Dule’*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, para. 102.

¹¹ ICTY Appeals Chamber, *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka ‘Pavo’), Hazim Delić and Esad Landžo (aka ‘Zenga’) (‘CELEBICI Case’)*, Judgment, 20 Feb 2001, para. 147.

¹² Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge, Cambridge University Press, 2005), 299 ff.

¹³ ICTY Trial Chamber, *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as ‘Pavo’, Hazim Delić, Esad Landžo also known as ‘Zenga’*, Judgment, 16 Nov. 1998, para. 314.

to civilians brought by Eritrea and Ethiopia with respect to the armed conflict that took place between them from 1998 to 2000. The Claims Commission emphasized the fundamental humanitarian nature of those rules and their correspondence with generally accepted human rights principles.¹⁴

The Commission's finding that the provisions of Article 75 are part of customary international law was extremely important, as those provisions did not apply to the conflict as treaty law, because Eritrea is 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.¹⁵

The separate opinion of Judge Simma appended to the 2005 judgement of the International Court of Justice in the case, *Democratic Republic of the Congo v. Uganda*, is also worth mentioning. Judge Simma stated unequivocally that 'the fundamental guarantees enshrined in Article 75 of Additional Protocol I are also embodied in customary international law'.¹⁶

Moreover, when assessing whether a treaty provision has become a customary rule, the practice of States not parties to the treaty is particularly relevant. Consistent practice of non-party States is an important positive evidence of the customary character of the provision in question. With regard to the rules contained in Article 75, the practice of Israel and the United States is to be considered carefully. Indeed, they are 'States whose interests are specially affected', to use the words of the International Court of Justice in the *North Sea Continental Shelf* cases.¹⁷

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.¹⁸ This law was enacted in 2002 and is still in force. 'Unlawful combatants' are defined as persons who participated in hostilities against Israel, whether directly or indirectly,

¹⁴ EECC, Partial Award, *Civilians' Claims, Eritrea's Claims 15, 16, 23 & 27-32*, The Hague, 17 Dec. 2004, para.30. EECC, Partial Award, *Civilians' Claims, Ethiopia's Claim 5*, The Hague, 17 Dec. 2004, para. 29.

¹⁵ EECC, Partial Award, *Civilians' Claims, Ethiopia's Claim 5*, para. 75.

¹⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, Separate Opinion of Judge Simma, ICJ Reports 2005, 334, 344, para. 28.

¹⁷ *North Sea Continental Shelf, Judgment*, ICJ Reports 1969, 3, 43, para. 74.

¹⁸ Incarceration of Unlawful Combatants Law, 5762-2002, available at <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/7A09C457F76A452BC12575C30049A7BD>.

or are members of a force committing hostilities against Israel, who are not entitled to the prisoners-of-war status under the Third Geneva Convention (Article 2).¹⁹ 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’.²⁰ 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.²¹

As regards the United States, 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 in the US military prison at Guantanamo Bay. 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 in Guantanamo, who was being tried before a military commission created pursuant to an executive order issued by President G.W. Bush in November 2001.²² 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.’²³ A majority of four judges made it clear that those guarantees 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’.²⁴ The same majority of four judges found that the military commission procedures were not consistent with at least two principles that

¹⁹ Hundreds of Palestinians suspected of terrorism have been detained under the Israeli Law on the imprisonment of unlawful combatants since its enactment. This law, however, has been severely critiqued as not affording basic legal guarantees. In particular, in 2016 the Committee against torture urged Israel to repeal it. It expressed concern that detainees under the law at issue ‘may be deprived of basic legal safeguards as, *inter alia*, they can be held in detention without charge indefinitely on the basis of secret evidence that is not made available to the detainees or his/her lawyer’ (Committee against Torture, *Concluding Observations on the Fifth Periodic Report of Israel*, 3 June 2016, CAT/C/ISR/CO/5, para. 22).

²⁰ Israeli Supreme Court (as High Court of Justice), *Public Committee against Torture in Israel and others v. Government of Israel and others (Targeted Killings)*, H CJ 769/02, 13 December 2006, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf, para. 25.

²¹ *Ibid.*

²² See Russell A. Miller, ‘Hamdan Case’ (2008) *Max Planck Encyclopedia of Public International Law*.

