



Detention and international humanitarian law: The significance of status

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Abstract

The significance of status in detention procedures under International Humanitarian Law is paramount for ensuring compliance with humanitarian principles, protecting detainees' rights, and upholding the rule of law in conflict zones. Status determination categorizes individuals based on their legal status, such as combatants, civilians, or other protected persons. This classification profoundly impacts detainees' treatment, rights, and entitlements to humane treatment, legal protections, and procedural safeguards. Accurate status determination is crucial for distinguishing between lawful and unlawful combatants, ensuring compliance with the principle of distinction, and preventing arbitrary detention. However, challenges like ambiguity in defining status, lack of uniform implementation, and political considerations often complicate this process. Addressing these challenges requires adherence to legal standards, transparency, and accountability in detention practices.

Keywords: Status, detention, international humanitarian law

Introduction

In the realm of detention within the framework of International Humanitarian Law (IHL), personal status plays a crucial role in delineating various groups of individuals subject to differing legal frameworks. These distinctions impact the legal basis, conditions of detention, treatment, judicial rights, procedural rights, conditions of release, and the entitlement of organizations like the ICRC to conduct visits^[1].

In international armed conflicts, two primary categories of detained individuals enjoy distinct statuses: prisoners of war and individuals protected under the Fourth Geneva Convention. Those falling under these categories are entitled to specific rights and protections. However, individuals detained in other circumstances during armed conflicts, whether international or non-international, lack a designated status. Nonetheless, they are entitled to fundamental guarantees ensuring humane treatment and various legal and procedural safeguards^[2]. Rooted in compassion, neutrality, and impartiality, these principles demand unwavering dedication to alleviating suffering, preserving dignity, and protecting the most vulnerable amidst the ravages of warfare.

Within this ethical framework, the concept of status assumes paramount importance, serving as a beacon for the provision of humane treatment and the equitable application of legal protections. By delineating between combatants, civilians, and other protected persons, status determination becomes fundamental in upholding the humanitarian mandate of IHL, ensuring that the treatment of detainee's remains grounded in principles of empathy and fairness. This paper shall thus examine the relevance of status in the context of detention in international humanitarian law. To achieve this, it shall be divided into different parts, part I is the introduction; Part II shall clarify key concepts; Part III shall examine detention in armed conflict situations – international and internal; Part IV the Significance of Status in IHL; Part V Challenges and Considerations in Status Determination in Detention Procedures under IHL and Part VI concludes the paper.

Conceptual Clarification

International Humanitarian Law

International Humanitarian Law (IHL) is characterized by its function of regulating the use of force in armed conflicts. This regulation aims to achieve two main objectives: firstly, to protect those who are not directly involved in hostilities^[3] or who have ceased their participation^[4]; and secondly, to limit the use of violence to what is essential to achieve the objectives of the conflict, which is primarily to diminish the enemy's military capabilities, regardless of the causes being fought for.

From this definition, several fundamental principles of IHL emerge

- a. **Distinction between civilians and combatants:** This principle requires parties to distinguish between individuals who are taking part in hostilities and those who are not, ensuring that civilians are not targeted during conflicts.
- b. **Prohibition of attacking those who are hors de combat:** Hors de combat refers to individuals who are incapacitated or no longer participating in hostilities, such as wounded soldiers or prisoners of war. Attacking such individuals is strictly prohibited under IHL.
- c. **Prohibition of inflicting unnecessary suffering:** IHL prohibits the use of weapons or tactics that cause unnecessary harm or suffering to combatants or civilians.
- d. **Principle of necessity:** This principle mandates that the use of force must be necessary to achieve legitimate military objectives and must not go beyond what is required to accomplish those objectives.
- e. **Principle of proportionality:** According to this principle, the anticipated military advantage of an attack must be balanced against the potential harm to civilians or civilian objects. The use of force must not be disproportionate to the expected military gain^[5].

These principles form the foundation of International Humanitarian Law and guide the conduct of parties involved in armed conflicts, aiming to mitigate the human suffering caused by warfare while also maintaining a level of military effectiveness necessary for achieving legitimate objectives^[6].

