

CAPTIVE OR CRIMINAL? REAPPRAISING THE LEGAL STATUS OF IRA PRISONERS AT THE HEIGHT OF THE TROUBLES UNDER INTERNATIONAL LAW

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ABSTRACT

For the citizens of Ireland and Great Britain, the second half of the twentieth century represents a period of great political struggle. The historical debate concerns the constitutional status of Northern Ireland; that is, whether the six northeastern most counties on the emerald isle belong to Ireland or to the United Kingdom. The late 1960s through the early 1990s is referred to commonly as “The Troubles,” a time rife with political struggle, violence, and reactionary laws aimed at restricting civil liberties in the name of security. One topic of contention during this era relates to the political status of prisoners convicted of terrorism. These men and women—mostly suspected members of a nationalist paramilitary, the provisional Irish Republican Army—claimed a right to special treatment as prisoners of war. The British rejected the notion that an international war existed in fact, and insisted on treating the prisoners as ordinary criminals under domestic law.

The conflict in Northern Ireland is too often and too easily dismissed as a purely internal matter, regarded a domestic civil rights movement. Consequently, any potential consideration of the conflict as an international armed conflict has been disregarded. This paper will reexamine the classification of The Troubles in light of current, applicable international law to make two determinations: first, to ascertain whether the armed conflict may be classified as one of an international, rather than a non-international, character. Based on this classification, this paper will then discern whether IRA prisoners should have been entitled to prisoner of war

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or some other discrete legal status, separate from that of ordinary criminals.

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INTRODUCTION

The most well-known and most broadly adopted treaties in the international community revolve around war and peace. At the end of World War II, nation states across the globe recognized the need for universal rules limiting and regulating the armed conflict. In the opening lines of the United Nations Charter, a treaty centered around the maintenance of international peace and security, all Member States commit themselves to refrain from using armed force whenever possible.¹ At the same time, the international community has accepted the inevitable reality that states will nevertheless resort to the use of force for various reasons. Therefore, the majority of

1. U.N. Charter art. 2 ¶ 4. (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

United Nations Member States have also signed agreements governing the use of force in armed conflicts. The most prominent of these treaties is the Geneva Conventions, first signed in 1949.² The Geneva Conventions and their Additional Protocols are a series of international agreements governing the protection and treatment of non-participants in armed conflicts. As discussed below,³ the Geneva Conventions contemplate two types of armed conflict: those of an international character and those not of an international character.⁴ The line between these two types of armed conflict began to blur after World War II, and has become increasingly vague due to a proliferation of activity by non-state actors. Unfortunately, the haziness of the line between international and non-international armed conflicts comes with serious legal consequences. One such consequence is illustrated by the conflict in Northern Ireland.

Much of the literature on the conflict, also known as “The Troubles,” (particularly regarding the status of potential human rights violations) has either presupposed that the conflict is a non-international conflict, or too quickly dismissed the idea that the conflict is indeed an international one. One particular issue these hasty, preliminary conclusions have affected is the evaluation of the political status granted by the British government to arrested and imprisoned members of the Irish Republic Army (“IRA”) during the late-1970s and early-1980s. During this period, the British government refused to recognize IRA detainees as prisoners of war (“POWs”).⁵ While the British granted IRA prisoners a distinctive political status (“Special Category Status”) at the outset of The Troubles, this policy was rescinded by 1975.⁶

According to the Geneva Conventions, POW status must be conferred on detained combatants whenever the conflict at issue is of an international character.⁷ When a conflict is of a non-international character, however,

2. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention (III) relative to the Treatment of Prisoners of War, Aug. 12, 1949, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter collectively Geneva Conventions].

3. Geneva Convention (III) relative to the Treatment of Prisoners of War art. 5 ¶ 2, Aug. 12, 1949, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; *see infra* Section II.A.

4. *Id.*

5. *See* discussion *infra* Section I.C.3.

6. *See* discussion *infra* Section I.C.3.

7. Third Geneva Convention, *supra* note 3, art. 4.

states have no legal obligation to grant captured soldiers POW status.⁸ In short, by remaining silent on the issue, other states have implicitly accepted both the British government's classification of the conflict as non-international, as well as its refusal to grant POW status, or any other political status, to IRA prisoners as lawful under international law.⁹

This paper takes a different view. A deeper look at international law and relations between Ireland and the United Kingdom during the late 1970s and early 1980s reveals that there is a strong case for treating the conflict in Northern Ireland as an international, rather than a non-international, conflict under international law. Therefore, whether the denial of POW status to IRA prisoners during this time was lawful is questionable at best. This paper argues that, at the very least, the British government should have continued to grant Special Category Status to IRA prisoners as it had at the outset of The Troubles. The revocation of Special Category Status was a mistake.

This paper begins with a historical overview of the conflict. By providing critical context, this section allows the reader to understand the respective perspectives of the parties involved. This background is especially helpful to comprehending how the IRA views its own role in the conflict. The section ends with the introduction and subsequent revocation of "Special Category Status" conferred upon IRA prisoners, which led to massive political protests. Next, this paper sets out the laws applicable to non-combatants in both international and non-international armed conflict. For present purposes, the relevant laws are all found in the Geneva Conventions and its Additional Protocols. The final section of this paper applies these laws to Northern Ireland in order to determine the proper classification of the conflict, as well as to properly characterize the IRA and determine which protections the group should have been afforded legally.

I. BACKGROUND: A HISTORICAL OVERVIEW OF THE CONFLICT

A. The Struggle for Independence

The long, bitter conflict that plagues Northern Ireland dates back to the seventeenth century. For several hundred years, Ireland existed as a colony of the British Crown. At that time, native Irish Catholic farmers and

8. *Id.*

9. Aside from Irish Republican outcry and a handful of infamous prison hunger strikes that took place at the time, the matter has been essentially ignored by the international community.

peasantry lived under the oppression of an English Protestant ruling class.¹⁰ Despite centuries of colonial occupation, the majority of Irishmen never assimilated into British culture. While the Irish may have lived under the common law of the crown, they maintained their own customs, traditions, and sense of identity.¹¹ Eventually, religion and nationality intertwined and played an essential role in labeling parties to the conflict.¹² As Irish Catholic natives began to voice grievances and a desire for independence from England, religious affiliation became an indicator of nationality and political preference.¹³ Identification as “Protestant” became synonymous with “British loyalist,” representing that portion of the population wishing to remain under British rule.¹⁴ In contrast, “Catholic” became synonymous with “Irish nationalist” or “republican,” representing those who desired freedom for the entire island and sought to establish a completely independent Irish republic.¹⁵ As political scientist Joanne McEvoy states, the conflict in Northern Ireland no longer contains a religious element in any real sense, but rather “is about two groups with allegiances to two different national communities . . . [I]t is about national identity whereby the Nationalist community looks to the Republic of Ireland as the ‘motherland’ whereas the Unionist community looks to Britain as their patron state.”¹⁶

Inevitably, tensions between the Catholic and Protestant communities mounted. By the mid-nineteenth century, several organizations dedicated to the establishment of an independent Irish republic emerged. The most notable and effective of these organizations was the Irish Republican Brotherhood (“IRB”),¹⁷ which took action in the early twentieth century.

