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Nature of Concepts of 'Spy' and 'Military Intelligence Officer' and Their Difference in International Law

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On the basis of classical sources of international humanitarian law, the latest Ukrainian and foreign works in the sphere of international legal science, the essential meanings of the terms 'a spy' and 'a military intelligence officer' are attempted to be determined. The international legal status of a military intelligence officer is analyzed. The difference between the latter's status from the legal status of a spy is defined.

Keywords: **spy, military intelligence officer, international law, law of war**

The law of war, or the law of armed conflicts, is an important area of international humanitarian law which has one of the leading positions within the doctrine of modern international law. For instance, the academician V. Grabar believed that the issue on the inter-relations of war and international law had always been of great importance and represented a primary issue of international legal science [*Poltorak*, 1976: 66]. According to the famous legal expert F. Martens, "in the objective sense, the law of war is a set of legal rules, laws and customs that determines the actions of states and their armed forces during a war" [*Martens*, 2008: 327].

In this respect, it should be recognized that international law primarily arose from the law of war. Thus, the work of the famous Dutch lawyer Hugo Grotius 'On the Laws of War and Peace' which was published in 1625 was mainly focused on the determination of the norms and principles of international humanitarian law to be followed before the beginning of a war and directly during the warfare [*Pavko*, 2011: 16]. After having analyzed a significant amount of historical and legal material, the scientist concluded that if Christian peoples are granted the right to conduct warfare, they are obliged to respect inalienable human rights and limit their abuse and violence.

The law of armed conflicts performs the key task of providing the maximum possible limitation of the damaging effects of war on the life and development of human civilization. It provides complete protection against destruction for specific categories of people, and guarantees protection, determined within certain limits, for others. In other words, there are no people who are completely deprived of defence by international law during an armed struggle. The only existing differences are related to the scope and content of the international legal protection that people are provided with.

In the professional literature on international law, only those individuals and organizations who take part in legal relations are considered as the subjects of the law of war [*Dmytriev*, 1999; *Poltorak*, 1976].

In particular, combatants are those people who belong to the armed forces of the parties in a state of conflict (except medical and religious personnel) and have the right to direct participation in warfare [*Dodonov*, 1997: 97]. The famous scientist and lawyer I. Lukashuk noted that the development of international humanitarian law has caused some evolutionary changes to the term itself, since previously it had covered only the combat personnel of regular armies [*Lukashuk*, 2008: 350].

It is important that the status of a combatant is directly related to their right to be considered as a prisoner of war while being captured by the opposite party. A combatant is obliged to abide by the rules of international law as applied to armed conflicts and is personally responsible for any violations of such rules. Nevertheless, the fact of

these violations does not deprive them of the right to be considered as a combatant or a prisoner of war (while being captured by the opposite party) [*Shemshuchenko*, 2012: 380].

Simultaneously, international law narrows the functions of non-combatants to the service of the armed forces they belong to and to the support of their military activities. When non-combatants engage in warfare, they lose their legal status and become combatants, and weapons can be used against them [*Dodonov*, 1997: 184].

Therefore, the measure to which the participants of a military struggle are related to the process of warfare, is the grounds for their classification. Due to the nature of a non-combatants' activities, they do not usually directly participate in warfare [*Artsibasov*, 1989: 109]. Therefore, the status of 'prisoner of war' is only granted to the lawful participants of military actions, i.e. to combatants [*Lukashuk*, 2008: 349].

Thusly, one can state on the basis of national and foreign works on international law, that military intelligence officers or spies, involved in an armed conflict, belong either to combatants or to non-combatants. As espionage can be considered not only as a social and legal phenomenon but also as a phenomenon of international law, it envisages that an interested party obtains non-public (secret) information, which legally belongs to an opposing party, consequently using the gained data against their owner [*Shemshuchenko*, 2012: 974]. So, when in the summer of 2013 E. Snowden, the former U.S. CIA and NSA agent, disclosed secret information on the activities of American intelligence agencies (which, in particular, concerned the interception and subreption of U.S. citizens' phone calls), it drew great attention to the issue of espionage in international law. As a result, scientists faced the need to define the essential and criterial differences between such international legal categories as 'a spy' and 'a military intelligence officer' in both the scientific research and practical senses.

As having been determined to be an activity of gaining military secrets and political information or data on a contestant by hidden methods, espionage does not contradict the principles of the law of armed conflicts; therefore, it is not a forbidden type of military activities. For example, according to E. David, espionage can be conducted either by combatants or by civil people who do not have such status [*David*, 2011: 24]. International humanitarian law considers the collection of valuable military information as a legal process if it is carried out by a person in military apparel or by a person who does not conceal their status of combatant (e.g., does not use the uniform of the opposite party) and takes place in the areas controlled by the contestant. When deception or hidden methods (e.g., the usage of the military apparel of the opposite party) are intentionally employed to collect such data, this activity is considered to be espionage [11, 1997: 43].