The definition of International Humanitarian Law further highlights certain inherent limitations, such as:

- a. IHL doesn't outright forbid the use of violence in armed conflict.
- b. It's unable to shield everyone impacted by armed conflict from harm.
- c. It doesn't differentiate based on the motives behind a conflict.
- d. IHL doesn't prevent a party from prevailing over its adversary.
- e. It operates under the assumption that parties to a conflict pursue rational objectives, and these objectives themselves don't inherently contradict the principles of IHL.

In essence, while IHL provides essential regulations and protections in armed conflict situations, it doesn't eliminate violence altogether, nor does it cover every aspect of human suffering in such scenarios. Additionally, it doesn't delve into the underlying causes or motivations behind conflicts, nor does it prevent parties from seeking victory over their opponents. However, it does expect that the parties involved in conflict pursue their objectives in a manner consistent with the principles of IHL^[7].

Status

According to Merriam-Websters dictionary, Status is said to mean: "a position or rank in relation to others, for example: the status of a father; relative rank in a hierarchy of prestige especially: high prestige; the condition of a person or thing in the eyes of the law, state or condition with respect to circumstances"^[8].

In the context of International Humanitarian Law (IHL), "status" refers to the legal classification or category that individuals fall into during armed conflict, particularly concerning their treatment and rights under the law. This status determines the rights and protections accorded to individuals based on their relationship to the conflict, such as whether they are combatants, civilians, prisoners of war, or other protected persons. Status under IHL serves as a crucial determinant of how individuals are treated by parties to the conflict, including their entitlement to humane treatment, legal protections, and access to judicial processes, and conditions of detention or release.

The status of individuals under international humanitarian law has significant implications for the application of humanitarian principles and the protection of rights. IHL distinguishes between different categories of persons, such as civilians, combatants, prisoners of war, and the wounded and sick, each with specific rights and protections^[9]. For example, combatants and prisoners of war have specific rights and obligations outlined in IHL, while civilians are entitled to protection from direct targeting and harm^[10].

According to the Geneva Conventions and Additional Protocols, combatants are individuals actively participating in hostilities, while civilians are those not taking part in hostilities. Additionally, other protected persons, such as medical personnel, journalists, and humanitarian workers,

are afforded specific protections under IHL. The accurate determination of status is paramount for ensuring the appropriate application of legal standards and the protection of detainees' rights.

Detention

Detention is the act of holding an individual against their will without a court order. Those detained are often vulnerable to various forms of abuse, including torture, physical and mental mistreatment, and sexual violence. In the context of armed conflict, detention is a means to safeguard against threats posed by enemies while conducting military operations within the bounds of the laws of war. However, in Non-International Armed Conflicts (NIACs), states may detain individuals deemed security threats without following legal procedures^[11].

The United Nations' Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment defines a 'detained person' as someone deprived of liberty except through a conviction for an offense. 'Detention' is the state of being deprived of personal liberty under these circumstances^[12]. This definition underscores the importance of respecting the rights and dignity of individuals in detention, particularly in conflict settings where vulnerabilities are heightened and abuses are more prevalent.

Detention Procedures

Detention procedures play a pivotal role by providing a systematic framework for the lawful apprehension, treatment, and eventual release of individuals by authorities. They guarantee that detainees receive their due legal rights, are treated with respect, and that the entire process remains transparent and subject to scrutiny^[13]. These procedures encompass various essential elements, such as: the initial lawful apprehension of individuals based on suspicion of crime, security threat, or violation; the legal basis and justification of the detention; timely notification of the rights possessed by the detainees; provision of humane conditions, including food, water, shelter, medical care, and sanitation, as well as ensuring detainees' access to legal representation, fair trial rights, and presumption of innocence; review and oversight mechanisms, as well as the prompt release when lawful detention ends, repatriating those entitled under international law^[14].

Detention procedures are crucial for several reasons

- a. **Protection of Human Rights:** Proper detention procedures ensure that individuals deprived of their liberty are treated in accordance with international human rights standards, protecting against abuse and ensuring access to legal representation and fair trials.
- b. **Prevention of Abuse:** Clear detention procedures deter abuse and misconduct by establishing transparent guidelines for arrest, detention, and interrogation, holding accountable those who violate detainees' rights.
- c. **Promotion of Accountability:** Effective detention procedures promote accountability by ensuring that decisions are made lawfully and subject to review, preventing arbitrary detention.

