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When Is Immigration Detention Lawful? The Monitoring Practices of UN Human Rights Mechanisms

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About the Global Detention Project

The Global Detention Project (GDP) is a non-profit research centre based in Geneva, Switzerland, that investigates the use of detention in response to global migration. The GDP's aims include: (1) providing researchers, advocates, and journalists with a measurable and regularly updated baseline for analysing the growth and evolution of detention practices and policies; (2) facilitating accountability and transparency in the treatment of detainees; and (3) encouraging scholarship in this field of immigration and refugee studies.

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Abstract: This Global Detention Project Working Paper details how the banalisation of immigration detention is contested by international human rights mechanisms. Since the creation of the United Nations, the global human rights regime has provided a framework for the protection of all people, including those living in foreign countries. This paper assesses how national sovereignty and access to territory is mitigated by the universal nature and applicability of human rights and refugee protection standards. The authors comprehensively describe the normative framework governing immigration detention established in core international treaties and discuss how human rights bodies apply this framework when reviewing states' policies and practices. Their assessment of the impact and implementation of fundamental norms reveals gaps in the international protection regime and highlights how states' responses to this regime have shaped contemporary immigration detention systems.

Introduction

> *Now, therefore the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations […] to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.*
>
> —Preamble, *Universal Declaration of Human Rights*

Every year hundreds of thousands of migrants and asylum-seekers are placed in mandatory detention under Australian, Canadian and United States' laws, often in places managed by private corporations; tens of thousands of foreign children are put behind bars in squalid conditions in Mexico and Thailand; approximately a hundred thousand "third-country nationals" are detained for up to 18 months under European Union (EU) "return" law; an unknown number of asylum-seekers fleeing war and conflict zones from Syria, Iraq and Afghanistan are stranded and detained in brittle states on the shores of the Mediterranean and the Pacific Ocean; an estimated 12,000 migrants, asylum seekers and refugees are in detention on any given day in 81 overcrowded detention centres with less than 2.5 square metres per person in Russia; thousands of other people are detained at the 4,000-bed "repatriation" centre in South Africa without adequate access to health-care and food. Around the world, systematic detention of non-citizens has become a standard response to migration and asylum flows.

Immigration detention generally refers to "the deprivation of an individual's liberty, usually of an administrative character, for an alleged breach of the conditions of entry, stay or residence in the receiving country" (UNHCR, APT & IDC, 2014), or more succinctly, to "the deprivation of

liberty of non-citizens for reasons related to their immigration status" (GDP, 2016). Contrary to criminal incarceration, immigration detention as an administrative measure "refers to deprivation of liberty ordered by the executive branch of government—rather than the judiciary—without charges or trial" (de Senarclens & Majcher, 2014; ICJ, 2012). Immigration detention is not prohibited per se under international law. Yet it must not amount to arbitrary deprivation of liberty, which is outlawed under the right to liberty. There is no international treaty on the human rights of persons placed in immigration detention. Yet, such detention does not take place in a legal vacuum. National (and regional) laws, policies, and practices that ignore, bypass or violate recognized norms and standards of protection against arbitrary detention and lead to abuse in detention are subject to international (and regional) scrutiny and monitoring.

The right to liberty and security, pivotal to both criminal and administrative detention, is clearly framed in international and regional human rights law. Immigration detention is mostly practiced as a form of administrative detention. Yet, administrative detention often fails to provide detainees with guarantees similar to those afforded to persons in criminal detention (Wilsher, 2012; Majcher, 2013). As such, specific safeguards are necessary to protect detained migrants and asylum-seekers (WGAD, 2014). Although criminal detention offers more guarantees of due process, human rights advocates and expert bodies argue that unauthorized entry or stay on the territory should not be criminalized and sanctioned with fines and prison (CAT, Cyprus, 2014; CMW, Belize, 2014).

Along with refugee law, international human rights treaties form the bedrock of the international normative framework for immigration detention. This paper explores how national sovereignty and access to territory is mitigated by the universal nature and applicability of human rights norms and standards to all people, including non-nationals detained on immigration status grounds. In particular, it highlights how the various rights mechanisms—like the UN treaty bodies that oversee implementation of international human right treaties—can be used to challenge unlawful detention practices. As Wilsher (2012) writes, "significant scrutiny of detention policy has only come about with the arrival of international human rights bodies."