10. During this time, a complex social class divide separated the wealthy English Protestant landowners from the poor Irish Catholic farmers and peasants. After several hundred years the farmers and peasants, who were mostly Catholic, were forced to endure the oppression of the Protestant ruling class. The British Crown considered the ‘Emerald Isle’ to be a colony that existed purely for its economic benefit, making up “The United Kingdom of Great Britain and Ireland.”

11. Alpha M. Connelly, *Political Violence and International Law: The Case of Northern Ireland*, 16 DENV. J. INT’L L. & POL’Y 79, 82 (1987–1988).

12. Initially, the tension stemmed from the British Protestants’ view of the Irish Catholics as papists who were placing their allegiance to the Pope above their commitment to God.

13. JANE JOANNE MCEVOY, *POLITICS OF NORTHERN IRELAND* 34 (2008).

14. *Id.* at 9.

15. *Id.*

16. *Id.* at 8.

17. Robert Perry, *Revising Irish History: The Northern Ireland Conflict and the War of Ideas*, 40 J. EUR. STUD. 329, 344 (2010).

1. 1916 Easter Rising and the Proclamation of the Irish Republic

The Easter Rising of 1916 represents the “beacon of militant Irish nationalism,”¹⁸ a lofty attempt to win independence for Ireland once and for all. On April 24, 1916, seven members of the IRB claiming to speak on behalf of The Provisional Government of the Republic of Ireland drafted and signed The Proclamation of the Irish Republic.¹⁹ These men posted the Proclamation outside the main post office in the center of Dublin, addressing the people of Ireland²⁰:

Irishmen and Irishwomen: In the name of God and of the dead generations from which she receives her old tradition of nationhood, Ireland, through us, summons her children to her flag and strikes for her freedom. . .

. . . We declare the right of the people of Ireland to the ownership of Ireland, and to the unfettered control of Irish destinies, to be sovereign and indefeasible. The long usurpation of that right by a foreign people and government has not extinguished the right, nor can it ever be extinguished except by the destruction of the Irish people. In every generation the Irish people have asserted their right to national freedom and sovereignty; six times during the past three hundred years they have asserted it in arms. Standing on that fundamental right and again asserting it in arms in the face of the world, we hereby proclaim the Irish Republic as a Sovereign Independent State. And we pledge our lives and the lives of our comrades-in-arms to the cause of its freedom, of its welfare, and of its exaltation among the nations. . .

. . . Until our arms have brought the opportune moment for the establishment of the permanent National Government, representative of the whole people of Ireland and elected by the suffrages of all her men and women, the Provision Government, hereby constituted will administer the civil and military affairs of the Republic in trust for the people. . .

. . . Signed on behalf of the Provisional Government,

Thomas J. Clarke, Sean Mac Diarmada, Thomas MacDonagh,
P.H. Pearse, Eamonn Ceannt, James Connolly, Joseph
Plunkett²¹

The posting of the Proclamation resulted in six days of fighting between the Irish insurrectionaries and British forces, ending with the execution of all of the signatories to the Proclamation.²² Despite its failure to establish independence, the Rising succeeded in bringing physical force republicanism to the fore of Irish politics.²³

18. Connelly, *supra* note 11, at 81.

19. Proclamation of the Irish Republic, 24 Apr. 1916; *see also* Connelly, *supra* note 11, at 81.

20. Proclamation of the Irish Republic, 24 Apr. 1916.

21. *Id.*

22. Connelly, *supra* note 11, at 82.

23. Perry, *supra* note 17, at 331.

In the years following the Easter Rising the movement toward establishing Irish independence gained momentum. In the 1918 all-Ireland Parliamentary elections, Sinn Fein—the political wing of the IRB—won 73 of 105 Irish seats in the British Parliament.²⁴ The Sinn Fein Parliamentarians disavowed the current state of political affairs and refused to take up their seats in the British Parliament. Instead, they held their own parliamentary sessions in Dublin.²⁵ The first Dáil Eireann (translated as “Assembly of Ireland”) described itself as the parliament of the Irish Republic “proclaimed in Dublin on Easter Monday, 1916, by the Irish Republican Army acting on behalf of the Irish people.”²⁶ Although the Dáil was not recognized by Britain, it continued to meet clandestinely while hostilities with Britain continued.²⁷

2. War of Independence and Partition, 1919-1921.

By 1919 the IRB, responsible for the 1916 Rising, reassembled to become the Irish Republican Army.²⁸ The IRA brought back the physical force republicanism employed in the 1916 Rising to fight the Irish War of Independence from 1919 until 1921.²⁹ Several important political events took place during this time. First, in 1920, at the height of the war, the British Parliament passed a bill partitioning all of Ireland.³⁰ The Government of Ireland Act shifted Ireland’s status from a colony of Britain to an official province of the United Kingdom.³¹ Then, in 1921, the hostilities ended with the signing of the Anglo-Irish Treaty.³² Finally, Ireland had won its long awaited independence from Britain. In 1922 the Irish Free State—The Republic of Ireland—was established.³³

24. TIM PAT COOGAN, *THE IRA* 23 (3d ed. 1987).

25. *Id.*

26. Connelly, *supra* note 11, at 83.

27. *Id.*

28. COOGAN, *supra* note 24, at 23.

29. See JOHN F. MORRISON, *THE ORIGINS AND RISE OF DISSIDENT IRISH REPUBLICANISM: THE ROLE AND IMPACT OF ORGANIZATIONAL SPLITS* 7 (2013).

30. *Id.*

31. Government of Ireland Act 1920, 10 & 11 Geo. 5 c. 67 § 2(1) (Gr. Brit.).

32. See Anglo-Irish Treaty, Dec. 6, 1921.

33. See *generally* Constitution of the Irish Free State 1922.



For many Irishmen both inside and outside of the IRA, however, the Irish Free State represented only limited success, as part of the island remained partitioned. Only twenty-six of Ireland’s thirty-two counties were granted independence from British occupation; the remaining six northeastern-most counties—which, together, make up the province of Ulster—remained under British rule.³⁴ The British government created Stormont, the Parliament building and estate in Belfast, Northern Ireland, and operated from there.³⁵ While the original issue revolved around gaining independence for all of Ireland, now the bone of contention was now the political status of “the six counties”—Northern Ireland.

B. The Northern Ireland Conflict Begins

The Parliament in Stormont was quite aware of the discontent among the nationalist population regarding the division of Ireland. To maintain its foothold in Belfast, Parliament passed the Special Powers Act.³⁶ An extraordinarily sweeping piece of legislation, the Special Powers Act authorized the Minister of Home Affairs to take any and all measures necessary for preserving peace and maintaining order in Northern Ireland.³⁷ These measures and orders were to be implemented by the Royal Ulster Constabulary (“RUC”), the British police force in Northern Ireland. Among other things, the Act authorized the Minister to ban meetings and

34. Jay M. Spillane, *Terrorists and Special Status: The British Experience in Northern Ireland*, 9 HASTINGS INT’L COMP. L. REV. 481, 484–85 (1986).

