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ON THE ISSUE OF THE LEGAL STATUS OF COMBATANTS AND NON-COMBATANTS

Abstract. *The article is devoted to the comparative study of the legal status of combatants and non-combatants from the position of international humanitarian law and from the point of view of Russian and foreign international law doctrine. Special attention is paid to differences in the legal status of these persons in land, sea and air warfare. The weak positions of the Russian and foreign international law specialists in an attempt to distinguish these categories of eligible participants of armed conflicts are observed. The provisions of the 1949 Geneva conventions and their Additional protocols of 1977 are analyzed. The objective of this study is to determine the qualitative feature, which may help to delineate clearly the legal status of combatants and non-combatants in international and internal armed conflicts.The research is based on a combination of specific historical, comparative-legal, formal-legal and political-legal methods.The main conclusions of the research are the following: 1) combatants should in any circumstances distinguish themselves from the civilian population; 2) non-combatants are entitled to use their weapons only for self-defense or the protection of the property and persons entrusted to them; 3) non-combatants should include only the medical staff and clergy, all other categories of eligible participants of armed conflict are considered to be combatants. The novelty of the research is that the position of the Russian international law specialists on the question is described for the first time in comparative perspective in English.*

Key words: *Russian doctrine, clergy, medical personnel, war, legal position, non-combatant, combatant, armed conflict, Geneva conventions, Additional protocols.*

Аннотация. *Статья посвящена сравнительному исследованию правового статуса комбатантов и некомбатантов с позиций международного гуманитарного права и с точки зрения российской и зарубежной международно-правовой доктрины. Особое внимание уделяется различиям в правовом статусе указанных лиц в сухопутной, морской и воздушной войне. Отмечаются слабые позиции российских и иностранных международников в попытке разграничения данных категорий законных участников вооруженных конфликтов. Анализируются положения Женевских конвенций 1949 г. и Дополнительных протоколов к ним 1977 г. Цель настоящего исследования – определить качественный признак, на основе которого возможно четкое разграничение правового статуса комбатантов и некомбатантов в международных и внутренних вооруженных конфликтах. Исследование осуществлено на основе сочетания конкретно-исторического, сравнительно-правового, формально-юридического и политико-правового методов. Основными выводами проведенного исследования являются следующие: 1) комбатанты должны в любых обстоятельствах отличать себя от гражданского населения; 2) некомбатанты вправе применять свое оружие только в целях самозащиты или защиты вверенного им имущества и лиц; 3) к числу некомбатантов следует относить только медицинский персонал и духовенство, все остальные категории законных участников вооруженных конфликтов считаются комбатантами. Новизна исследования состоит в том, что позиция российских международников по указанному вопросу впервые излагается в сравнительном ракурсе на английском языке.*

Ключевые слова: *вооруженный конфликт, комбатант, некомбатант, правовой статус, война, медицинский персонал, духовенство, российская доктрина, Женевские конвенции, Дополнительные протоколы.*

The legal status of belligerents was always the spotlight of politicians, militarians, diplomats and scientists who have dedicated many researches to this issue. Prerevolutionary Russian scientist Michael Dogel separated from a complex of laws of warfare legal norms that define the status of a person in time of war and determine his/her rights and obligations. Dogel attributed them to the personal (private) law of warfare (as opposed to the property law of warfare). Such a personal law of warfare, according to the scientist, governs the legal status of every person, not only being a citizen of one of the warring States, but also a foreigner residing on the territory of one of them; the obedience of all persons at the moment of declaring war on the territories of the warring States to the laws and customs of warfare is unconditional and not subject to exceptions; but these laws and customs of warfare are not the same for all persons within the territories of the warring States [1, c. 173-174]. The validity of this approach was confirmed in the history of formation and development of international humanitarian law and is also relevant in modern conditions.

The legal status of combatants and non-combatants is different. It is associated with the right of direct participation in hostilities.

During an armed conflict combatants may use the highest degree of violence to an enemy, such as exterminating its personnel, destroying military facilities, structures and military equipment without the risk of being prosecuted.

