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INTERNATIONAL LEGAL REGULATION OF THE RESTRICTION OF THE RIGHT TO LIFE IN ARMED CONFLICTS

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SUMMARY

The article is devoted to the topical theme of the definition of the limits of the protection of the right to life during any armed conflict. The article explores the conditions and situations, their peculiarities, when, despite the presence of international and regional protection, the right to life of a person can be deprived lawfully, which speaks of the relative nature of such a right.

It is the presence of simultaneous international protection of the right to life and the possibility of its restriction in conditions of armed conflict makes important this scientific research.

Key words: right to life, right to life in armed conflicts, restriction of right to life, limitation of right to life, armed conflicts.

АНОТАЦІЯ

Стаття присвячена актуальній на сьогодні темі визначення меж захисту права на життя під час збройного конфлікту. У статті досліджуються умови і ситуації, їхні особливості, коли, незважаючи на наявність міжнародного і регіонального захисту, людина правомірно може бути позбавлена права на життя, що говорить про відносний характер такого права.

Саме наявність одночасного міжнародного захисту права на життя та можливості його обмеження в умовах збройного конфлікту робить важливим таке наукове дослідження.

Ключові слова: право на життя, право на життя у збройних конфліктах, обмеження права на життя, збройні конфлікти.

Introduction. Despite the fact that today the right to life is recognized by the entire world community and protected by international law, it still has a relative character and, under certain legal and factual conditions, may be legally restricted. So, the armed conflict that is currently taking place in the East of Ukraine has shown again that our right to life can be the highest value in peacetime, but in fact it does not weigh more than a shell for the passengers bus, who are bombarded in 2015 near Volnovaha in Donbass.

The simultaneous existence of international protection of the right to life and, at the same time, the possibility of limiting it in conditions of non-international (NIAC) and international (IAC) armed conflicts makes such a topic of research **topical** to the protection of human life, which is the highest value, even in an armed conflict.

Among the recent works, which are devoted to this problem, we can name the works of E. David, L. Doswald-Beck, D. Kretzmer, M.O'Connell, W.Schabas, G.Gasteyger, N.Lubell, J.Rait, V.Rusinova, M. Savriga and others.

The purpose of this article is to determine the limits of the protection of the right to life, the conditions of situations in which the lawful restriction of such a right during international and non-international armed conflicts may be legitimate, to disclosure of their essence and peculiarities.

1. The right to life in armed conflicts according tothe International Human Rights Law

The right to life is regulated and protected by international, regional normative acts in the field of human rights, as well as the norms of international humanitarian law (IHL). Art. 6 of the International Covenant on Civil and Political Rights, Art. 4 American Convention on Human Rights, 1969, Art. 4 of the African Charter on Human and Peoples' Rights, 1981, Art. 5 of the Arab Charter for Human Rights state, that everyone has an inalienable right to life and no one can be arbitrarily deprived of such a right.

In contrast to the aforementioned international and regional treaties, the European Convention on Human Rights, 1950, (ECHR, the Convention) uniquely indicates 5 cases, where a person may legitimately be deprived of the right to life, such as: a) in defense of any person from unlawful violence; B) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c) in action lawfully taken for the purpose of quelling a riot or insurrection, (Par. 2 of Art. 2); d) in lawful execution of the death penalty, which was passed by the court (Par.1 of Art. 2); and also e) death resulting from lawful acts of war (Par. 2 of Art.15).

Speaking about restrictions on the right to life in armed conflicts, scholar Louisa Dosswald-Beck, based on the views of most experts at the University Center for International Humanitarian Law in Geneva, argues, that the latter ground (e) – is more relevant to international armed conflicts, while the ground in paragraph (c) (in action lawfully taken for the purpose of quelling a riot or insurrection) refers to non-international armed conflicts. In addition, she notes, that the ECHR has never used the ground for derogating the right to life "from lawful acts of war", despite the fact that all the preconditions for this were, for example, in Turkey during the occupation of Northern Cyprus [1], the situation in Northern Ireland, in the south-east of Turkey and in Chechnya, where the concerned states denied that there was an armed conflict at all, and for this reason, by definition, the above-mentioned ground could not be applied [2; p. 884]. The same position with respect to the absence in the ECHL of such practices is respected by Professor of Nottingham University M. Melanovich [3; p.8].