- d. **Maintenance of Public Trust:** Fair detention procedures contribute to public trust in the legal system and law enforcement, reducing societal unrest.
- e. **National Security and Public Safety:** Detention procedures help safeguard national security and public safety while balancing human rights considerations.
- f. **International Obligations:** Adhering to detention standards outlined in international treaties demonstrates a commitment to upholding human rights principles globally ^[15].

Forms of Long-Term Detention in Armed Conflicts

1. *Administrative detention* also known as *internment*. Administrative detention allows for the detention of an individual on the basis that they represent a security threat of some kind, rather than in response to a specific offence. IHL captures this notion under 'civilian internees' ^[16]. Internment is the term used in IHL to denote the detention of someone believed to pose a serious threat to the detaining authority's security, without the intention of bringing criminal charges against that person. However, since the creation of the Geneva Conventions there have been significant developments, mainly under international human rights law, which places restrictions on the possibility to detain individuals indefinitely without charging them. Human rights law establishes: an obligation to inform the individual of the reasons for their detention; an obligation to bring a person arrested on a criminal charge promptly before a judge; and an obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention (*habeas corpus*). With regard to the first two obligations, even though they are not listed as non-derogable in human rights treaties, case law has established that they may never be dispensed with altogether ^[17].
2. *Detention* for the purpose of criminal proceedings is the deprivation of liberty to which a criminal suspect may be subjected, lasting until final conviction or acquittal ^[18].

The Status of Persons Held in Detention in Armed Conflict Situations

Detention in International Armed Conflict

The Third and Fourth Geneva Conventions provide comprehensive safeguards for individuals held in detention during international armed conflicts. The Third Convention delineates protections for Prisoners of War, while the Fourth Convention specifies the rights afforded to civilians and the conditions under which they may be detained.

Prisoners of War

Prisoners of war are basically combatants ^[19] who have fallen into the power of an adverse party to a conflict, regardless of whether they are members of the regular or irregular armed forces ^[20] or participants in a *levée en masse* ^[21]. Also entitled to prisoner-of-war status, but not to the privilege of combatancy, are civilians formally authorized to accompany the armed forces, such as civilian crew members of military aircraft, war correspondents, private contractors, and crew members of the merchant marine or civilian aircraft of the belligerent parties ^[22].

Demobilized military personnel in occupied territory and military personnel interned in a neutral country are also entitled to the prisoner of war status. In the first scenario, demobilized military personnel living in occupied territory may be interned by the occupying power due to security concerns stemming from their past affiliation with opposing armed forces and their ongoing allegiance to a belligerent party in an active conflict. While these individuals are considered civilians, they are treated as prisoners of war once interned ^[23]. The second scenario involves military personnel interned in neutral countries. Neutral states hosting members of belligerent armed forces, including those who are wounded or sick are obligated to intern such personnel and provide them with at least the humanitarian benefits and protections afforded to prisoners of war ^[24]. The primary implication of being granted prisoner-of-war status is that, typically, detainees can be held by the capturing power until the conclusion of active hostilities without the need for specific legal or administrative proceedings, except in the case of prosecution for war crimes. The purpose of internment in such cases is preventive rather than punitive; it is aimed at removing hostile combatants from the battlefield while ensuring their well-being and safeguarding them from the hazards of ongoing conflict. Throughout their internment, prisoners of war are entitled to a comprehensive set of rights and protections outlined primarily in the Third Geneva Convention ^[25].

Civilians

Civilians may be prosecuted for participating in hostilities and for war crimes if they commit acts prohibited by international law during armed conflict, such as targeting civilians or using prohibited weapons ^[26]. Individuals who do not meet the criteria for prisoner-of-war status fall under the purview of the Fourth Geneva Convention, which safeguards civilian persons during times of war, despite its title suggesting otherwise. This protection extends beyond civilians to encompass various groups such as civilians involved in hostilities, mercenaries, and even members of armed forces who have forfeited their prisoner-of-war status due to activities like espionage or failure to distinguish themselves from civilians as required by international humanitarian law.

