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# IHL, IHRL, AND LEGAL INTEROPERABILITY IN INTERNATIONAL MILITARY OPERATIONS

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# INTRODUCTION

- Coalition warfare (e.g., Napoleonic Wars, World War I & II, post Cold War combat ops)
- Advantages of military and political nature:
  - + assets
  - + legitimacy
- Varying forms
- Downsides:
  - Differences > < interoperability



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## (LEGAL) INTEROPERABILITY

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- **Ability to work together effectively**
  - Technical, procedural, human
  - Legal interoperability
- **Impacting legal interoperability:**
  - Substantive differences in obligations
  - Differences of interpretation
- **Causes of differences**



- **IHL:** North American States v. European States
  - Geneva Conventions = universally ratified
  - Other treaties?
  - Customary IHL
  - Differences of interpretation (e.g., **conflict classification**, targeting)





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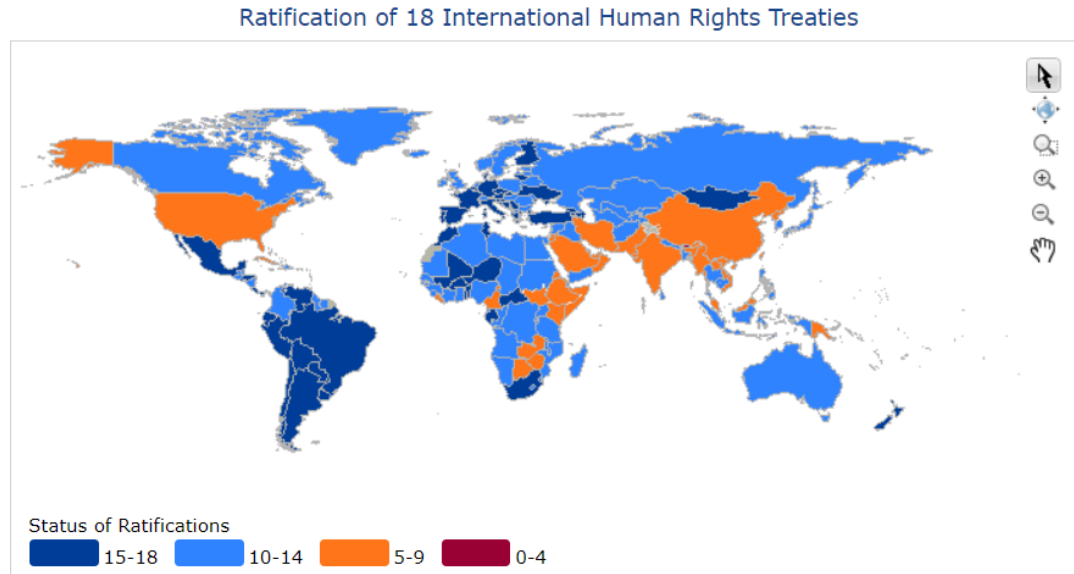
# CONFLICT CLASSIFICATION

- IAC, NIAC, Internationalised NIAC, Transnational NIAC, ...?
  - Different classification = different set of rules
    - Obligations in NIAC (CArt. 3, AP II) far less developed => Applicability of IHRL?
  - Afghanistan
    - US position pre-Hamdan v. Rumsfeld (SCOTUS, 2006) (= IAC)
    - Positions other NATO countries (=NIAC), e.g. Germany



Table 1. Core United Nations Human Rights Treaties<sup>11</sup>

TREATY	SUBJECT	OPEN	MONITOR
CPPCG	Genocide	1948	Various
ICERD	Racial Discrimination	1965	CERD
ICCPR**	Civil & Political Rights	1966	UNHRC
ICESCR*	Economic, Social & Cultural Rights	1966	CECSR
CEDAW*	Discrimination Against Women	1979	CEDAW
CAT*	Torture, Inhumane Punishment	1984	CAT
CRC**	Rights of the Child	1989	CRC
ICRMW	Migrant Worker & Family Rights	1990	CMW
UNTOC	UN Conv Against Trans Org Crime	2000	UNTOC
CPED	Enforced Disappearances	2006	CED
CPRD*	Persons with Disabilities	2006	CPRD