For example, in the case of "Isayeva, Yusupova and Bazayeva v. Russia", the ECHR, using IHL standards, explicitly indicated that the use of lethal force (air strike) by Russian SU-25 pilots in Grozny, who legitimately assumed the existence of an attack or risk of attack from rebels, who, along with the civilians, could leave the city through the humanitarian corridor, was justified in the order of self-defense, given the fact that there was an armed conflict in Chechnya (Russia) and that such force pursued a legitimate military purpose [4].However, in this case, similar to Isayeva v. Russia, the Court, again applying the IHL rules, acknowledged the violation of the right to life of civilians by government forces because of non-compliance with the State's positive obligation to protect the lives of the civilian population, the choice of the minimum necessary means to reduce the collateral damage, etc., and also the violation of the principle of "caution", which was manifested in

the use of indiscriminate weapons in a residential area without prior planning, warning, evacuation of civilians and other necessary actions for the sake of reduction of casualties among the civilian population [5, p.173].

Consequently, in the light of the norms of the ECHR and the practice of the ECtHR, a person may legitimately be deprived of his right to life in two cases in any armed conflict (not taking into account the ground for the death penalty): for the purpose of quelling a riot or insurrection and at the time of lawful acts of war.

2. The right to life in armed conflicts according to IHL norms

If we talk about IHL norms, which is directly applicable in any armed conflicts, it treats the right to life restrictively, extending its protection only to defendants: the wounded, sick, prisoners of war, civilians and those who do not accept or cease to be directly involved in armed conflict (Geneva Conventions 1949, Additional Protocols to them). That is why we will further consider the issue of restricting the right to life, depending on the status of participants in the armed conflict.

2.1. Limitation of the right to life in depend on participation in an armed conflict

Conditionally, all people who are involved in an armed conflict and whose right to life may be limited, are divided into two categories: *A. participants of the armed conflict and B. persons, who do not directly participate in such a conflict.*

A. Participants of the armed conflict – combatants, dissident armed forces and other members of organized armed groups (OAG).

According to Art. 43 AP(I), combatants – individuals, who are involved in the part of the armed forces of a party in conflict, who are eligible to participate directly in hostilities and obey an internal disciplinary system, that complies with IHL norms. In other words, it is a regular armed force and other organized armed groups or units, that are under the responsible command for the state [6; p.35]. According to paragraphs 1, 2, b, 3, and 6 of the Geneva Conventions: I, Art. 13; II, Art. 13, b and III, art. 4. (a) 1949, the status of a "combatant" according to certain criteria may be extended to persons, who are belonging to the personnel of the armed forces, volunteer detachments and resistance movements, of the people's militia, which are formed by the population in the approach of the enemy. This means that only the aforementioned persons have the right to directly participate in hostilities, to kill other combatants and to have the status of "prisoners of war", if they are captured.

It is important to emphasize that the deprivation of life of one combatant by another enemy combatant will not be considered as an illegal act, because this is the sense of any armed conflict – to weaken its military power and gain victory based on the principle of humanity and military necessity [7]. As the Inter-American Commission on Human Rights notes in this regard, the combatant's privilege is essentially a permission to kill or wound the enemy's combatants, as well as to destroy other enemy's military targets [8].

According to IHL, the official status of a "combatant" is granted only to those persons, who participate in the IAC, that is, they are included in the armed forces of a particular country [9; p.17]. That is, the reception of such status by members of dissident forces or other organized armed groups, fighting among themselves, who are parties in the confrontation only in the NIAC, is not provided either by treaty, nor by customary norms of international law because of the complexity of their definition, and therefore the question of the possibility to attack of and to this people is still not regulated normatively [10; p.16].

In international law there is no single normative definition of members of dissident forces or other organized armed groups (OAG), so the views of scientists on this question are divergent. As Rusinova notes, Goodman R. says, that the basis for such definition is in clause 2 of Article 4 of the Geneva Convention III: relative to the Treatment of Prisoners of War, 1949, but this approach is not widespread, because members of the OAG are often not respected requirements for the presence of distinguishing marks, carrying arms in public, following IHL norms. The second approach, which takes into account only the criteria of OAG, which are contained in Art. 1 AP (II). But it is also unlikely to be applied, because such signs as organization, the presence of central command and control over a particular territory are allocated more for the establishment of a measure of intensity of NIAC in order to narrowing the application of AP (II) in relation to General article 3 of the Geneva Conventions. The third approach, where a certain group is recognized as a party of the conflict on an individual basis also has drawbacks, because it gives to the state party possibility to abuse the use of force to individuals because of the lack of clear criteria for determining their membership of the OAG. Therefore, we agree with Rusinova's opinion, that the practice of defining "an organized armed group" is more justified by analogy with the definition of armed forces, which is contained in Art. 43 AP (I) [11; p. 224]. That's why, according to N. Melzer, members of such organized armed groups (dissident armed forces and other organized armed groups) in the NIAC are those, who have regular functions to directly take part in hostilities ("continuous combat function") [12; p.p. 18, 34].