The Convention obligates parties to the conflict or occupying powers to safeguard individuals who find themselves in their custody during a conflict or occupation, irrespective of their civilian or military status, except for their own nationals and nationals of neutral or co-belligerent states, provided normal diplomatic relations are maintained ^[27]. However, in conflicts where both sides may formally have the same nationality, this exclusion of nationals can pose challenges, especially in national liberation wars. Additionally, nationals of states not party to the Fourth Geneva Convention are not covered by its protections ^[28]. Nonetheless, given the widespread ratification of the 1949 Geneva Conventions and the customary nature of their principles, this exclusion is largely considered irrelevant today.

Detention in Non-International Armed Conflict

Detaining individuals during non-international armed conflicts involves holding them in custody within a single state's borders, where government forces confront non-state

armed groups like insurgents or rebels. Unlike conflicts between states, these are internal struggles. Individuals accused of committing crimes are typically subject to prosecution and potential imprisonment. Consequently, during conflicts where an armed group opposes a state, members of that group are likely to be prosecuted ^[29].

International humanitarian law, notably Common Article 3 of the Geneva Conventions and Additional Protocol II, governs detention practices. Common Article 3 sets basic standards for treating individuals not involved in hostilities, forbidding violence, cruelty, torture, and actions compromising dignity. It mandates humane treatment and certain fundamental rights, such as fair trial guarantees ^[30].

Additional Protocol II expands on protecting individuals in such conflicts, including provisions on detention. It stresses humane treatment, detainees' right to know why they're detained, and their ability to challenge detention's legality before a competent court ^[31]. Detaining individuals in non-international armed conflicts raises legal and humanitarian concerns, like arbitrary detention, conditions in detention facilities, access to legal aid, and the right to a fair trial. Human rights groups and international bodies monitor these practices to ensure adherence to the law and advocate for detainees' rights.

A key issue in modern international humanitarian law (IHL) revolves around whether armed non-state groups have the authority to prosecute and detain their opponents. Despite IHL's principle of equal treatment for all belligerents, the rules governing non-international conflicts are mostly shaped by states, potentially complicating this equality principle. Consequently, IHL doesn't provide a clear answer to this issue. The crux of the matter lies in the fact that while IHL aims for fair standards for all conflict parties, the legal framework mainly reflects state perspectives and interests. This means that the rights and duties of non-state armed groups, particularly regarding prosecution and detention, might not be well-defined or addressed within the existing legal structure. This ambiguity can lead to uncertainty and debates about the appropriate actions for non-state actors in conflict settings ^[32].

Significance of Status in IHL

The significance of status in detention in International Humanitarian Law (IHL) is crucial as it bears severe implications for humanitarian principles and rights protection as well as enhanced protections against arbitrary detention of individuals held in detention during armed conflicts.

Implications for Humanitarian Principles and Rights Protection

The classification of detainees based on their status holds profound implications for the adherence to humanitarian principles and the protection of their rights. The principle of humanity underscores the importance of alleviating suffering and protecting human dignity, while neutrality and impartiality emphasize the need for non-discriminatory treatment and assistance based on humanitarian needs alone ^[33]. By accurately determining the status of detainees, authorities can ensure that their treatment aligns with these fundamental principles, thereby upholding the humanitarian ethos of IHL ^[34].

Combatants, for instance, may be subject to lawful detention for the duration of hostilities but are entitled to certain

protections, such as humane treatment and due process guarantees. Conversely, civilians enjoy enhanced protections against arbitrary detention and must be afforded humane treatment at all times. By categorizing detainees according to their status, authorities can tailor their treatment and procedural safeguards to uphold these rights, thereby safeguarding the dignity and well-being of individuals caught in the midst of armed conflicts ^[35].

Ensuring Compliance and Preventing Arbitrary Detention

Arbitrary detention, a practice prohibited by both IHL and international human rights law involves depriving individuals of liberty without legal justification or due process, constituting a severe violation of their rights. Establishing clear criteria and procedures for status determination helps prevent arbitrary detention and protect individuals from abuses of power in conflict zones ^[36].