# HUMAN RIGHTS OBLIGATIONS

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# REGIONAL HUMAN RIGHTS OBLIGATIONS & NATO

## Inter-American Human Rights System

- American Convention on Human Rights (1969)



## European Human Rights System

- European Convention on Human Rights (1950)





- **Differences in IHRL obligations can impact interoperability**

1. Different NATO forces operating under either more permissive or more restrictive paradigms might politically and legally expose higher-level commanders.
2. A divergence would result in some States taking on more warfighting operations and a more significant risk of casualties.
3. NATO member states may choose to participate in the NATO mission, but also, concurrently, act on a national basis, in a separate mission.



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# ECTHR AND “THE TRANSATLANTIC DIVIDE” (1)

## **Al-Skeini and others v. UK (ECtHR 2011, nr. 55721/07)**

- Facts: fatal incidents involving UK forces in occupied Basra (Iraq) between 8 may 2003 and 10 november 2003
- Jurisdiction (art. 1 ECHR)
  - Extraterritorial application
- Right to life (art. 2 ECHR)
  - Procedural aspect: duty to investigate

## **Al-Jedda v. UK (ECtHR 2011, nr. 27021/08)**

- Facts: British-Iraqi citizen detained between 2004 and late 2007 on the suspicion of him being involved in terrorist activities
- Jurisdiction (art. 1 ECHR)
  - Attributability to UN?
- Right to liberty (art. 5 ECHR)

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# ECTHR AND “THE TRANSATLANTIC DIVIDE” (2)

- Issues of extraterritorial application
- Whether ECHR rights can be “divided and tailored”
- The interpretation given to the right to life
- The trigger and procedural content of the duty to investigate
- The interpretation given to UN Security Council Resolutions authorizing the use of force under Chapter VII of the UN Charter and the interplay between the ECHR and Article 103 of the UN Charter
- Treaty-based non-criminal administrative or preventive detention
- ...

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# EXTRATERRITORIAL APPLICATION OF IHRL

- Extraterritorial application?
  - Widely accepted POV: extraterritorial application
    - **ICCPR**
      - Art. 2, § 1: "*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory **and** subject to its jurisdiction the rights recognized in the present Covenant (...)*"
      - Disjunctive ["or"] (ICJ, HRC) ⇔ Conjunctive ["and"] (US, ISR)
    - **ECHR:**
      - Art. 1: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.*"
        - Territorial principle + state agency authority and control, effective control over an area, "espace juridique"

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# IHL AS A BASIS FOR DETENTION?

- Art. 5, § 1 ECHR: limitative list of grounds for deprivation of liberty; detention/internment for imperative reasons of security NOT included.
- Al-Jedda:
  - UK argument: detention on the basis of UNSC Resolution 1546 + application art. 103 UNC
  - ECtHR:
    - UNSC Resolution imposes no obligation of internment => interpretation most in harmony with ECHR
    - IHL: no obligation in IHL for occupying power to resort to indefinite detention without trial
  - Consequences:
    - More specific UNSC Res to avoid conflict with ECHR?
    - Dismissal of IV GC as basis to disapply art. 5, § 1 ECHR?
- Similar observations in Al-Skeini

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# CHANGES IN THE COURT'S ATTITUDE?

- Hassan v UK (2014):
  - Explicit reference to art. 31 VCLT, interpretation in harmony with IHL
  - No derogation (art. 15) necessary, but harmonious interpretation only when specifically pleaded
- Hanan v Germany (2021) – right to life (procedural aspect):
  - No substantive normative conflict between IHL and IHRL => application art. 2 jurisprudence
- Georgia v Russia II (2021):
  - No jurisdiction with regards to substantive obligation of the right to life during active hostilities phase of an IAC



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# CONCLUSION

Thank you for your attention!