Combatants are subjects to military captivity under the precondition of distinguishing themselves from civilians (Art. I and III of the Hague Regulations of 1907, Art. 4(A) of Geneva Convention III of 1949, Art. 44(1) of the Additional Protocol I 1977). Moreover, in order to strengthen the protection of civilians, the mentioned Protocol obliges combatants to distinguish themselves during the conduct of hostilities (attacks) or while preparing for such attacks. However, in exceptional cases, when a combatant, during the conduct of hostilities, cannot distinguish himself from civilians, he nevertheless retains his status of combatant, as long as he openly carries weapons in such situations: a) during each military engagement; b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate (Art. 44(3) of the Additional Protocol I).

A combatant who falls into the power of an adverse Party, while failing to meet the requirements set forth in the second sentence of paragraph 3, shall forfeit his right to be a prisoner of war, but nevertheless, he shall be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol (Art. 44(4) of the Additional Protocol I). From the Article 44 it follows that combatant of both regular and irregular armed forces in order to obtain prisoner of war (POW) status should only carry weapons openly during military engagement and being engaged in a military deployment prior to fight.

As for wearing uniforms, according to the Article 44(7) of the Additional Protocol I, this Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

The duties of combatants are the following: to respect the principles and norms of international humanitarian law (though violation of those rules does not forfeit them the combatant status); to distinguish themselves from civilians; to prevent attacks on civilians and civilian objects; to use legitimate methods and means of warfare; to take responsibility (disciplinary, administrative, civil, financial, criminal) for violations of international humanitarian law.

In contrast to combatants, non-combatants being in the armed forces of belligerent States are not eligible to participate directly in the conduct of hostilities and to eliminate enemy. Their activities are aimed at ensuring the physical and spiritual condition of armed forces personnel. Even personal weapons they are allowed to apply only in self-defense. Yet if they participate in hostilities, they can be held liable for a breach of international humanitarian law.

Unlike the Hague Convention of 1907 (Art. III of the Regulations concerning the laws and customs of war on land), the mode of military captivity does not cover non-combatants. Under the Geneva Convention (III) relative to the treatment of prisoners of war, the Detaining Power ensures the retained medical and religious personnel all the capabilities necessary to provide medical care and religious ministration to the prisoners of war (Art. 33).

The notion of "medical personnel" includes individuals who are part of medical groups and assigned by the belligerent to perform exclusively medical functions: search of wounded, sick and shipwrecked, their evacuation, diagnosis, medical care, prevention of diseases, and for administrative support of medical units, ambulance vehicles and their maintenance (Art. 8 of the Additional Protocol I).

Thus, the term "medical personnel" refers to individuals in the broad sense of the word: including professional doctors, nurses, administrative and household workers, drivers, etc. The members of medical personnel are assigned by the belligerents on permanent or temporary basis. Temporary medical staff operates only at the time of appointment, unlike permanent staff, which is included in the structure of the armed forces.

Medical personnel may be military or civilian. Namely the assigned civilian personnel of warring parties are protected by international humanitarian law within a certain period of their work. For example, a civil doctor performing his/her professional duties during the period of armed conflict and having no assignment of his/her State for such activity does not fall under the term "medical personnel" within the meaning of international humanitarian law. Certainly the order of such assignment must comply with the domestic legislation of the State making the assignment. This can be explained by the fact that medical personnel during the armed conflict enjoys special rights, and as soon as belligerent State responsible for any acts of individuals belonging to this category, it has to provide adequate control over their activities as well. For example, public authorities should not allow medical personnel to be engaged in commercial or other activity incompatible with their purpose.

The personnel of medical units are equal in their rights to the personnel of volunteer aid societies, specially trained troops to be used when needed as auxiliary nurses or porters for searching, collecting, transporting or treatment of wounded, sick and shipwrecked, autho-

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rized by their governments, and national Red Cross societies and other comparable voluntary society. Also, the members of medical staff can be the citizens of foreign States that are not parties to the conflict. They perform their professional duties on the orders of their government. In addition, medical personnel may include the representatives of the Red Cross or Red Crescent national societies of non-belligerent States. They usually work under the supervision of the ICRC.

