

# “The Just War tradition and Human Rights”

FOCAE  
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Peloponnesian War - 416 BC

Melian Dialogue

“You know as well as we do that right, as the word goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must”

Athenians to Melians

The Athenians attacked, slaying all the Island’s inhabitants

They paid a heavy price. The injustices of the Athenian actions in Melos encouraged the other states to ally against them.

In 404 BC, the Sicilians and a number of Allies defeated Athens and the Peloponnesian War came to an end

Just War tradition

We stand in the continuum of the “Just War” tradition

416 BC-----2014AD

What is the Just War tradition?  
Contested Ground

“a set of essentially contested concepts around which political life is focussed”  
Contested Ground

“Blessed are the peacemakers for theirs is the Kingdom of God”  
Contested Ground

“the tradition is most readily identified by reference to certain perennial questions – which are:

1. May the Christian, without sin, wage war?
2. What constraints are there upon the activity of the Christian in the waging of war?”.

Contested Ground

- legitimate authority
- just cause and
- right intent

Contested Ground

What is good for the State is good for humankind

Sometimes necessary to act against charity, humanity and religion  
Contested Ground

Grotius – Father of International Law

Human Law – regulates civic society

International Law – relationships between states (war as judicial act)

Contested Ground

Middle Ages – Canon Law, Scholasticism, Chivalry

16<sup>th</sup> C – Legalism, Scholasticism, Realism (Machiavelli)

18<sup>th</sup> C – Legalism, Reformism, *Realpolitik*

20<sup>th</sup> C – Legalism (International Law), liberal humanitarianism, power politics (Realism)

Contested Ground

“if it were possible to point to some agreed body of gradually progressing doctrine, free of all internal contradiction, as “the tradition” then the problem of identity would be simple, but such a ploy is impossible”

Compassion in warfare

- Christ
- Gratian – pilgrims, clerics, women and unarmed peasants
- Grotius – women, children, elderly, prisoners of war
- Henri Dunant – wounded and sick in war, prisoners of war, civilians

Just War Tradition (today)

**Legalism (International Law)**

v

Power politics (realism)

Just War tradition

Legalism (International Law)

Rules are important because they reflect embedded moral truths or because they are created by authoritative bodies

1899/1907 Hague Conventions

WW1

- 1925 Geneva Gas Protocol
- 1929 Geneva Convention (POW)

WW2

1945 UN Charter – self defence/chapter VII

- 1949 Geneva Conventions
- 1954 Hague Convention for Cultural Property  
Northern Ireland
- 1977 Geneva Protocols I and II  
Falklands/Gulf1/Bosnia Herzegovina
- 1997 Ottawa Convention on anti-personnel mines
- 1998 Rome Statute of the International Criminal Court  
Iraq/Afghanistan
- 2008 Convention on cluster munitions
- 2011 European Convention on Human Rights

Just War tradition

Power politics (realism)

World politics is anarchic, international rules cannot be enforced and therefore lose their binding character

Just War tradition

The Just War tradition (today) is led by Legalism (International Law)

## What about Human Rights?

### Op Demetrius (1971)

#### UK Operations

- Numerous persons in Northern Ireland were arrested and taken into custody by the security forces acting in pursuance of the emergency powers.
- 93 Allegations of ill-treatment have been made by the applicant Government in relation both to the initial arrests and to the subsequent interrogations.

#### UK Operations

*Ireland v UK 1978*

#### *Ireland v UK 1978*

- 5 techniques used by Security Forces
- Wall standing
- Hooding
- White noise
- Deprivation of sleep
- Deprivation of food

### *Ireland v UK 1978*

The five techniques amounted to **inhuman and degrading** treatment contrary to Article 3

### *Ireland v UK 1978*

*“[The] Government, having reviewed the whole matter with great care and with reference to any future operations, have decided that the techniques ... will not be used in future as an aid to interrogation... **The statement that I have made covers all future circumstances**”.*

Op Flavius  
(1988)

### *McCann v UK*

- OP FLAVIUS
- IRA bombing attack on the changing of the guard in Gibraltar
- Bombers let through the border and tailed by SAS (soldiers A,B,C,D)
- All three bombers killed
- All unarmed, but car belonging to bombers with Semtex discovered (in Spain)

*McCann v UK*  
(1995)

### *McCann v UK*

- the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than reasonably necessary within the meaning of Article 2
- **There has been a breach of Article 2**

*Bankovic v Belgium and others*

2001

### *Bancovik*

- 23<sup>rd</sup> April 1999
- NATO Bombing of TV Station in Belgrade
- 16 people killed
- 16 people injured
- NATO issued warning before the attack
- Did the ECHR apply?

### *Bankovic*

*“A watershed authority in the light of which the Strasbourg jurisprudence as a whole has to be re-evaluated”*

Lord Brown  
*Bankovic*

- *ECHR is essentially territorial (regional)*
- *Art 1 avoids a HR vacuum in European Council states*
- *Rights and freedoms cannot be divided and tailored (indivisible)*

— Extraterritorial application only by exception...

*Bankovic*

- *Where a state has through the effective control of territory e.g. through occupation, consent, exercises all or some public powers normally exercised by the government of the territory when otherwise there would be a vacuum within a European state*
- *Activities of dip or consular agents abroad and on vessels in/flying the flag, [or a prison (Hess, Al-Skeini case)]*

Does it apply?

Does it apply?

*Ireland v UK 1978*

*“[The] Government, having reviewed the whole matter with great care and with reference to any future operations, have decided that the techniques ... will not be used in future as an aid to interrogation...*

***The statement that I have made covers all future circumstances”.***

*Ireland v UK 1978*

Really?

IRAQ – 29 March 2003

Operational impact

“It is important that detention by UK Forces meets the highest standards and can stand up to possible International criticism.....only the highest standards will suffice”

Memo dated 16<sup>th</sup> April 2003

Sept 2003

- *Al Skeini v Secretary of State for Defence (2007) UKHL*  
*Al Skeini*
- Death of six Iraqi civilians
- Death No 6 killed in a UK detention facility (beaten to death)
- UK accepted that the Convention applied to Death No 6
- Except a man is now dead.....

2011

- In brief, the UK government lost quite badly...the Grand Chamber has effectively overruled the House of Lords on a number of points; the applicants have every reason to be pleased. In *Al-Skeini*, the Court held that (1) **all** of the applicants were within the UK's Art. 1 ECHR jurisdiction
- and (2) that the UK has not held an Art. 2- compliant investigation in five of the cases, all but that of Baha Mousa where there is an ongoing public inquiry.

Political impact

Operational impact

Washington Post

“It’s Our Cage Too”

17<sup>th</sup> May 2007

General Charles Krulak USMC

General Joseph Hoar CinC CENTCOM

Operational Impact

“This (Abu Ghraib) has had disastrous consequences. Revelations of abuse feed what the Army's new counterinsurgency manual, which was drafted under the command of Gen. David Petraeus, calls the "recuperative power" of the terrorist enemy”.

Operational Impact

“The War will be won or lost not on the battlefield but in the minds of potential supporters who have not yet thrown in their lot with the enemy. If we forfeit our values by signalling that they are negotiable in situations of grave or imminent danger, we drive those undecided into the arms of the enemy. This way lies defeat and we are well down the road to it”

Compassion in warfare

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Compassion in warfare

Compassion/Human Rights for soldiers

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“The only secure basis for a doctrine of human liberty and human dignity is the belief that each man is made in God’s image”

Bishop Kallistos Ware

Questions?