International human rights law, particularly Article 9 of the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights of 1966, explicitly prohibits arbitrary detention. Key principles include the right to liberty and security of person, the obligation to inform individuals of the reasons for their arrest and any charges against them, and the right to challenge the lawfulness of detention before a court promptly ^[37].

Challenges and Considerations in Status Determination in Detention Procedures under IHL

The process of status determination in detention procedures under International Humanitarian Law faces several challenges and considerations that complicate its implementation ^[38]. One significant challenge is the ambiguity in defining status, especially in non-international armed conflicts, where the distinction between combatants and civilians can be unclear. This ambiguity poses difficulties in accurately classifying individuals, leading to potential errors in determining their rights and treatment ^[39]. Furthermore, the lack of consistent implementation of status determination procedures across different conflict zones exacerbates the challenges. Varying interpretations and applications of status determination protocols, influenced by political considerations, can result in inconsistencies and discrepancies in how detainees are classified and treated. This lack of uniformity can undermine the fairness and effectiveness of detention practices under IHL ^[40].

To address these challenges, it is crucial to prioritize upholding legal standards, transparency, and accountability in detention practices. Adhering to established principles of IHL, such as the principle of distinction and the prohibition of arbitrary detention, is essential for ensuring that detainees are treated fairly and humanely. Transparent status determination procedures, supported by robust oversight mechanisms and judicial review, can enhance accountability, prevent abuses of power, and promote consistency in the treatment of detainees across conflict-affected areas. By addressing these challenges and considerations, the process of status determination in detention can be strengthened to uphold the rights and dignity of individuals in accordance with international humanitarian norms ^[41].

Conclusion

In conclusion, the importance of accurately determining the status of individuals in detention procedures under International Humanitarian Law (IHL) cannot be emphasized enough. This aspect carries immense significance in ensuring adherence to humanitarian principles, safeguarding the rights of detainees, and upholding the rule of law within conflict zones. Accurate status determination is indispensable for maintaining legal order and preserving the dignity of individuals impacted by armed conflicts. The significance of status determination lies in

- a. Properly identifying the status of detainees ensures that they receive the protections and treatment to which they are entitled under IHL. This includes ensuring that civilians are not unlawfully detained and that combatants are treated in accordance with the applicable rules, such as those outlined in the Geneva Conventions.
- b. Accurate status determination is essential for safeguarding the rights of detainees, including the right to humane treatment, access to legal representation, and the right to challenge the legality of their detention before a competent authority. Without proper status determination, detainees may be vulnerable to abuse, arbitrary detention, and denial of their fundamental rights.
- c. Ensuring accurate status determination contributes to upholding the rule of law within conflict zones. It reinforces the principle that individuals should be detained and treated in accordance with established legal standards and procedures, rather than based on arbitrary decisions or biases.

Despite the inherent challenges and complexities associated with determining the status of individuals in conflict situations, a commitment to legal standards, transparency, and accountability is essential. This commitment helps mitigate the risks of abuse and injustice, prevents violations of human rights, and promotes respect for humanitarian principles in conflict-affected areas.

Thus, accurate status determination forms the cornerstone of a legal and ethical framework for detention practices in armed conflicts. It serves as a vital mechanism for protecting the rights and dignity of individuals affected by conflict, while also upholding the principles of justice, fairness, and respect for human rights.

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3. International Humanitarian Law (IHL) indeed sets a high threshold for defining "participation" in armed conflicts. It doesn't consider mere causal contributions to the war effort as constituting participation. Instead, it focuses on the direct involvement in military violence or the implementation of the final element in the causality chain, which is the application of military force. This means that simply providing support, resources, or assistance to a party involved in a conflict

may not necessarily be regarded as direct participation according to IHL. Rather, the law primarily concerns itself with individuals who are directly engaged in military activities or violence, such as combatants actively fighting in battles or carrying out military operations. By delineating participation in this manner, IHL aims to ensure that individuals who are not directly involved in armed conflict, such as civilians or non-combatants, are spared from the dangers and consequences of war as much as possible. This approach underscores IHL's fundamental commitment to protecting those who are not actively engaged in hostilities and minimizing the impact of armed conflict on civilian populations.

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