35. *Id.* at 485.

36. Civil Authorities (Special Powers) Act (Northern Ireland) 1922, 12 & 14 Geo. V, c. 5.

37. *Id.* § 1(3).

publications, to arrest without a warrant, to intern suspects without trial, to search persons and vehicles anywhere, and to declare various organizations—for instance, Sinn Fein—unlawful.³⁸ Finally, a catch-all provision in Section 2(4) of the Special Powers Act provided:

If any person does any act of such a nature as to be calculated to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided for in the regulations he shall be deemed guilty of an offence as against the regulations.³⁹

At the outset, Parliament intended the act to be temporary, albeit renewable annually.⁴⁰ Nevertheless, the mutually exclusive nature of the British Protestant and Irish Catholic identities led to a belief over time that Northern Ireland was a problem without a solution; that tensions arising out of the political status of the six counties could only be managed rather than resolved.⁴¹ In 1928 Parliament extended the Act's application for an additional five years, and in 1933 made the Act permanent.⁴²

The impact of the Special Powers Act in conjunction with the effects of World War II resulted in the muffling of republican dissident activity for several decades. But by the 1960s, many Western nations had largely recovered from the aftermath of World War II. Moreover, the Civil Rights movement in America was in full swing, influencing oppressed minority groups across the world. Among these inspired groups was the Irish Catholic population in Northern Ireland.

“The deprivation and discrimination suffered over the years by Catholics . . . fuelled a resentment which [] found expression in the civil rights movement of the 1960s and a more militant voice in the long tradition of armed resistance by the I.R.A. to British oppression.”⁴³ A report by Lord Cameron, then Governor of Northern Ireland, concluded that the various factors contributing to this indignation included: a rising sense of injustice among the Catholic population regarding housing practices; discrimination in the Loyalist-controlled police force; complaints of gerrymandering to deny Catholic influence in local government in proportion to their numbers; and a resentment over the government's failure to investigate complaints or

38. *Id.* §§ 3, 18, 23, 25.

39. *Id.* § 2(4).

40. WHYTE, *How much discrimination was there under the Unionist regime, 1921-1968?*, in CONTEMPORARY IRISH STUDIES 1, 25 (Tom Gallagher & James O'Connell eds., 1983).

41. PAUL NOLAN, THE NORTHERN IRELAND PEACE MONITORING REPORT 14 (2013).

42. See WHYTE, *supra* note 40, at 22.

43. Connelly, *supra* note 11, at 83.

provide a remedy for them.⁴⁴ In the late-1960s Irish Catholics in Northern Ireland staged a series of protests. Thus began “The Troubles.”

C. The Troubles

1. The Parties to the Conflict

“The Troubles” refers to an approximately thirty-year campaign to end discrimination against the Catholic nationalist minority by the Protestant loyalist-dominated government and police force. Beginning with the Battle of the Bogside in 1969 and ending with the Good Friday Agreement in 1998, The Troubles represented the latest chapter in the long-running saga of armed resistance to a British presence in Ireland.

There are two, clear-cut sides in the conflict, but each side is composed of multiple parties. Over the years, several paramilitaries have fought in the name of the Catholic nationalists, but the Provisional IRA has been most famous and effectual by far. The “Provos” or “PIRA” split from the original IRA in 1969 and reorganized as a violent military faction.⁴⁵ Though technically incorrect, the Provisional IRA is most commonly known as, simply, “the IRA.”⁴⁶ The underlying purposes for reorganization of the IRA were twofold: first, to continue to reject Northern Ireland as part of the United Kingdom, and second, to provide armed protection for Catholic communities besieged by the Protestant-controlled government, police force, and military organizations.⁴⁷ Specifically, the parties on the Protestant loyalist side include the RUC—the British police force in Northern Ireland; the British Army; and several loyalist paramilitaries: most notably the Ulster Defence Association (“UDA”) and the Ulster Volunteer Force (“UVF”).⁴⁸

Seventy years after the Rising, the IRA “still claimed to be an army of national liberation, fighting to remove the last vestiges of colonial occupation by the British from the northeastern part of Ireland.”⁴⁹ The IRA sought to produce bad propaganda throughout Northern Irish society to undermine the legitimacy of the RUC, to raise the cost of keeping British troops in the six counties, and to assert the IRA as the true police force and

44. See DISTURBANCES IN NORTHERN IRELAND: REPORT OF THE COMMISSION APPOINTED BY THE GOVERNOR OF NORTHERN IRELAND, 1969, No. 532 (Lord Cameron, Chairman), cited in Spillane, *supra* note 34, at 485 n.27.

45. COOGAN, *supra* note 24, at 366–67.

46. Therefore, the use of “the IRA” throughout this article is a reference to the Provisional IRA, the violent military faction, and not the original IRA.

47. *Provisional Irish Republican Army (PIRA)*, THE MACKENZIE INST. (Jan. 1, 2016), <http://mackenzieinstitute.com/provisional-irish-republican-army-pira/> [<https://perma.cc/PQ53-ZTWD>].

48. *Id.* at 448.

49. Connelly, *supra* note 11, at 83.

protector of Catholic communities in Northern Ireland.⁵⁰ Before long, IRA activities expanded to include attacks on British troops and the RUC. At last, the paramilitary organizations on both sides engaged in full fledged guerilla warfare.

2. The Troubles Begins

On August 12, 1969, the frustration and resentment of the Irish Catholic community culminated in the Battle of the Bogside in County Derry.⁵¹ There, loyalists held a customary parade in which they marched provocatively through Catholic communities that Protestants had occupied historically.⁵² Massive rioting broke out, and RUC policemen from all over Northern Ireland arrived to contain the crowd.⁵³ Unable to control the political unrest, the British government sent British troops into Northern Ireland to maintain order.⁵⁴ The IRA launched their military campaign to end British rule in Ireland, and The Troubles had officially begun.

The overwhelming levels of sectarianism and violence brought about by The Troubles led to massive changes in security policy in Northern Ireland.⁵⁵ A series of sweeping legislation gave security forces enormous power to arrest and detain. The new laws permitted the authorities to strike at suspected terrorists against whom sufficient evidence could not be marshalled for an ordinary trial.⁵⁶ In 1971, Stormont restructured the Special Powers Act of 1922 and enforced an internment policy legalizing arrest, detention, and imprisonment of suspected terrorists without trial.⁵⁷ Concurrently, English judge Lord Diplock issued the “Diplock Report,”⁵⁸ allowing a single judge to convict any suspected terrorist on the sole basis of

50. *Id.*

51. R. Poole & J. Llewellyn, *The Battle of the Bogside*, ALPHA HISTORY, <http://alphahistory.com/northernireland/battle-of-the-bogside/> [https://perma.cc/RLD3-Y3D4].