The legal status of medical personnel provides rights and obligations under international humanitarian law, and liability for violation of its provisions. The main objective of establishing the legal status is to ensure that medical personnel are able to carry out their humanitarian mission in time of armed conflict. Medical staff of armed forces is under the protection of international humanitarian law.

Within the framework of the military laws and regulations of the Detaining Power, under the supervision of its eligible authorities and in accordance with professional ethics, they continue to exercise their medical duties in the interests of prisoners of war, preferably of those of the armed forces to which they belong themselves.

The main duties of medical staff are:

- strict compliance with international humanitarian law;
- humane treatment of the victims of war (not to expose persons, belonging to these categories, to any harmful to their health procedures and experiments, to respect their physical and mental integrity);
- provision to the wounded and sick, prisoners of war and shipwrecked individuals medical assistance (not to do so is a violation by the medical staff of the international humanitarian law);
- strict observance of the principles of medical ethics, i.e. their medical duties (Art. 16 of Additional Protocol I; Art. 10 of Additional Protocol II) in accordance with the "Hippocratic oath" (460-380 BC), provisions which were developed by "the Geneva oath" and "the International code of medical ethics" developed by the World Medical Association (WMA) (i.e., to perform professional duties conscientiously; to consider as their main concern the health of the sick and wounded; not to divulge secrets entrusted by the protected persons; to respect the value of human life; not to use medical knowledge against the laws of humanity; not to allow any religious, national, racial, political or social discrimination in carrying out their duty; even under the threat of life not to use medical knowledge against the laws of humanity);
- implementation of the Medical ethics in wartime and the Rules on providing aid to wounded and sick in armed conflicts (approved in 1957 by ICRC, the International Committee of Military Medicine, the World Health Organization and approved by the World Medical Association. The main provisions of these documents are in the fact that the protection of life and health is the main task of the medical personnel; it is prohibited to conduct medical experiments on human beings; they are obliged to provide medical assistance without distinction as to race, sex, religion, nationality, etc.) [2, p. 37];
- humane treatment without any distinction on persons, who do not directly take part in hostilities or laid down their arms;
- prevention of any medical procedure, that is not required by the state of health of protected persons or any medical, scientific or other experiments on them;
- obtaining the patient's consent (if he/she is able to do this) for treatment, surgery that associated with risk for his/her life.

Violation by medical staff of their professional duties, as well as perpetration of serious or other violations of international humanitarian law entails disciplinary or criminal liability.

The term "religious personnel" covers both militarians and civilians who are involved solely in the discharge of their spiritual functions. International humanitarian law (Art. 24, 28 of the Geneva Convention I; Art. 36 of the Geneva Convention II; Art. 33 of the Geneva Convention III; Art. 9 of the Additional Protocol II) provides protection to religious personnel, which includes both militarians (military chaplains) and civilians. Religious personnel may be permanent (structure of the armed forces) or temporary, i.e. accompanying armed forces, medical units, transports or civil defense organizations.

If representatives of religious personnel fall under the control of an adverse party, they may be detained only to the extent required by the spiritual needs and the number of prisoners of war. They are provided with all possible assistance in their discharge of religious ministration, and they should not be compelled to carry out tasks which are not compatible with their humanitarian mission. The Warring Powers, which control these individuals, should allow them to visit prisoners of war in working teams and hospitals outside the camp.

In the Armed Forces of Russian Federation measures are taken to establish the institution of clergymen. Patriarch of Moscow and all Russia Alexy II gave his approval for the training of chaplains for the Armed forces of Russian Federation. A preliminary draft has already been developed by the Chief Military Prosecutor's office jointly with the Ministry of Defense and the Synodal Department for the cooperation of the Moscow Patriarchate with the Armed Forces. Primarily in the Russian Army there should appear Orthodox priests. However,

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Church representatives claim that the opportunity to preach will be given everyone and, first of all, Muslims.

Presently about 2 000 Orthodox priests preach on a voluntary basis and often absolutely free in the Russian Army. According to a survey, more than 60% of militarians advocate the revival of the institution of the clergy in the modern armed forces. In the words of father Dimitry, the Archpriest and the Chairman of the Synodal Department on interaction with armed forces and law enforcement agencies of the Moscow Patriarchate, in order to implement the program on equipping the army with military chaplains, at least another 3 500 priests will be required [3].

