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THE CHALLENGES TO THE PRINCIPLE OF DISTINCTION POSED BY NON-INTERNATIONAL ARMED CONFLICTS

This paper focuses on the understanding of the importance for applying of the principle of distinction not only in international armed conflict, but also in non-international armed conflicts. The author defines the key features of the principle of distinction in international humanitarian law. The main emphasis is made on the need of making a distinction between the persons, who take direct part in hostilities and civilians, military and civilian objects. The article describes the legislative background of features of this principle on international level. In addition, successful practice of international criminal tribunals for the application of this principle on practice was indicated.

Key words: law of armed conflict, the principles of international humanitarian law, principle of distinction, non-international armed conflicts.

Дана стаття присвячена розумінню необхідності застосування принципу розмежування (відмінності) не тільки в міжнародних збройних конфліктах, але й в збройних конфліктах неміжнародного характеру. Автором визначено ключові риси принципу розмежування в міжнародному гуманітарному праві. Основний акцент зроблено на необхідності здійснення розмежування між учасниками збройних дій та цивільним населенням, військовими та цивільними об'єктами. У статті наведено законодавче закріплення на міжнародному рівні особливостей даного принципу. Крім того, вдало наведено практику міжнародних кримінальних трибуналів з питань застосування даного принципу.

Ключові слова: право збройних конфліктів, принципи міжнародного гуманітарного права, принцип розмежування, збройні конфлікти неміжнародного характеру.

Данная статья посвящена пониманию необходимости применения принципа различия не только в международных вооруженных конфликтах, но и в вооруженных конфликтах не-международного характера. Автором определены ключевые черты принципа разграничения в международном гуманитарном праве. Основной акцент сделан на необходимости осуществления различия между участниками вооруженных действий и гражданским населением, военными и гражданскими объектами. В статье приведено законодательное закрепление на международном уровне особенностей данного принципа. Кроме того, удачно указано практику международных уголовных трибуналов по вопросам применения данного принципа.

Ключевые слова: право вооруженных конфликтов, принципы международного гуманитарного права, принцип разграничения (различия), вооруженные конфликты не-международного характера.

Introduction. It is a well-known fact, that armed conflicts (majority of which has non-international character) are a reality of the modern world and should be considered as a separate subject of international regulation. That is why an international humanitarian law has emerged as a field of international law and combined the basic principles and institutions to ensure and protect the rights of nations and nationalities under the Universal Declaration of Human Rights. International humanitarian law includes international armed conflicts and non-international armed conflicts. In this paper will be examined in details one of the fundamental principles of international armed conflicts and the possibility its implementation into non-international armed conflicts. Principle of distinction takes independent place among five main principle of international humanitarian law. **Main objectives of this article** are the following: 1) to analyze characteristics of the principle of distinction in international armed conflicts and non-international armed conflicts and to investigate the established views and perceptions of this institution by



focusing on controversial and obscure points; 2) to identify the challenges that principle of distinction can pose in non-international armed conflicts.

Results of conducted research. According to the provisions of the common article 3 of Geneva Conventions non-international armed conflict can be defined as «not of an international character occurring in the territory of one of the High Contracting Parties» [1]. Hence, the next conclusion can be made: as non-international armed conflicts may be considered those that are armed confrontations occurring within the territory of a single State and are engaged against the central government. In the Tadić case, the ICTY has noted that non-international armed conflict exists in the case when there is: «protracted armed violence between governmental authorities and organized armed groups or between such groups within a State» [2].

The main difference between non-international and international armed conflicts is that non-international armed conflicts do not include conflicts in which two or more States are involved and the conflicts, which extend to the territory of two or more States.

One of the determinative principles of international armed conflicts is the principle of distinction. Article 48 of the Additional protocol I to Geneva Conventions has following requirements: «A distinction must always be made in the conduct of military operations between fighters and civilians. A distinction must also always be made between military objectives and civilian objects and accordingly shall direct their operations only against military objectives» [3]. Such understanding of the principle of distinction is also fixed in:

– The Lieber Code of April 24, 1863, also known as Instructions for the Government of Armies of the United States in the Field, General Order № 100 – «[A]s civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms» [4].

– The Laws of War on Land. Oxford, 9 September 1880. Article 1 of the 1880 Oxford Manual provides: «The state of war does not admit of acts of violence, save between the armed forces of belligerent States. Persons not forming part of a belligerent armed force should abstain from such acts» [4].