52. *Id.*

53. *Id.*

54. Spillane, *supra* note 34, at 486.

55. For instance, Protestants in the Ardoyne area of Belfast—which is predominantly Catholic—fled, only after setting fire to their own homes. The violence even trickled down into Ireland, as the British Embassy in Dublin was burnt down. *See 1971: NI Activates Internment Law*, BBC NEWS (Aug. 9, 1971), http://news.bbc.co.uk/onthisday/hi/dates/stories/august/9/newsid_4071000/4071849.stm [https://perma.cc/2ZK2-NWS9].

56. Spillane, *supra* note 35, at 506 n.177.

57. *Id.*

58. Lord Diplock, REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND (Cmnd. Ser. 5, No. 5185, 1972), <http://cain.ulst.ac.uk/hmso/diplock.htm#1> [https://perma.cc/YMG3-KEQA].

his confession procured by the RUC.⁵⁹ Then, in 1972, the British government abolished the Parliament at Stormont, and instead implemented Direct Rule from the Parliament in Westminster.⁶⁰

3. Special Category Status

The Emergency Provisions Act of 1973 complemented Direct Rule, emphasizing the use of the British military to apply security policy.⁶¹ The Emergency legislation created policies which recognized the political nature of terrorist offenses in two ways: first, these enhanced security powers were available only to combat “terrorist” offenders, distinguished from ordinary criminals on the basis of the political nature of their crimes.⁶² “The word ‘terrorism’ throughout [the] legislation refers to ‘the use of violence *for political ends* and includes any use of violence for the purpose of putting the public or any section of the public in fear.’”⁶³ Second, those detained and convicted under the Emergency powers were granted “Special Category Status.”⁶⁴ Under this regime, any prisoner convicted of a terrorist offense and sentenced to more than nine months imprisonment was afforded Special Category status.⁶⁵ IRA members imprisoned under the new security policies of the early 1970s were granted Special Category Status across the board.⁶⁷ Thus, the explicit recognition of the political nature of Republican

59. Neil J. Conway & Gary Abrams, *McFeely v. The United Kingdom: Death Knell for Prisoners of The Maze*, 3 ANTIOCH L. J. 99, 103 n.22 (1985) (“After arrest, many interned individuals are tortured into making incriminating statements. The single judge ‘Diplock’ courts have been able to maintain an 85-90 percent conviction rate over the defendants based on evidence obtained solely from such statements.”). Moreover, the legislation permitted the RUC to interrogate a suspect without legal counsel for up to seven days. *Id.* Consequently, many interned suspects were tortured into giving coerced confessions. *Id.* The single judge “Diplock” courts resulted in a 85–90% conviction rate, imprisoning over 2,000 suspects by 1976. *Id.* at 103.

60. The British implemented Direct Rule following the “Bloody Sunday” massacre on March 24, 1972. There, British soldiers shot and killed thirteen innocent Catholics participating in a civil rights march in Derry. *A Chronology of the IRA Campaign in the 20th Century*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/ira/etc/cron.html> (last visited Mar. 16, 2016) [<https://perma.cc/2DYS-2Q4T>] [hereinafter CHRONOLOGY].

61. See generally Northern Ireland (Emergency Provisions) Act 1973, c. 53 (UK) [hereinafter 1973 Act].

62. *Id.*

63. Spillane, *supra* note 34, at 489, citing 1973 Act, *supra* note 61, § 28(1) (emphasis added by Spillane).

64. Lord Gardiner, Chairman, REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISTS IN NORTHERN IRELAND 33–34 (No. 5847, 1975) [hereinafter Gardiner Report].

65. *Id.*

66. To be granted Special Category Status, these prisoners also must have been accepted by a “compound leader.” *Id.*

67. Spillane, *supra* note 34, at 488.

dissident activities meant IRA convicts were legally distinct from ordinary criminals.

In contrast to the treatment of ordinary criminals, Special Category prisoners were given a great deal of autonomy. Housed in hutted compounds according to the paramilitary to which they claimed allegiance, Special Category prisoners were permitted to organize themselves as POWs.⁶⁸ Prison guards rarely interacted with Special Category prisoners, who were instead represented by a “compound leader.”⁶⁹ Compound leaders acted as commanding officers who organized the detainees’ daily routines, as well as military orders and training.⁷⁰ Special Category prisoners were also exempted from regular prison work, permitted to wear their own clothes rather than prison uniforms, allowed to spend their own money in the canteen, and could receive more frequent visitors than ordinary criminals.⁷¹

The British government grew concerned about the political message sent by recognition of IRA members as Special Category prisoners. Many officials contended that the political nature of their terrorist offenses should not be distinguished from the offenses of ordinary criminals. A 1978 report by Lord Baker, summarizes and reflects on these concerns:

The Baker Report roundly criticized the retention of a definition of terrorism as a political offense. It acknowledged the inconsistency in downplaying the political motivation of terrorist violence through Britain’s criminalization policy and maintaining a definition of terrorism as “the use of violence for political ends.” Baker stated that the emphasis should be “on the crime and not the motive of the criminal” in order to divorce the act of terrorism from its political ends. Accordingly, Baker recommended that the 1978 Act be amended to abandon the “political ends” language in the definition of terrorism and that another definition be adopted which emphasizes terrorists’ use of fear and coercion.⁷² Accordingly, in a 1975 report by Lord Gardiner concluded that “the introducing of Special Category Status for convicted prisoners was a serious mistake.”⁷³

In 1976, the British Government revoked Special Category Status, and all prisoners convicted of terrorist acts were treated as ordinary criminals and

68. Spillane, *supra* note 34, at 488, citing K. BOYLE, T. HADDEN & P. HILLYARD, TEN YEARS ON IN NORTHERN IRELAND: THE LEGAL CONTROL OF POLITICAL VIOLENCE 89 (1980).

69. Spillane, *supra* note 34.

70. During this time, suspected members of the IRA were detained in two main prisons: Long Kesh and Magilligan. Later, Long Kesh would be transformed into H.M. Maze Prison. The buildings at Maze prison facility were H-Shaped, know as “H-blocks.” They would later become the setting for the infamous prison hunger strikes in the early 1980s.

71. Spillane, *supra* note 34, at 488.

72. *Id.* at 489 n.51.