It is important that the international legal status of a spy was determined in the Hague Convention № IV respecting the Laws and Customs of War on Land of 1907 and in the Additional Protocol I to the Geneva Conventions for the Protection of War Victims of 1949. Taking into account the provisions of these international legal instruments, one can define the examined concept as follows: a spy is a person who belongs to the armed forces of a party to the conflict and secretly or by using false pretexts collects data in the area of military actions with the further intention to transfer them to the other party to the conflict [10, 1996: 440–441].

While spying, a person out of a combat organization cannot claim the status of prisoner of war: their case should be transferred to a military tribunal. But in the case of when such a person is detained after the fulfillment of their task and he/she has already rejoined their troops, he/she shall not lose his/her right to the status of prisoner of war (Article 46 of the Additional Protocol). Therefore, a spy cannot be punished for their activities in the past.

It is necessary to mention that international humanitarian law clearly distinguishes the concepts of 'spy' and 'military intelligence officer'. A military intelligence officer is a person who collects data in the area of a contestant's military activities and carries out their tasks wearing the uniform of their own armed forces [*Dodonov*, 1997: 32]. The activity of such a person is not considered to be espionage unless he/she acts intentionally or uses deceptive or hidden means. When this person is captured by the opposite party, he/she does not lose their right to claim the status of prisoner of war and cannot be treated as a spy [10, 1996: 361].

According to the provisions of the Hague Convention № IV, the combatants or civil people who openly carry out their duties regarding the transfer of dispatches as intended to the deployment of their own armed forces or the armed forces of the contestant cannot be considered as spies [10, 1996: 441].

Therefore, the differences between the international legal statuses of spy and military intelligence officer are caused by the character and legal particularities of the procedures of the collection of important secret information regarding the contestant; as well as the usage of methods allowed or forbidden by the law of war. Therefore, the author believes that a spy who is protected by the rules and principles of international humanitarian law can be considered as 'a humanitarian spy'.

Taking into account the main modern trends of international law development, in particular, the strengthening of its humanitarian part, one should state that the existing international legal tools for protecting military intelligence officers require further improvement. It is also important to clearly define the criteria for the legal identification of a spies' or military intelligence officers' activities, especially in the context of the situation which has emerged as a consequence of E. Snowden actions.

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Щодо ролі органів державної влади та місцевого самоврядування у вирішенні питань адміністративно-територіального устрою: вітчизняний та зарубіжний досвід

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Проаналізовано роль органів державної влади та місцевого самоврядування у вирішенні питань адміністративно-територіального устрою в Україні та окремих європейських унітарних державах на основі використання відповідних положень законодавчих нормативно-правових актів. Установлено, що є необхідність ухвалення закону України, в якому було б чітко визначено процедуру зміни статусу адміністративно-територіальних одиниць та їхніх просторових меж.
Ключові слова: **статус адміністративно-територіальної одиниці, зміна статусу та меж адміністративно-територіальної одиниці, законодавство європейських унітарних держав, парламент, уряд, президент, органи місцевого самоврядування.**

Проанализирована роль органов государственной власти и местного самоуправления в решении вопросов административно-территориального устройства в Украине и отдельных европейских унитарных государствах на основе использования соответствующих положений законодательных нормативно-правовых актов. Установлено, что существует необходимость принятия закона Украины, в котором была бы четко определена процедура изменения статуса административно-территориальных единиц и их пространственных границ.
Ключевые слова: **статус административно-территориальной единицы, изменение статуса и границ административно-территориальной единицы, законодательство европейских унитарных государств, парламент, правительство, президент, органы местного самоуправления.**

У конституційних актах європейських унітарних держав закріплені положення про те, що основним джерелом ініціювання питань з утворення, зміни меж і статусу адміністративно-територіальних одиниць (далі – АТО) є жителі зацікавлених територіальних одиниць. Як правило, питання щодо утворення, трансформації, ліквідації АТО вирішуються через видання окремого акта парламентом держави (Італія, Іспанія, Ліхтенштейн, Люксембург, Нідерланди, Молдова, Франція, Португалія та ін.). Однак у Білорусії та Болгарії визначальну роль у вирішенні питань щодо зміни адміністративно-територіального устрою (далі – АТУ) має Президент та Рада Міністрів, а в Польщі – Рада Міністрів і Прем'єр-міністр.

Формування цілісного уявлення про ступінь досконалості законодавчого регулювання процедури зміни статусу АТО та їхніх просторових меж можливе лише на основі результату порівняльно-правового аналізу відповідних вітчизняних і зарубіжних законодавчих актів. Такий аналіз дасть змогу визначити роль органів, які беруть участь у вирішенні питань АТУ: парламенту, уряду, глави держави, центральних і місцевих органів виконавчої влади, органів місцевого самоврядування. Цією проблематикою займалися: Я. Верменич, К. Вітман, І. Кресіна, А. Коваленко, В. Новик, І. Магновський, М. Матвіїшин, М. Хонда, В. Яцуба та інші. Перейдімо до розгляду проблематики, виокремлюючи роль кожного зі згаданих органів влади.