– Section 5.1 of the 1999 UN Secretary-General's Bulletin states: «The United Nations force shall make a clear distinction at all times between civilians and combatants...» [4].

As we can see distinction must be made between civilians and combatants at all times, and attacks shall be directed against combatants; and between civilian objects and military objectives, and shall direct their operations only against military objectives. But such provisions are relevant in the case of international armed conflicts.

Nevertheless we can speak about the distinction as such during the determination of the international and non-international armed conflicts. Regarding to the provisions of the article 3 of the Additional Protocol II to Geneva Conventions: «This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol» [5].

Nowadays we can say with confidence that the principle of distinction is customary for international and non-international armed conflicts. In support to this statement article 13 of Additional Protocol II sets that «the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations» [5].

As we see from all abovementioned, the principle of distinction is broadly used only in international armed conflicts. Given the technical nature of humanitarian law, there are no combatants *stricto sensu* in non-international armed conflicts as combatants are defined in the context of the Third Geneva Convention and Additional Protocol I, both of which apply to international armed conflict [6].

Speaking about the participants of the non-international armed conflict it should be noticed that there are members of armed forces of a State, which are not combatants, and legally civilians. Customary International Humanitarian Law study explains that, in non-international armed conflicts, the term «combatant» is used in the generic sense to refer to «persons who do not enjoy the protection against attack accorded to civilians, but does not imply a right to combatant status or prisoner of war status». Similarly, the International Committee of the Red Cross's Interpretive Guidance on the Notion of Direct Participation in Hostilities considers that «for the purposes of the principle of distinction in non-international armed conflict» civilians are those individuals who are neither members of the state's armed forces nor members of the armed forces of a non-state party [6].

Thus we can conclude that the main difference between using the principle of distinction in international and non-international armed conflicts is differentiation among combatants, members of armed forces of the State, which are not combatants, and civilians.

However not using the principle of distinction directly as such in non-international armed conflicts does not mean that grounds of this principle are not applicable when there is a need to differentiate between military



objectives and civilian objects. According to the List of Customary Rules of International Humanitarian Law: «The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects» [4].

The common features of the principle of distinctions, that can be used in both – international and non-international armed conflicts – are necessity to distinguish between military objects and civilian objects. According to article 52 (2) of Additional Protocol II «...military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage» [5].

Conclusions. As we see from the legal regulation of the international and non-international armed conflicts – principle of distinction is used in both cases, but unfortunately not so wide as the circumstances of each conflict require. Moreover, regulation of international armed conflicts is more detailed and lawfully issued than non-international ones. The illustrative example of such issue can be specified by giving to the combatants the status of Prisoners of war, which means also giving them all relevant obligations and rights, including protection from prosecution for military action. This is cannot be traced in non-international armed conflicts, members of which (we can call them - fighters) do not have such privilege.

All information mentioned above leads us to the logical conclusion that one of the basic principle of international humanitarian law – principle of distinction – is applicable to all armed conflicts. This principle imposes on the parties of the conflict (States, armed forces of the State, etc.) the duty to target only military objectives, not a civilian objects. Violation of this principle through the carrying out of an indiscriminate attack entails as a war crime.

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МІЖНАРОДНІ ТА РЕГІОНАЛЬНІ СТАНДАРТИ ЗАХИСТУ ПРАВ ЛЮДИНИ У КОНТЕКСТІ ДІЯЛЬНОСТІ ТРАНСНАЦІОНАЛЬНИХ КОРПОРАЦІЙ

Розглянуто джерела права ООН, ЄС та ОЕСР, які регулюють захист прав людини у зв'язку із діяльністю транснаціональних корпорацій.

Ключові слова: міжнародні та регіональні стандарти, захист прав людини, транснаціональні корпорації.

Рассмотрены источники права ООН, ЕС и ОЭСР, которые регулируют защиту прав человека в связи с деятельностью транснациональных корпораций.

Ключевые слова: международные и региональные стандарты, защита прав человека, транснациональные корпорации.

In this paper, international and regional standards (worked out by the UN, EU and OECD), which regulate human rights in relation to the functioning of transnational corporations, are considered.

Key words: international and regional standards, human rights protection, transnational corporations.