Due to the fact that military actions are often being conducted on the sea space, there is a need in illuming the issue of combatants and non-combatants in naval warfare. The combatants in this war are: the crews of the warships of all types (battleships, cruisers, destroyers, aircraft carriers, submarines, boats, etc.), the crews of aircraft of the Navy (aircraft, helicopters), supporting boats of all kinds, as well as merchant vessels that were converted into warships.

The emergence of submarines and the violation of the rules of naval warfare by the German submarines in the First World War raised the question of the need to comply by their crews with international humanitarian law. The Washington rules of naval warfare (1922), London Protocol (1936) and Nyon agreement (1937) formulated the rule that the submarine crew must abide by the rules of naval warfare set for surface ships.

It is noteworthy to mention the merchant ships converted into war ships. The Hague Convention of 1907 (VII) relative to the conversion of merchant ships into war ships sets the following rules: the vessel shall be placed under the direct authority, immediate control, and responsibility of the Power whose flag it flies; merchant ships converted into war-ships must bear the external marks which distinguish the war-ships of their nationality; the commander must be in the service of the State and duly commissioned by the competent authorities. His name must figure on the list of the officers of the fighting fleet; the crew must be subject to military discipline; every merchant ship converted into a war-ship must observe in its operations the laws and customs of war. The conversion of a merchant ship into a warship is valid in its own port or in territorial waters, as well as in the waters of the ally and in the waters under military occupation, but it is prohibited in the ports and territorial waters of a neutral State and in the open sea.

From the conversion of merchant ships into warships one should distinguish arming merchant ships for self-defense. This practice was yet developed in the Middle Ages, when merchant ships had to defend themselves from the attacks of pirates and privateers. In the two World Wars many States were arming their merchant ships. However, a merchant ship that set a weapon for self-defense does not become a military ship and therefore does not enjoy the right to stop ships at sea, their inspection and seizure. It can only use its weapons in self-defense.

Non-combatants in the naval warfare are the crews of military hospital ships, if such ships were built or equipped by the States with the special purpose of assisting the wounded, sick and shipwrecked, as well as the crews of hospital ships of ICRC. They cannot be attacked or captured, as they are under the protection of international humanitarian law.

Combatants in the air warfare are the crews of all aircraft that are part of military aircraft of the warring States and have their insignia. This includes the crews of civil aviation, which were turned into military within the jurisdiction of the belligerent State.

Non-combatants in the air warfare are the crews of medical aircraft and hospital aircraft used by the warring States and national societies of the Red Cross for evacuation and treatment of the wounded and sick. Sanitary and hospital ships must have clearly visible distinguishing mark, and in certain cases – also the distinctive emblem of the Red Cross. States in conflict are not allowed to use sanitary aircraft to ensure the safety of military facilities, intelligence gathering, and to carry personnel and military cargoes in order to assist the belligerents.

The division of the armed forces into combatants and non-combatants derives of the Additional Protocol I of 1977, which regulates the relations of States in international armed conflicts. During the period of internal armed conflict, such distinction of fighting into these categories is not provided by the Additional Protocol II of 1977. If the participants of an internal armed conflict fall under the authority of the opposing party, they are regarded as detained or deprived of liberty.

The treaty provisions also use other names of "fighting" in the case of non-international armed conflict, such as: persons who directly participate in hostilities; members of anti-government armed forces or other organized armed groups; persons taking direct part in hostilities, etc. The legal status of prisoners of war does not apply to them. Professor Eric David noted rightly that there is no status of prisoners of war in non-international armed conflicts [4, p. 579]. The same opinion holds Peter Rowe, who notes that during the armed conflicts of non-international character rebels do not receive prisoners of war status as defined by the Geneva Convention III and the Additional Protocol I [5, p. 90]. The validity of direct participation of individuals in hostilities during an internal conflict is governed by domestic law. Jean-Marie Henckaerts and Louise Doswald-Beck point out correctly that although such persons could be called "fighting", on a number of languages this term is also translated as "combatant" and therefore could not be considered fully satisfactory [6, p. 16].