It is precisely because such participants are parties of the conflict, their right to life may be limited, that means, they have the right to kill other participants and be killed during the NIAC.

Obviously, the legitimate ability of one participant in an armed conflict to kill another participant of the opposite party does not mean that such murders will be carried beyond compliance with IHL norms, because during an armed conflict participants of the opposing parties have a number of obligations, that guarantee the observance and preservation of the right to life.

Thus, in the course of hostilities, the main responsibilities of the parties are based on the general principle of observance of IHL norms, including the limitation of the choice of means and methods of conducting military operations, for example, the prohibition of perfidy (Article 37 of the AP (I)), the murder of a person, who is "outside the fight" (hors de combat) (Article 41, AP(I)), etc., and also compliance with the *principle of proportionality,* that is, the prohibition of attacking military targets, if this could lead to accidental loss of life among the civilian population, their injuries, civilian objects, and that would be excessive and disproportionate in relation to the achieved specific direct military advantage, and the *principle of military necessity,* that is, the obligation to apply the minimum necessary steps, methods and means, that are not prohibited by IHL, to achieve legitimate military objectives, to weaken the military forces of the other side of the armed conflict [13].

Unfortunately, AP (II) does not put forward the criteria for distinction of the above-mentioned members of the NIAC with the civilian population, which is why there are several differentiation approaches on this subject, which will be discussed further.

B. Persons, who do not take direct part in armed conflict – parliamentarians, clergy, medical staff, prisoners of war, wounded, sick, shipwrecked civilians. According to IHL, such persons acquire the status of "defendants", that means the prohibition of deprivation of their right to life during an armed conflict, respectively, the deliberate killing of such persons will be considered as an international crime.

One of the most problematic issues in the IHL is the distinction of the civilian population from the members of the NIAC, as well as those civilian, who are directly involved in the NIAC, because the right to life of the latter two categories

of persons may be legitimately restricted. Let's consider this in more detail.

B.1 The distinction of members of OAG from a civilian population, who does not directly participate in the NIAC

According to customary norms, civilians are individuals, who are not members of the armed forces. It consists of persons who are civilians [9; norm.5].

According to Article 13 AP (II), the murder of a civilian population is prohibited, they have special protection. At the same time, the IHL does not directly prohibit civilians from directly participating in hostilities, including OAG (dissident forces), whose members carry out a continuous combat function, but does not create any privileges for such participants. Because members of organized armed groups stop being civilians for the period of the continuous combat function. Accordingly, at this time, all of them can be killed by other members of the NIAC and this will be not a violation of the right to life. From the moment, when members of OAG cease to perform a continuous combat function, they regain the status of "defendants", but they are not released from prosecution for violations of domestic and international law [12; p. 20].

So, according with what criteria are members of the NIAC distinguished from civilian population, that does not directly participate in the conflict?

On this subject, there are three concepts in international law.

The first concept of "active participation" appeals to Common Art. 3 to Geneva Conventions 1949, which provides, persons, who are acting on the side of the non-governmental forces in the NIAC and who are not actively involved in hostilities get special protection, respectively, those persons, who are actively involved, are losing such protection. This approach greatly simplifies the distinction of the civilian population, because it does not take into account the fact, that the active participants in the conflict are trying to "merge" and disguise with the civilian population, thus, internal troops have the time for killing the opposite side only at the moment of the armed collision, which leads to an imbalance of participants in an armed confrontation, what could affect the civilian population's protection status. Therefore, according to this position, if a civilian at least once participated in an armed conflict, then from this moment a civilian may be killed, that is, it`s right to life may be limited, because he\she becomes a full member of the NIAC. Such position did not find its support and embodiment in judicial practice, because it introduces a certain relativity in the status of a civilian in armed conflict [14; p. 23], [15; p. 828].

Proponents of the second approach propose to distinct the civilian population from the members of the conflict by the criterion of membership in a non-governmental organized group with a continuous combat function. It does not matter, if a person takes an active part in such a group or performs only assistant functions, it may be the victim of a murder while he\she is a member of this group or do not become hors de combat ("out of battle"). Moreover, according to G. Gasteyger, who is referring to Y. Dinstein, such persons become combatants in the broadest sense without having the privileges of being able to participate in military confrontation and being prisoners of war, that's is why they can be lawfully killed on the battlefield. That is, these individuals, who carry out military raids at night and turn into civilians in the afternoon, are not combatants and at the same time are not civilians. This approach is supported in practice by US and Israeli policies in the fight against terrorism [16; p. 145]. Consequently, all, but the aforementioned persons, are civilians and can be killed only when they are directly involved in an armed conflict [14; p. 23], [12; p. 85]. This position was also supported by the Israeli Supreme Court in 2006 in Case 769/02 The Public Committee Against Torture in Israel v. Government of Israel.