73. Gardiner Report, *supra* note 64.

locked in H-Block prisons. On September 15, 1976, Kieran Nugent became the first IRA member to be convicted of terrorism and not granted Special Category status.⁷⁴ In protest, Nugent refused to wear a prison uniform and instead wrapped himself in a blanket, so as to differentiate himself from ordinary criminals in the prison.⁷⁵ Many other men and women joined him, asserting that they were “political prisoners” and legally entitled to treatment as POWs under the Third Geneva Convention.⁷⁶ By the early 1980s, this practice led to numerous hunger strikes, which succeeded in bringing global attention to the conflict.⁷⁷

In 1980, seven prisoners⁷⁸ brought their case to the European Commission on Human Rights, filing *McFeeley v. United Kingdom*. Among many other complaints about their treatment at H.M. Maze prison, the IRA prisoners argued that they were legally entitled to Special Category Status under Article 9 of the European Convention on Human Rights.⁷⁹ Under Article 9:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.⁸⁰

Accordingly, the prisoners argued that wearing ordinary prison uniforms and engaging in ordinary prison work was contrary to their beliefs.⁸¹ They asserted that since they considered themselves to be “political

74. CHRONOLOGY, *supra* note 60.

75. *Id.*

76. *Id.*

77. *Id.*

78. “The seven prisoners-applicants were: Leo Green, interned 13 months before trial and denied access to legal counsel-convicted of the murder of a police inspector based on an admission made while being interrogated; Brendon Hughes, sentenced to 14 years imprisonment for possession of firearms and explosives-he and Green refused to recognize the Court’s jurisdiction as a matter of republican principle; Raymond McCartney, convicted of murder, his 57 day trial contested the confession he signed during interrogation at the Castlereagh Detention Center; Thomas McFeeley, sentenced to 26 years imprisonment for robbery and possession of firearms-his body showed burns obtained during interrogation; Thomas McKearney, confessed to IRA membership after three days of torture—civil rights activist since early youth-medical evidence showed severe marks of torture applied to induce confession; Sean McKenna, arrested in the Republic of Ireland and brought into Northern Ireland covertly by British soldiers-found guilty of IRA membership and attempted murder.” Neil J. Conway & Gary Abrams, *McFeeley v. The United Kingdom: Death Knell for Prisoners of The Maze*, 3 ANTIOCH L. J. 99, 103 n.22 (1985) [hereinafter *McFeeley*].

79. *McFeeley*, *supra* note 78, at 106.

80. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature*, Nov. 4, 1950, 213 U.N.T.S. 221, *reprinted in* 1950 Y.B. ON HUMAN RIGHTS 418 [hereinafter *European Convention*].

81. *McFeeley et. al v. the United Kingdom*, Eur. Ct. H. R. 8317/78 (1980), ¶ 27.

prisoners” or “prisoners of war,” they “should not be subjected to the same prison regime as other prisoners convicted of ‘ordinary’ criminal offences.”⁸²

On the other hand, the British government contended that the term “belief” within Article 9 did not extend to mere opinions about political matters.⁸³ Rather, they argued, “belief” related only to spiritual or philosophical convictions “which have an identifiable formal content.”⁸⁴

Ultimately, the Commission sided with the British government, dismissing the prisoners’ Article 9 complaint.⁸⁵ The Commission treated the case as a simple matter of statutory interpretation.⁸⁶ The Commission provided no further explanation, nor did it cite the authority it relied upon in coming to its decision. Setting aside the question of whether or not the Commission’s interpretation of the European Convention of Human Rights was accurate, this paper turns to other considerations and addresses arguments available to the IRA prisoners in asserting their right to special treatment under international law.

II. INTERNATIONAL LAW

A. Classifying Armed Conflicts

Determining whether IRA prisoners were legally entitled to POW status cannot be done without first classifying the conflict between Britain and the IRA, as it existed during The Troubles. The fundamental question is whether The Troubles is more appropriately classified as an *international* armed conflict (“IAC”), or as a *non-international* armed conflict (“NIAC”).⁸⁷ Although international humanitarian law governs the treatment of non-combatants in both international and non-international armed conflicts,⁸⁸ there are important legal differences. The key distinction between IACs and

82. *Id.*

83. *Id.* ¶ 29.

84. *Id.*

85. “The Commission is of the opinion that the right to such a preferential status for a certain category of prisoner is not amongst the rights guaranteed by the Convention or by Article 9 in particular. Moreover, it considers that the freedom to manifest religion or belief ‘in practice’ as contained in this provision cannot be interpreted to include a right for the applicants to wear their own clothes in prison.” *Id.* ¶ 30.

86. *Id.* ¶ 30–33.

87. The acronyms IAC, NIAC, and NLM are my own, created for the purposes of this paper. These acronyms are not used generally across political science or international law literature.

88. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 66–70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). It is also important to note here that international humanitarian law continues to apply from the initiation of the armed conflict until a peaceful settlement is reached. *Id.* ¶ 70.70))

NIACs under international humanitarian law—at least for the purposes of this paper—is that non-combatants may be entitled to POW status *only* in IACs.⁸⁹

In general, an “armed conflict” exists wherever (1) organized armed groups are (2) engaged in fighting of some intensity.⁹⁰ Because “intensity” has varying degrees, armed conflicts may exist on a sliding scale from civil unrest to full blown war. Armed conflicts may be classified further as either an IAC or a NIAC. An IAC exists any time two nation-States are at odds with one another, and at least one of the States resorts to armed force.⁹¹ On the other hand, a non-international armed conflict is created where a State and some other non-State group, organization, or governmental authority, are in disagreement, and armed force is used.⁹²

The IAC/NIAC dichotomy is muddied wherever the dispute involves an established State on one side, and an organized armed group that proclaims to be fighting *on behalf* of another State on the other side. These conflicts may be considered either a national liberation movement or a civil war. While national liberation movements are viewed as international disputes and fall under the IAC umbrella, civil wars are deemed purely internal matters and are categorized as NIACs.⁹³ The subtle yet important distinction between a national liberation movement and a civil war is that in the former, the struggle involves a legitimate use of force against unlawful occupation.⁹⁴ In addition, the organized armed group fighting on behalf of the ostensible state must meet certain criteria.^{95, 96}

B. The Geneva Conventions and Additional Protocols

Whether classified as an IAC or NIAC, national liberation movement or civil war, all armed conflicts are governed by The Geneva Conventions and their Additional Protocols (“The Conventions”). The Conventions are a series of international agreements created in response to the savagery

89. See Third Geneva Convention, *supra* note 3.

90. Mary Ellen O’Connell, *Initial Report on the Meaning of Armed Conflict in International Law*, in INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS 13 (2d ed. 2009).

91. *Id.*

92. While conflicts not of an international character may be “internal” conflicts, e.g. civil wars, it is becoming more commonplace for the organized armed group opposing a State to be external to the territory of that State, e.g. Al-Qaeda versus the United States. Thus, it is more appropriate to refer to these types of conflict in the abstract as non-international conflicts rather than internal conflicts.