For decades UN human rights treaty monitoring bodies (or "treaty bodies") have sought to interpret, buttress and operationalize these norms and standards as they review state reports on national implementation. The nine supervisory treaty bodies[1] adopt interpretative thematic "general comments",[2] country specific "concluding observations" and decisions on individual complaints (known as *views*). While not legally binding, recommendations expressed in concluding observations represent "the single most important activity of human rights treaty bodies" (O'Flaherty, 2006). The International Court of Justice as well as some national courts and tribunals have used concluding observations as authoritative interpretations of the relevant human rights treaties (International Court of Justice, 2004; ILA, 2004). UN actors integrate support for states to implement treaty bodies' recommendations in their advisory programmes

[1] Human Rights Committee (CCPR), Committee on Economic, Social and Cultural Rights (CESCR) Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination against Women (CEDAW), Committee against Torture (CAT), Committee on the Rights of the Child (CRC), Committee on Migrant Workers (CMW), Committee on the Rights of Persons with Disabilities (CRPD), Committee on Enforced Disappearances (CED).

[2] Treaty bodies often refer to their own evolutive interpretations adopted as thematic General Comments/Recommendations in relation to norms relevant to immigration detention. This includes: CCPR: GC 35: No. 35- Article 9 (Liberty and security of person) (2014); CRC: GC No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin; CAT: GC 3 on article 14 (redress to victims of torture) (2012); CERD: No. 30 on discrimination against non-citizens (2004) and No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2004); CMW: No. 2 on the rights of migrant workers in an irregular situation and members of their families (2013).

and have developed web tools to make them available to state parties and civil society actors (OHCHR, 2014). While some states have no strategy or mechanism for implementing concluding observations, thus making them ineffective in some cases, others take up treaty bodies' recommendations seriously (Krommendijk, 2001; Niemi, 2003).

Over the years, another array of norms, dubbed *soft law*, has been adopted at the UN, including by the General Assembly, the United Nations High Commissioner for Refugees (UNHCR), the High Commissioner for Human Rights (OHCHR) and independent investigation mechanisms of the Human Rights Council known as "special procedures" (SPs). These progressive and practical minimum rules, guidelines and principles crafted to follow pace with contemporary developments are often relevant to immigration detention.

This paper pursues dual aims. First, it delineates the relevant international legal framework for immigration detention. Since, as noted above, there is no international convention regulating the practice of immigration detention, the paper unpacks provisions, relevant to immigration detention, laid down in the main international human rights treaties, including the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (ICCPR and ICESCR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). The main regional human rights instruments are also occasionally referenced although the scope of this paper is limited to the international legal framework. The paper also flags soft law standards applicable to immigration detention used by treaty bodies.[3]

The second objective of the paper is to demonstrate the practical relevance of the normative framework regulating immigration detention through the operationalization of the norms as tested by the treaty bodies within the review procedure of country reports. It unpacks the international legal framework for immigration detention as a living set of norms authoritatively monitored and interpreted by the independent expert committees. The paper also signals interpretative evolutions and identifies loopholes in the normative regime that are exploited by states, like the growing practice of re-detention (GDP & Access Info Europe, 2015).

Research was based on two main sources. First, the paper relied on the international legal framework as mapped out and used as the bedrock for Global Detention Project research work, including indicator and database development. Second, the authors used the advanced research function of the Universal Human Rights Index (UHRI) database available at the OHCHR website. The Index provides instant access to recommendations contained in concluding observations of the treaty bodies. The authors used the UHRI advanced search function to enter targeted keywords to identify issues relating to immigration detention in concluding observations - "detention," "detain," "arrest," "prison" and "apprehended" - cross filtered through the UHRI "Affected Persons" category by choosing "migrants," "non-citizens",

[3] CCPR and CAT quote the Standard Minimum Rules for the Treatment of Prisoners (SMR), CAT also uses the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. CAT and CRC quote the UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention; CERD quotes the (first) UNHCR Detention guidelines. CMW quotes the Recommended Principles and Guidelines on Human Rights at International Borders of the Office of the United Nations High Commissioner for Human Rights.

"refugees and asylum seekers" and "stateless". As the UHRI included concluding observations up to 2015 only (as of November 2016), the authors used the UN Treaty Bodies Database to screen through the additional 11 sessions held in 2016 by CAT, CCPR, CRC, CERD and CMW. They were able to analyze some 300 immigration detention related concluding observations for 100 UN member states (70 of which feature on the GDP site) plus a specific one for the EU, under the CRPD, covering the period 2000 to 2016. The two authors – both long-time GDP researchers – applied their combined knowledge and experience from their social science/legal academic and human rights practitioner backgrounds to analyze the quantitative and qualitative data harvested.