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The legal position of participants of an internal armed conflict is determined by the standards set forth in the Additional Protocol II (Art. 4 and 5). They are entitled to respect for their person, honour and convictions and religious practices.

The following acts against such persons remain prohibited: issuance of an order not to leave anyone alive; violence to the life, health and physical or mental well-being of persons, cruel treatment (torture, mutilation or any form of corporal punishment); collective punishments, taking of hostages; acts of terrorism; outrages upon personal dignity (humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault); slavery and the slave trade; recruitment into armed forces or compulsion to participate in hostilities of children under 15 years of age; robbery, as well as the threat to commit any of the foregoing actions. Special attention is paid to children, they shall be provided with the care and aid they require and shall receive an education.

All appropriate steps shall be taken to facilitate the reunion of families temporarily separated (Art. 2, 4 and 5 of the Additional Protocol II). All the wounded, sick and shipwrecked, whether they have taken part in the armed conflict or not, shall be respected and protected (Art. 7 of the Additional Protocol II).

At the same time, as correctly noted by Peter Rowe, participants of armed conflicts of non-international character can be prosecuted for mutiny, treason, armed rebellion, murder and other crimes, envisaged by the legislation of their country. However, in accordance with Article 3, common to the Geneva conventions of 1949, and regardless of the fact that these categories of persons can be prosecuted by their State, they enjoy certain minimal protection under international humanitarian law. In particular, they may not be subjected to summary executions and shall enjoy the right to a trial by a duly established court [7, p. 90].

Unfortunately, it should be recognized that the adoption and entry into force of the Additional Protocol I stayed undetected for many Russian and some foreign authors, who continue, as before in their writings, not to reflect the supplements associated with its adoption, which could have a negative impact on the quality of the dissemination of international humanitarian law, as well as proper understanding of its content and the implementation in national legislation.

Professor Sergey Egorov notes that the division of the armed forces into fighting and non-fighting is based on their direct armed participation in hostilities in the interests of the warring party to which armed forces they are eligibly included. He erroneously attributed intendants to non-combatants [8, с. 798].

At the same time, as the basis for such division in international humanitarian law a new approach is laid and it is associated with the right of fighting and non-fighting to participate directly in hostilities, not the implication to them (Art. 43(2) of the Additional Protocol I). A similar view is expressed by Pavel Biryukov in his textbook on international law. Although he incorrectly classifies military correspondents, lawyers and intendants as non-combatants and does not mention medical staff at all, that is contrary to the Additional Protocol I [9, с. 238].

Lev Lazutin notes that in accordance with the effective international standards the armed forces (both regular and irregular) include units of ground, naval and air forces. Then he enumerates legally warring "persons accompanying the army, but not included directly in the armed forces…" as if they all have the same right to fight as combatants. The imprecision of this approach is seen in the fact that, firstly, the structure of armed forces is determined by national legislation, not by international law, and secondly, not all listed by the author categories of legally fighting are entitled to take up arms and eliminate the enemy. For example, persons that "accompany the army, but not included directly in the armed forces" have no such right (Art. 43 of the Additional Protocol I) [10, с. 459].

Peter Kremnev correctly notes that erroneous doctrinal endowment with the combatant status of persons following the armed forces but not being their members directly (civilians included in the crews of military aircraft) and the members of the crews of merchant ships and the crews of civil aviation may lead to bona fide misconception regarding the commitment by them of acts that are prohibited under the effective international law. For example, to cause the illusion that these persons can "legitimately" use their weapons against the enemy, and after the expenditure of ammunition – surrender, not being prosecuted for such acts. The enemy, in his turn, could also "lawfully" exercise their capture (with automatic granting them of the status of prisoner of war) or even regard them as an object of attack. Both the actions of such individuals and of the enemy against them are not compatible with the status of civilians. The cited author rightly considers these persons as civilians on the precondition that the ships of the merchant fleet and civil aviation are not converted into military, and their crews are not subject to the direct authority of a belligerent [11, с. 287].

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