93. O’CONNELL I, *supra* note 90, at 13.

94. *Id.*

95. *Id.*

96. See *infra* Section II.B.1.

exhibited during World War II.⁹⁷ Moreover, the Additional Protocols to the four Geneva Conventions were adopted in 1977 in response to the increasing number of non-international armed conflicts and wars of national liberation.⁹⁸ Together, The Conventions contain the most important rules limiting the barbarity of war, and establish standards and protections for the treatment of non-combatants in armed conflicts.⁹⁹ The term “non-combatants” encompasses those individuals who do not participate in the fighting (civilians, medics, and aid workers) as well as those who once did, but no longer do, take part in the fighting (the wounded, sick and shipwrecked troops, and prisoners of war).¹⁰⁰

The components of The Conventions are context specific; that is, the classification of an armed conflict determines which provisions of The Conventions apply. First, in IACs, all four Geneva Conventions apply.¹⁰¹ Most importantly, the Third Geneva Convention, which governs the treatment of non-combatants, applies to all IACs.¹⁰² In national liberation movements—a particular type of IAC—Protocol I also applies.¹⁰³ On the other hand, in NIACs, only Article 3 of The Conventions applies.¹⁰⁴ Similarly, if the NIAC is classified as a civil war, then Protocol II also applies.¹⁰⁵

97. *The Geneva Conventions of 1949 and their Additional Protocols*, INTERNATIONAL COMMITTEE OF THE RED CROSS (Jan. 23, 2017), <https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> [https://perma.cc/U3BA-4G54]. The first Geneva Convention was created in 1949; the second, third, and fourth Geneva Conventions, along with Additional Protocols I, II, and III, were agreed upon sequentially in the following decades.

98. *Id.*

99. *See generally*, Geneva Conventions, *supra* note 2.

100. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, art. 13, Aug. 12, 1949, 75 U.N.T.S. 31.

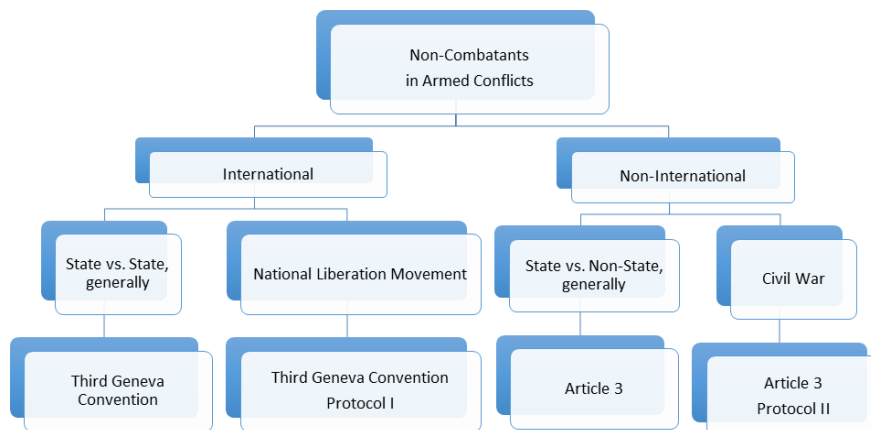
101. “[A]ll cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is *not recognized by one of them*.” *Id.* at art. 2.

102. Third Geneva Convention, *supra* note 3; Geneva Conventions, *supra* note 2, Protocol I.

103. Geneva Conventions, *supra* note 2, Protocol I.

104. *Id.* art. 3.

105. *Id.* Protocol II.



1. The Law in International Armed Conflicts

The Third Geneva Convention governs the treatment on non-combatants in all IACs. Protocol I supplements the Third Convention by extending those humanitarian guarantees to national liberation movements.¹⁰⁶ The text of the Third Convention and Protocol I establishes when an IAC exists, and who qualifies as a member of an armed group in an IAC. Pursuant to The Conventions, only those individuals deemed a member of an armed group in an IAC are entitled POW status.¹⁰⁷

The Third Geneva Convention discusses the general protection of POWs and their captivity, including special conditions of internment, quarters, food, clothing, discipline, and organization, while imprisoned. Article 2 sets out the conditions necessary for an IAC to exist, while Article 4 defines the category of persons within that conflict who qualify as non-combatants, and eligible for legal protection.¹⁰⁸

Pursuant to Article 2, an IAC exists (1) in all cases of declared war between two parties to the Convention, even if the state of war is not recognized by one of those parties;¹⁰⁹ and (2) in all cases of partial or total occupation of the territory of a contracting party.¹¹⁰ Under Article 4, individuals imprisoned by the enemy qualify for Third Convention

106. *Id.* Protocol I.

107. Third Geneva Convention, *supra* note 3; Geneva Conventions, *supra* note 2, Protocol I.

108. Third Geneva Convention, *supra* note 3, at Additional Protocol I, art. 43 (2).

109. “[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” *Id.* art. 2.

110. *Id.* (“The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”).

protection so long as they are either: (1) members of the armed forces of a Party to the conflict¹¹¹ or (2) a member of another organized armed group involved in the conflict, and meet four additional criteria.¹¹² Finally, under Article 5, should any doubt arise as to whether the non-combatant belongs to one of the groups as defined in Article 4, the individual must be granted POW status in the interim, until a “competent tribunal” makes a final determination:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.¹¹³

Similarly, Protocol I defines a national liberation movement as an armed conflict “in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”¹¹⁴ Under Protocol I, “armed forces” are all armed groups under a command responsible for the conduct of its subordinates, and a member of such a force is a “combatant.”¹¹⁵ Furthermore, combatants who distinguish themselves from the civilian population while they are engaged in military operations by carrying their arms openly are “prisoners of war” upon capture by the adverse party.¹¹⁶

In sum, so long as a conflict may be defined as an IAC or a national liberation movement, and a prisoner may be characterized as a member of the armed forces or an organized armed group, the non-combatant in question must be granted POW status.

2. The Law in Non-International Armed Conflicts

While the provisions within the four Geneva Conventions pertain only to IACs, the drafters contemplated NIACs in Common Article 3.¹¹⁷ Common Article 3 is so named because it appears consistently throughout all four of the Conventions. Article 3 contains fundamental rules regarding non-combatants, and is especially powerful because no derogation is permitted

111. *Id.* art. 4.

112. *Id.* For members of organized armed groups to be granted POW status, they must (a) be commanded by a person responsible for subordinates, (b) wear a fixed distinctive sign (such as a uniform or armband) recognizable at a distance, (c) carry arms openly, and (d) conduct their operations in accordance with the laws of war.

113. *Id.* art. 5.

114. Geneva Conventions, *supra* note 2, Protocol I, art. 1, sec. 4.

115. *Id.*

116. Spillane, *supra* note 34, at 497.

117. Geneva Conventions, *supra* note 2, art. 3.

from any of its provisions.¹¹⁸ Subsection (1) of the Article lists several prohibitions relating to the treatment of those no longer taking part in the hostilities, namely:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . .

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.¹¹⁹

As history progressed, NIACs became more the norm than the exception. The international community thus supplemented Common Article 3 with Protocol II.¹²⁰ Protocol II strengthens the protections afforded to non-combatants in NIACs and extends those protections to internal (i.e. “civil”) wars.¹²¹ Specifically, Protocol II applies to:

[A]rmed conflicts . . . 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.¹²²

III. APPLICATION

A. An International or a Non-International Armed Conflict?

That the Northern Ireland conflict as it existed during The Troubles rose to the level of armed conflict is undisputed. The existence of armed groups is self-evident, and the intensity of the conflict is marked by the need to send in armed forces, rather than mere policemen, to quell unrest.¹²³ Whether the conflict may be classified as an international rather than a non-international conflict, however, has been virtually ignored. Most of the literature on The Troubles has assumed that the conflict was of a non-international character. Presumably, the logic is as follows: the IRA was an insurgent group fighting

118. *Id.*

119. Geneva Conventions, *supra* note 2, art. 3, sec. 1.

120. *Id.* Protocol II.