The international legal framework governing immigration detention includes two broad sets of safeguards, notably guarantees stemming from the right to liberty and the conditions of detention. This paper focuses solely on the right to liberty.[4] By virtue of article 9(1) of the ICCPR, and in similar terms articles 16(1) of the ICRMW and 37(b) of the CRC, "[everyone] has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."[5] While not universally defined, the notion of "arbitrariness" has been interpreted by international human rights mechanisms. The case law of the CCPR (1997; 2006b) reveals that detention of non-citizens may be arbitrary under the ICCPR if "it is not necessary in all the circumstances of the case and proportionate to the ends sought." In turn, according to the Working Group on Arbitrary Detention (WGAD), immigration detention may be arbitrary under customary international law where "[asylum] seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy" (WGAD, 2011). These interpretations entail several guarantees protecting individuals from arbitrary detention. They can be clustered in two categories, in focus of this paper, such as justification of detention (1) and procedural safeguards (2). The paper also discusses new trends in the recommendations of the treaty bodies (3) and concludes with observations on the practice of treaty bodies in relation to immigration detention.

1. Justification of immigration detention

There are several elements necessary to ensure that detention is justified in law. It should be lawful (1.1), necessary and proportionate (1.2), and for the shortest time possible time (1.3).

1.1 Lawfulness: detention in accordance with grounds and procedure prescribed by law

According to article 9(1) of the ICCPR, "[no] one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." This provision entails that in order not to amount to arbitrary detention, deprivation of liberty must be based on lawful grounds for detention and appropriate procedures. On this basis, the WGAD and Special Rapporteur on the Human Rights of Migrants (SRHRM) have explicitly addressed grounds for immigration detention. Both UN mechanisms (special procedures) recommend that the grounds for detention should be clearly defined and exhaustively enumerated in legislation (SRHRM, 2012; WGAD, 2008; WGAD, 2009). In its decisions on cases challenging immigration detention, such as *A. v. Australia* (1997) or *Shafiq v. Australia* (2006b), the CCPR recognized that prevention of absconding or interference with evidence may constitute legitimate grounds for detention of a non-citizen.

Treaty bodies sometimes address the grounds for detention and the relevant procedures. The CCPR recommended that state parties provide information on criteria on basis of which asylum-seekers may be detained and to ensure that procedures to adopt detention decision comply fully

[4] A more substantive working paper which includes conditions of detention is forthcoming.
[5] At the regional level, the right to liberty is laid down in ACHR (art.7), AChHPR (art. 6), AChHR, and ECHR (art. 5).

with the procedure set out by law (Lithuania, 2004). Likewise, the CMW recommends that migrants are not detained except in accordance with clear legal criteria (Bosnia and Herzegovina, 2012) and that immigration detention is compatible with domestic law (Honduras, 2012). Moreover, national laws, policies and practices themselves should adequately respect the right to liberty and the prohibition of arbitrary detention (Nicaragua, 2016). The CERD also reminds states to ensure that the objective grounds justifying immigration detention, such as risk of flight, risk that the person might destroy evidence or influence witnesses or risk of serious disturbance of public order, are provided for in the domestic legislation (Canada, 2007; Norway, 2006).

Contrary to imprisonment under penal law, detention of non-citizens is commonly described as an administrative measure. Immigration detention proceedings are thus accompanied by fewer procedural safeguards than criminal proceedings. This may create a temptation for states to extend immigration detention to non-immigration grounds and thus avoid the duty to ensure stronger procedural safeguards. The CCPR in 2006 (Canada, 2006), and CAT in 2012 (recalling WGAD recommendations) (Canada, 2005) have denounced this practice in relation to suspects of terrorism or other criminal offences and recommended that detention of suspects be imposed in the framework of criminal proceedings and "corresponding safeguards."

The lawfulness of detention of asylum seekers is subject to additional requirements stemming from refugee law. By virtue of article 31(1) of the Refugee Convention, states must not penalize refugees (and asylum seekers) for their irregular entry or stay, if they present themselves without delay to the authorities and show good cause for their irregular entry or stay. This non-penalization clause is rarely quoted as such by the treaty bodies. A notable exception appears to be the CEDAW which, on a few occasions, urged states not to penalize refugees and asylum seekers, in particular women and girls, for irregular entry and stay in the country (Algeria, 2012; Bahamas, 2012). To a lesser extent, CAT requested that detention of asylum-seekers be in accordance with article 31 of the Geneva Convention (Liechtenstein, 2010) and CRC recommended that unaccompanied refugees and asylum-seeking children are not detained because of unlawful entry or stay (Yemen, 2014).