²³ Supreme Court of the United States, *Hamdan v. Rumsfeld, Secretary of Defense, et al.*, Certiorari to the United States Court of Appeals for the District of Columbia Circuit, No. 05-184, 29 June 2006, 548 US 557 (2006), 631 f, 635.

²⁴ *Ibid.*, 633.

are spelt 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.²⁵

In March 2011, the Obama Administration issued a statement on Article 75. In a fact sheet on the Guantanamo detention facility 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 were 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’.²⁶ Three months later, in June 2011, answering a question submitted by Senator R.G. Lugar, 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’.²⁷ 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’.²⁸

The Law of War Manual, which was issued by the Department of Defense in 2015 and updated in 2016, incorporates the principles laid down in Article 75 and expressly refers to the Obama Administration’s statement of 2011.²⁹ However, the importance of this statement, in so far as it assumes that the rules contained in Article 75 are not yet part of customary international law, should not be overestimated. The phrase ‘out of a sense of legal obligation’ may well conceal the intention of the United States Government to avoid being accused of having breached some of those rules.

²⁵ *Ibid.*, 634.

²⁶ The White House, *Fact Sheet: New Actions on Guantanamo and Detainee Policy*, 7 March 2011, available at <https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

²⁷ ‘Responses of Legal Adviser Harold Koh to Questions submitted by Senator Richard G. Lugar’ in *Libya and War Powers: Hearing before the Committee on Foreign Relations, United States Senate*, 28 June 2011, available at: https://fas.org/irp/congress/2011_hr/libya.pdf, 53, 57.

²⁸ *Ibid.*

²⁹ US Department of Defense, *Law of War Manual*, June 2015 (Updated Dec. 2016), 512, para. 8.1.4.2.

5. Conclusion

Given the overall practice and case law mentioned above, it is submitted that nowadays the provisions of Article 75 reflects customary international law.³⁰ Therefore, they bind all States, whether parties or not to Additional Protocol I. About twenty States are not yet parties to this Protocol, including Eritrea, Iran, India, Israel, Pakistan, Turkey and the United States. By virtue of customary international law, however, whenever involved in an international armed conflict, such States are obliged to accord the fundamental guarantees set forth in Article 75 to persons fulfilling the requirements therein.

³⁰ This view is shared by a significant number of scholars. See among others: Jelena Pejić, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 *International Review of the Red Cross* 375, 377; Marko Milanovic, 'Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing *Hamdan* and the Israeli *Targeted Killings* Case' (2007) 89 *International Review of the Red Cross* 373, 387; Dörmann, 'Combatants, Unlawful', para.30; Anicée Van Engeland, *Civilian or Combatant? A Challenge for the Twenty-First Century* (Oxford: Oxford University Press, 2011), 56; Laura M. Olson, 'Status and Treatment of Those Who Do Not Fulfil the Conditions for Status as Prisoners of War' in Andrew Clapham, Paola Gaeta, Marco Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (Oxford: Oxford University Press, 2015), 911, 926; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd ed., Cambridge: Cambridge University Press, 2016), 47.

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

This collection of contributions made by renowned international experts and practitioners in the field of IHL - recalling the 40th anniversary of the adoption of the Additional Protocols to the Geneva Conventions - addresses the central question of sexual and gender violence in armed conflicts and of the integration of a gender perspective into IHL.

The 40th Round Table on current issues of international humanitarian law (IHL), focussed on some very fundamental themes, such as the principles of distinction and precaution, the definition and the time frame of armed conflicts, as well as the threshold of the application of the Protocols.

The Round Table provided a forum to discuss other relevant topics including the treatment of persons deprived of their liberty, the protection of medical personnel and of medical activities, and the question of humanitarian access, as well as to explore whether and how the 40th anniversary of the Protocols could serve as an opportunity to shed some light on their enforcement.

The **International Institute of Humanitarian Law** is an independent, non-profit humanitarian organization founded in 1970. Its headquarters are situated in Villa Ormond, Sanremo (Italy). Its main objective is the promotion and dissemination of international humanitarian law, human rights, refugee law and migration law. Thanks to its longstanding experience and its internationally acknowledged academic standards, the International Institute of Humanitarian Law is considered to be a centre of excellence and has developed close co-operation with the most important international organizations.