121. *Id.*

122. *Id.*

123. INTERNATIONAL COMMITTEE OF THE RED CROSS, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 3 (2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> [<https://perma.cc/S2QU-GUXU>].

on behalf of Northern Ireland, a province of the UK. Thus, the conflict was not between two High Contracting Parties (The UK and Ireland), but rather between one High Contracting Party (the UK) and dissidents within its own territory (the IRA). Furthermore, the notion that The Troubles qualifies as national liberation movement has been overlooked—perhaps because the UK did not ratify Protocol I of the Geneva Conventions until 1998.

A closer look at The Troubles and the perspective of the nationalists, however, reveals that there is a strong case to be made in classifying the conflict as international, rather than non-international. To reiterate, the classification of the conflict as either an international armed conflict or a non-international armed conflict is essential for the purposes of determining whether the prisoners at H.M. Maze Prison should have been awarded POW status, or at least continued to be awarded Special Category Status.¹²⁴

While the British government has maintained that the conflict was purely within the domain of the UK, the Republic of Ireland never issued an official statement about the status of the conflict at that time.¹²⁵ There is evidence, however, that the Irish government did not believe British control and occupation was legitimate.¹²⁶ Moreover, the Irish government felt that international intervention in the conflict was needed.¹²⁷ At the outbreak of The Troubles, the Irish Minister for External Affairs made a requested meeting with the United Nations Security Council, where he urged the U.N. to send troops to help control the situation in Derry.¹²⁸ An official U.N. synopsis of that meeting—U.N. Security Council meeting 1503 on August 20, 1969—offers insight into the Republic's position:

[The Minister for External Affairs] [took] exception to the argument that the situation in Northern Ireland fell exclusively within the domestic jurisdiction of the United Kingdom [and] stated that the present situation in the Six Counties of Northern Ireland had its origins in the partition of Ireland, a unilateral act on the part of the United Kingdom Government which had never been conceded to by the Government of Ireland whose declared policy was to bring about reunification by peaceful means. The persistent denial by the United Kingdom Government of their civil rights to a large part of the population of Northern Ireland had culminated in the present crisis.¹²⁹

124. Steven Haines, *Northern Ireland 1968-1998*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 141 (Elizabeth Wilmschurst ed., 2012).

125. *Id.* at 117–45.

126. *Id.*

127. *Id.*

128. *Id.*

129. “Proposals by his Government that the United Kingdom ask for the dis-patch of a United Nations peace-keeping force and, subsequently, that a joint British-Irish peace-keeping force be

Moreover, both sides conceded that the immediate situation in Derry brought about by the Bloody Sunday massacre required armed forces to be maintained. The Irish Minister urged the participation of an impartial authority out of a concern that the grave situation in Northern Ireland could become aggravated to a degree likely to affect relations between Great Britain and Ireland:

The calling of British troops had been a confession of the inability of the Government of the six counties to maintain law and order impartially through its police force. There was need, he stressed, for an impartial peace-keeping force, inasmuch as the use of British troops constituted a basic factor in the perpetuation of partition. The Council must consider also that the tension created by these events might spread beyond the area itself and lead to friction between two neighbouring Member States.¹³⁰

As it happens, the Council meeting was adjourned and the matter went no further; the British government had been successful behind the scenes. Evidently, while the representatives of the Republic of Ireland did not issue a formal statement on the matter, they clearly opposed the actions of the British behind closed doors.

1. A National Liberation Movement?

The suggestion of the Irish Minister in the U.N. Security Council meeting may have been that the IRA was engaged in a struggle for national liberation. To be sure, since the early-twentieth century, the IRA contended that it was fighting for the liberation of the whole island of Ireland.¹³¹ The IRA never recognized the Anglo-Irish Treaty in 1922 granting the twenty-six counties freedom from British occupation; they believed that only when the remaining six counties were free and united with the rest of the island would Ireland be complete.¹³² Moreover, the IRA never recognized any government in Northern Ireland as legitimate. The IRA viewed Sinn Fein as the true political party of Ireland, with the freedom and unification with the six counties as the utmost priority on its agenda.¹³³ Thus the IRA holds that it was, and had always been, engaged in a national liberation movement—

established had been rejected by the British Government. The Government of Ireland therefore felt obliged to appeal to the Security Council for the dispatch of a United Nations peace-keeping force, since it could not stand by and see the people in the six counties of Northern Ireland suffer injury; nor could it tolerate the tensions created along the border between the two areas which might give rise to serious disturbances in its own State.” UNITED NATIONS, MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY: SITUATION IN NORTHERN IRELAND 139, http://www.un.org/en/sc/repertoire/69-71/Chapter%208/69-71_08-7-Situation%20in%20Northern%20Ireland.pdf [https://perma.cc/7RZY-GWHF].

130. *Id.* at 140.

131. Haines, *supra* note 124.

132. *Id.*

133. See Connelly, *supra* note 11, at 80n.3.

and therefore an international armed conflict—with the British government over the political status of Northern Ireland.¹³⁴

The IRA appears to have met all the criteria for self-determination, that is, a historical connection and claim to the territory which is occupied by a foreign power, and for asserting the protection of a minority ethnic group.¹³⁵ The IRA of The Troubles was an organized armed group certainly with historical claims to the six counties, acting to protect Irish Catholics in Northern Ireland.

Furthermore, the question between the characterization of an armed conflict and that of the parties involved is always and inevitably intertwined. A group of landmark U.S. Supreme Court cases spoke to the characterization of armed conflicts when they turn on the characterization of the armed groups involved.¹³⁶ In the *Prize Cases*, the Supreme Court noted that when rebels “occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; [and] have commenced hostilities against their formed sovereign, the world acknowledges them as belligerents, and the contest a war.”¹³⁷ Thus, it is at least arguable that where an organized armed group can satisfy the *Prize Cases* criteria, it is an army of national liberation engaged in an international armed conflict, and must be afforded rights and guarantees under Protocol I to the Geneva Convention protection. The only criteria of the *Prize Cases* the IRA may perhaps not fulfill is the occupation and control of a portion of territory. Because the British government asserted lawful control over Northern Ireland at that time, the answer to this question turns on whether the IRA has a legitimate claim in its assertion to be fighting on behalf of the Republic of Ireland itself. This issue is grounded in Article 2 of the third Geneva Convention, discussed below.