Last point of view, so-called the approach of the "revolving door", supported by the United Nations Commission on Human Rights, the ICRC, the scientists O. Ben-Naftali, K.R. Michaeli [17], A. Cassese [18] and us also, that a civilians can be killed as a combatant only when they are directly involved in armed confrontation or preparing for it, or returning from the point of armed collision, or there is evidence that at that moment it served military functions, despite civilian appearance [12; p. 86].

In the affairs of the ECHR "McCann", "Ogur", "Gül", ECHR emphasized that there was no absolute necessity to kill a person who carried out intelligence activities, did not directly participate in terrorist activities at the time of detention, that is why the government was obliged to arrest such a person first, and did not kill this person. The ECHR subsequently confirmed this position in similar cases where armed conflicts were present [16; p. 147].

But at the same time, the state has no obligation to have information about the person's belonging to the fighting forces, such information can be obtained after the assassination, and the case of the ECHR "McCann" supports this confirmation [15; p. 829]. That is why this approach is more often used in practice.

But at the same time, O'Connell notes, that the United States, for example, in practice completely ignores the criterion of "evidence of participation", since they never provided evidence of direct participation of persons in armed confrontation, since such information, first, it is classified by the government and the United States does not disclose them, and second, the recognition of this criterion would have led the United States to acknowledgment of fact, that the killing of terrorists in Afghanistan, Somalia are outside the zone of armed conflict, that took place in Pakistan, would be unlawful [19; p. 13].

In the scientific environment, there is another approach that is supported by the ICRC, that states in the case of doubt in determining the status of a person have to confess the status of a civilian [12; p.92]. But this approach has no imperative status, and acts only as a recommendation.

Consequently, we can see, that international law establishes a distinction between the civilian population and the direct members of the NIAC, because the right to life of the latter can be lawfully limited.

B.2. The distinction of the civilians depending on participation in the non-international armed conflict

As mentioned earlier, murder of the civilians is strictly prohibited. However, IHL does not forbid their direct participation in hostilities. At the same time, during the period of such participation, civilians lose their status of "protected persons", which makes their killing by the opposite side of the conflict possible and legitimate [12; p. 20]. This raises the question how to distinguish civilians who are not directly involved in NIACs from those who take such a part.

In 2009, the ICRC published a document entitled "Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law", which has been endorsed by the scientific community and until now is actively applied in practice. Here, ICRC defines the direct involvement in hostilities – as specific hostile acts committed by the individuals in the frames of an armed conflict between the parties. Direct involvement should be distinguished from the indirect participation in hostilities; the last one, despite its complementary to the overall military effort character, do not harm them directly, thus does not lead to loss of protection against the attacks [12].

Referring to the foregoing definition, as well as decision of the International Tribunal for Rwanda, N. Melzer identifies the definitions "direct participation in hostilities" and "active participation in hostilities", and marks three mandatory elements:

1) Action. It needs to be specific, carried out resolutely and for a certain period of time, as a person who is not a party to the conflict and is not a member of an organized group (NIAC) could be killed only in the course of such an action. The purpose of such an action is to cause harm (achievement of the harm threshold), negative consequences for civilian, military objects, other side`s individuals.

2) Direct causal link between the action and damage. For example, the action of a munition`s factory worker, who produces the weapon, is an indirect action, therefore couldn`t be classified as a direct participation.

3) And the last element – the results of an action: caused damage or received military advantage. The main criterion here is the opposite`s party perception of a harm done or support received as a result of person`s activity, and the expectation of such a result [12; p. 54, 59–62,], [15, p. 830–831].

Consequently, civilians, who take a direct part in NIAC hostilities lose their status of the "protected persons" for the period of such participation, they could be killed by other members of NIAC and this won't be considered as the right to life violation.

2.2 Collateral damage

In addition to the above-mentioned direct participation in an armed conflict, during both IAC and NIAC civilians' right to life could also be limited by the collateral damage, that is, the inevitable and unintended damage inflicted by the armed forces to the civilian population, civilian objects, property during the attack on a legitimate military purpose [20; p. 14] (other-side combatants, military objects). Such damage is permitted by IHL norms and will be legal only if not excessive, collateral attack wasn't non-selective, deliberately directed towards civilians and was carried out in accordance with the principles of proportionality and military necessity according to Art. 51 AP (I). This means parties should use force in a way when damage is proportional to the military advantage obtained, and the force methods' amount does not exceed the necessary level for stopping the struggle [15; p. 830].