However, article 31(2) of the Refugee Convention allows states to impose restrictions on movements on refugees and asylum seekers who entered irregularly, "provided that these measures are necessary and applied only until their status is regularized" (Goodwin-Gill, 2001). The restrictions of movements may include such measures as non-punitive administrative detention (Noll, 2011). Based on this provision, the UNHCR governing body ExCom elaborated an exhaustive list of lawful grounds which may justify such detention, including to verify identity, determine the elements on which the asylum application is based, deal with cases where asylum seekers have destroyed their travel or identity documents or have used fraudulent documents in order to mislead the authorities of the host state; or to protect national security or public order (ExCom, 1986). These permissible grounds were further elaborated on in the UNHCR 2012 *Detention Guidelines* (UNHCR, 2012). As interpreted in this doctrine, the regularization does not equate to the final recognition of refugee status, which would allow detention during refugee status determination procedures. Rather, the term refers to any measure ending irregular presence, in particular admission to the asylum procedure (Noll, 2011; Provera, 2013). It is thus generally agreed that detention of asylum seekers must be justified on the grounds elaborated by ExCom and maintained only during preliminary proceedings prior to the admission to in-merit asylum procedures. These requirements are reflected in the CCPR's case law (2013a; 2013b). According to the committee, asylum seekers who unlawfully enter a state may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being

examined would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others or a risk of acts against national security.

1.2 Necessity and proportionality: prohibition of mandatory detention and priority to alternatives to detention

The requirement of lawfulness is not sufficient to prevent that immigration detention amounts to prohibited arbitrary detention. In several cases, the CCPR held that "the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice." The CCPR regularly stresses that immigration detention "could be considered arbitrary if it is not necessary in all the circumstances of the case and proportionate to the ends sought, for example, to prevent absconding" (1997; 2004a; 2006b; 2013a; 2013b). As explained by the WGAD (2008; 2009) and SRHRM (2012), detention should not be a migration-control measure resorted to in a systematic way. Rather, immigration detention should be the exception, not the rule, and imposed as the last resort when there are no less coercive ways to achieve the state's objectives. Several treaty bodies, including CAT (Australia 2014; Canada, 2012; Cyprus 2010), CCPR (Canada, 2015; Czech Republic 2013; Finland, 2013), CERD (Australia, 2010; Belgium, 2014; Netherlands, 2010), and CRC (Germany, 2014) systematically formulate such recommendations during the review of states reports. The CCPR urges states to ensure that "detention is justified as reasonable, necessary and proportionate in light of the specific circumstances" (Costa Rica, 2016; Czech Republic, 2013; Denmark 2016; Finland 2013; Israel 2014; Malta 2014; Spain 2015; UK 2015). In turn, more recently the CAT has used the "necessary and proportionate" language (Australia, 2014; Cyprus 2014; Israel 2016; New Zealand 2015; Switzerland 2015).

The principles of necessity and proportionality entail that immigration detention should be necessary taking into account particular circumstances of individual case – which bars systematic or mandatory detention. As the CCPR stressed in the General Comment on article 19 (2014), "[the] decision [to detain] must consider relevant factors case by case and not be based on a mandatory rule for a broad category." The problem of mandatory detention has been raised by the CCPR, CAT, and (to a lesser extent) CERD in their concluding observations. The CCPR stressed that detention should never be mandatory (Australia, 2009; United States, 2014), and urged a state party to abolish a system of automatic detention of asylum seekers (Israel, 2014). Australia was also urged by the CAT to repeal the provisions establishing the mandatory detention of persons entering its territory irregularly (Australia, 2008; Australia, 2014), by CESCR to repeal this system (Australia, 2009), and by the CERD to review mandatory regime (Australia, 2010).

The CCPR's case law demonstrates that by virtue of the proportionality requirement, detention should be proportionate to the objective pursued by the authorities, hence be imposed where there are no non-custodial alternative measures available. Finding a violation of the right to liberty under article 9(1) of the ICCPR in several cases brought against Australia, such as *Baban* (2003), *C.* (2002) or *Kwok* (2009), the Committee held that "[the] State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions." In a similar vein, both the WGAD (2010) and SRHRM (2012) reiterate that immigration detention should only be imposed as a last resort when there are no less coercive ways to achieve the state's objectives. More precisely, the SRHRM (2012) stressed that '[governments] have an obligation to establish a presumption in favour of liberty in national law, first consider alternative non-custodial measures, proceed to an individual assessment, and choose the least intrusive or restrictive measure.'