134. Regardless, an organized group’s subjective perception of its own status does not necessarily make it so; just because the IRA viewed itself as a national liberation movement for Ireland does not automatically make the claim true according to international law. Today, the ostensible arguments again the IRA as a national liberation movement are that IRA of 1922 War of Independence was a different organization than it is presently. Therefore, it was not a single, cohesive group throughout the decades, but a group that has morphed and transformed. In addition, the group no longer enjoys popular support, and representative of the opinion of the population that it purports to represent. While this contention certainly holds water in the post-Good Friday Agreement world, it is weak on the merits if analyzed in the context of The Troubles.

135. U.N. Charter arts. 1, 73.

136. *Prize Cases*, 67 U.S. 635 (1862).

137. *Id.* at 666–67.

2. The Third Geneva Convention

The IRA would likely be able to make a claim that the conflict qualifies under Article 2 of the third Geneva Convention, albeit with many caveats. While the UK government always held the events in Northern Ireland were a completely internal matter, nationalists—in Ireland and America alike—consistently asserted that the conflict was a war to expel British authority from the island of Ireland.¹³⁸ In other words, the IRA has always maintained that “Northern Ireland” is not a separate province; rather, it is the “North of Ireland.”¹³⁹ To this day, they are awaiting the rightful return of the six counties to Ireland, and the unification of the entire island as one nation.¹⁴⁰ Thus to nationalists, The Troubles was, under Article 2, a case of declared war arising between two High Contracting Parties (the UK and Ireland) even though the state of war—at least as characterized by nationalists—was not recognized by the British government. At the very least, it would qualify under the second part of Article 2, which goes on to state that it applies in “all cases of partial or total occupation on the territory of a High Contracting Party,” that is, on Irish territory.¹⁴¹

Moving on from Article 2, one must then determine if IRA prisoners fall under the category of persons to which Article 4 of the third Convention applies. Accepting, for the moment, the assertion that Ireland itself was a party to the conflict, members of the IRA would qualify as members of the armed forces of a party to the conflict, or at least volunteer corps forming part of such armed forces; at least that was the IRA’s contention. However, the fact of the matter is that the Anglo Irish Treaty of 1922 created one separate legal entity: the Republic of Ireland, which did not include Northern Ireland. Moreover, the Republic did not fund the IRA, and did not send its own troops into Northern Ireland to support them. Thus, the argument that Ireland was a party to the conflict does not hold water. The more prudent case for the IRA would be to assert that they qualified under subsection 2 of Article 4 as an organized resistance movement. This also fails, however, as the IRA did not fulfill the four required conditions. The guerrilla warfare and terrorist tactics employed by the IRA violated conditions (c) and (d)—carrying their arms open and conducting their operations in accordance with the laws and customs of war—disqualifying them as persons entitled to POW status under Article 4.

138. COOGAN, *supra* note 24, at 40–41.

139. ‘Real’ Irish Republican Army (rIRA) Statement, 28 January 2003, Cain Web Service.

140. COOGAN, *supra* note 24, at xx.

141. Third Geneva Convention, *supra* note 3, art. 2.

Finally, the IRA could insist that because the status of the IRA prisoners was in dispute, they were entitled to a decision under an Article 5 tribunal to determine whether they were eligible for POW status under the third Geneva Convention. While *McFeely* ostensibly serves as that Article 5 tribunal, the scope of its decision is unclear. Because the Commission's analysis was limited to rights asserted under Article 9 of the European Convention on Human Rights and because the Commission provided no explanation indicating the authority in which its decision was grounded, it is certainly tenable that the IRA prisoners are entitled to an additional, official decision on the matter. This, however, they have never received. Nevertheless, even if a tribunal were arranged to determine the status of the IRA prisoners at the time, it is highly unlikely that it would be resolved in their favor, namely because it is very difficult to separate the legal analysis of history without the hindsight bias. First, because of the way politics has played out, today it is by and large settled that Northern Ireland is part of the UK, not part of Ireland. Second, since 2001, terrorism has been condemned as abhorrent on a global scale, and the recognition of terrorism as a legitimate political act has been downright repudiated by the international community. Therefore, the IRA's argument as belonging to armed groups under subsection 1 of Article 4 would be rejected, and instead analyzed under subsection 2. As previously mentioned, the IRA does not meet the criteria of subsection 2 under any circumstances. Thus, even if the conflict could be classified as an international one, it is unlikely that the IRA prisoners would be entitled to POW status now, nor at the height of The Troubles.

3. The Law Pertaining to Non-International Armed Conflicts: A Reprieve

If one does not buy the argument that The Troubles manifested an international armed conflict, then by default, it is a non-international armed conflict, to which Common Article 3 and Protocol II of the Geneva Conventions thus apply. Here, the British government assuredly ran afoul of international law with respect to the treatment of IRA prisoners. First, the Emergency legislation of the early 1970s and 1980s violated the judicial guarantees set out in subsection (1)(d).¹⁴² To reiterate, that subsection prohibits the sentencing over non-combatants without judgment pronounced by a regularly constituted court affording certain judicial guarantees.¹⁴³ Because Diplock courts were by and large a significant exception to regularly-constituted trials by jury, these proceedings were a non-

142. See *supra* Section I.C.3, Special Category Status.

143. Geneva Conventions, *supra* note 2, Common Article 3, § 1(d).

permissible derogation from Common Article 3.¹⁴⁴ Furthermore, Protocol II prohibits coerced confessions under Article 6, subsection f.¹⁴⁵ While that remains an argument for another day, infamous prosecutions such as the Guildford Four and the Maguire Seven are a testament to the many illegal and false confessions coerced by the British authorities during The Troubles¹⁴⁶ While the UK did not ratify Protocol II until 1998, an application of international law as it stands today to the situation at that time would hold the British government in violation of it.

CONCLUSION

This paper contends that the conflict in Northern Ireland has been too often and too easily dismissed as a purely internal matter, and its potential status as an international armed conflict has been improperly disregarded. A closer look at the perspective of the Republic of Ireland at the height of The Troubles, albeit unofficial and behind closed doors, reveals a much stronger case for classifying the conflict as an international armed conflict than it has been given. The strongest argument for categorizing The Troubles as an international armed conflict probably under Protocol I. The UK, however, did not ratify Protocol I until 1998, after the signing of the Good Friday Agreement which is recognized as the official end of the conflict, bringing peace to Northern Ireland. Therefore, under international law as it exists and applies to Britain today, the IRA prisoners of the 1970s and 1980s would be entitled to POW status. Even if the conflict was classified as non-international, the IRA prisoners still should have been afforded some distinguished sort of status, because the British government derogated from Common Article 3 when it instated internment and Diplock prosecutions. For that reason, the British government should have retained Special Category Status for the IRA under international law as it did in fact apply at the height of The Troubles. Perhaps if they had done so, the political strife between the IRA and British forces would not be primed to persist for decades to come.

144. *Id.* at Protocol II, art. 6.

145. *Id.*

146. David Pallister, *An Injustice That Still Reverberates*, THE GUARDIAN (Oct. 18, 1999), <https://www.theguardian.com/uk/1999/oct/19/davidpallister1> [<https://perma.cc/7VB4-WW7L>].