At the same time, according to the provisions of Art. 57 AP (I), the parties have positive obligations before a military attack commitment, in order to maximize collateral damage avoidance, i. e.: 1) verification and attestation in witness of the military purpose existence; 2) minimizing the collateral damage by observing precautionary measures when choosing methods and means of attack; 3) abstention from an excessive collateral damage, which would clearly not correspond to specific and direct military superiority. In the event the object is under special protection, is not or ceases to be a military target, or the collateral damage could be excessive, commanders must stop military attacks and operations [21; p. 827].

The most controversial and complicated issue in this area is the problem of determining the collateral damage excessiveness, because harm and corresponding right to life restrictions, will be legal only while the redundancy threshold is not exceeded. That is why the answer is so important for the parties of the conflict.

Wright J. D. determines this as the humanitarian and military interests' problem. ICRC holds the position the huge collateral damage is prohibited under any circumstance. However the experts from Garvard's "Program on Humanitarian Policy and Conflict Research (HPCR)" together with a group of IHL specialists express the opinion that huge collateral damage is not always excessive, because the excessiveness is not absolute and depends on the amount of military advantage expected and therefore may be justified by the military purpose [22; p. 91].

Obviously, if an attack was committed intentionally and the person knew an excessive collateral damage could be done, then it would be qualified as a war crime in accordance with Part 2 of Article 57 of the AP (I).

Appealing to a fact that a normative definition of an "excessive collateral damage" as well as customary practice are absent, according to Wright J. D., many scientists, in particular Leslie Green, Judith Gardam, Ian Henderson, Dieter Fleck, Nils Melzer insist on the dominant "subjective" criterion, which today has no significant alternatives, that "excessiveness" should be based on the subjective position of the commander, that is, his assessment of the probable expected collateral damage and military advantage in certain circumstances on the basis of available information. The opposite – "objective" criterion based on "rational" assessment by a commander, with determination of a military superiority and proportionality principle, did not find much support.

At the same time, in 2003 ICTY convicted General S. Galic of violation of the proportionality principle through a 23-month siege of Sarajevo by his army, causing the death of thousands of civilians. The Court indicated an excessive collateral damage and stated: "In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack" [23; p. 842].

However, an extra "hybrid" criterion exists. It bases on a subjective assessment of a collateral damage, and further rational determination of the attack proportionality according to the information possessed by a commander [21; p. 840]. Precisely this criterion E. David insists on using, he points out that in case of determination whether the military task (military superiority), connected with a military object attack, corresponds a collateral damage among the civilians, the starting point should be a case of a person, prudent in standard situation, in order to check if he/she could reasonably use available information to foresee an excessive collateral damage to a civilians.

A similar approach was adopted by the Committee from the Office of the Prosecutor (OTP) during the bombing of residential areas in Kosovo, 1999, which developed the following criteria of proportionality: 1) correlation between the military superiority and collateral damage; 2) determination of the final result; 3) determination of geographical and time boundaries; 4) determination of an attack's security factor. Taking such criteria into account, the Committee concluded the NATO's armed attack on the Belgian television and radio company office (loss of 17 civilians), during the Yugoslav command attacks, was not excessive as the obtained military advantage exceeded the collateral damage. The same judgment was made in case of Croatian troops` attack on the city of Vitez in 1993, when the forces of Bosnia and Herzegovina were located in the city.

Speaking about the collateral damage assessment, it is also necessary to indicate, (according to Wright J. D.) that in accordance with the provisions of subpar. 4, par. b), Art. 8 the Rome Statute, criminal punishment for the excessive collateral damage was significantly raised, because the provision prohibits only *obviously* not comparable collateral damage. However, the scientist notes that to date he is unaware of any cases when the question about proportionality principle was under ICJ consideration. In addition, according to Art. 10 of the Rome statute, the ICJ jurisdiction for the attacks with obviously excessive collateral damage is less authoritative than Conventional or common humanitarian law [21; p. 843].

Conclusion

Summarizing all of the above, it can be noted that right to life is recognized by the world community as a fundamental and absolute value. At the same time, international law, prohibiting the deprivation of a person's right to life, gives a relative character to it, because allows a legitimate restriction of such a right. Thus, the limitation of combatants' and equated to them individuals' right to life during non-international and interna-

tional armed conflicts is permitted by IHL provisions, although there are certain limitations on the methods and means of conducting such a conflict. As for civilians, their right to life during the armed conflicts can be restricted only in case of direct participation in an armed confrontation (during the period of such confrontation) and in the case of collateral damage.

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