Of all the committees, the CCPR (Canada, 2015; Cyprus, 2015; Czech Republic, 2013; Denmark, 2016; Finland, 2013; FYROM, 2015; Greece, 2015; Japan, 2014; Kuwait, 2016; Malta, 2014; Spain, 2015; Sweden, 2016; Ukraine, 2013; UK, 2008), CAT (Australia, 2014; Austria, 2015; China Hong Kong, 2016; Costa Rica, 2008; Cyprus, 2014), CMW (Belize, 2014; Ghana, 2014; Lesotho, 2016; Mauritania, 2016; Nicaragua, 2016; Niger, 2016; Timor Leste, 2015; Turkey, 2016; Uganda, 2015), and CERD (Australia, 2010; Bahamas, 2004; Belgium, 2014; Bosnia and Herzegovina, 2015; Cameroon, 2014; Czech Republic, 2015; Finland, 2012; Greece, 2016; Japan, 2014; Lithuania, 2006; Malta, 2011; Netherlands, 2015; Spain, 2016) more systematically recommend states to consider alternatives to detention and non-custodial measures. Frequently domestic legislation may well provide for alternatives to detention however in practice these measures may be very rarely used. The CCPR (Denmark, 2016; FYROM, 2015; Greece, 2015; Kuwait, 2016; Sweden, 2016) and CMW (Honduras, 2016) appear to recognize this problem and asked states to adopt alternatives in law and practice.

Since 2012, CAT markedly recommends stronger safeguards for asylum seekers and refugees, stressing that detention of asylum seekers be only used as a last resort (Congo, 2015; Croatia, 2014; Cyprus, 2014; Israel, 2016; Japan, 2013; Latvia, 2013; Mauritania, 2013; Netherlands, 2013; Norway, 2012; Poland, 2013; Sweden, 2014; Ukraine, 2014; United Kingdom, 2013). This tendency has been followed by CCPR (Czech Republic, 2013; Latvia, 2014), CERD (Belgium, 2014; Cameroon, 2014; Japan, 2014) and CRC (Austria, 2012; India, 2014; Indonesia, 2014). In view of the majority of states concerned, it might be that this trend responds to a growing practice of detention for persons in need of international protection.

1.3 Limitations on the length of detention

The requirements of lawfulness, necessity and proportionality apply not only to the initial detention order but the whole period of detention. As an exceptional measure, applied as a last resort, immigration detention must be as short as possible (WGAD, 2009).

The length of immigration has been addressed in the monitoring procedure of several treaty bodies. The CCPR emphasizes that detention must not be indefinite (Canada, 2015; Malta, 2014; Sweden, 2009), but rather be subject to a reasonable/specific/statutory time limit (Canada, 2015; Korea, 2015; Malta, 2014; UK, 2015) and be used for the shortest time possible (Costa Rica, 2016; FYROM, 2015; Korea, 2015; Kuwait, 2016; Latvia, 2014; Malta, 2014; South Africa, 2016; Sweden, 2016; Ukraine, 2013; United Kingdom, 2015). Similarly, criticizing indefinite detention (Australia, 2014; Costa Rica, 2008; United Kingdom, 2013), the CAT frequently requires states to have "statutory limits" and "enforceable time limits" applicable to immigration detention (Australia, 2014; Belgium, 2003; Cyprus, 2014; Estonia, 2002; Latvia, 2004; Netherlands, 2013; New Zealand, 2015; Switzerland 2010; UK, 2013). In turn the CMW focuses merely on the prevention of indefinite detention (Bosnia and Herzegovina, 2012; Mexico, 2011). Likewise, the CRC (Australia, 2012; Malta, 2013) and CERD (Australia, 2010; Bahamas, 2004) regularly urge states to subject immigration detention to clear time limits. Interestingly, the CESCR also addressed length of immigration detention in its concluding observations. The committee urged states to guarantee that the period of detention is "limited to a strict minimum" (Cyprus, 2009; Netherlands, 2010).

In practice, non-citizens risk staying indefinitely in detention in circumstances where their removal is not possible, including because of statelessness. According to the CCPR (2014), "[the] inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention." Likewise, the CAT urged a state party to take urgent measures to avoid the indefinite character of detention of stateless persons (Australia, 2008).

A growing issue related to length of detention is re-detention (Majcher, 2017). Although the re-detention of detainees released after exhaustion of the legal limit for detention prior to deportation is not foreseen in international human rights law, CAT appears to have recognized this worrying state practice and addressed it in concluding observations. The Committee is concerned by the cumulative length of penal and administrative detention exceeding the permissible 18-month period under EU legislation (Netherlands, 2013). It also recommends monitoring asylum-seekers who have been released and subsequently placed in closed transit area (Belgium, 2003). Significantly, it recommended that a state party "ensure that the release letter provides for a temporary residence permit for immigrants pending the regularization of their status, so that they do not enter the detention cycle" (Cyprus, 2014).

2. Procedural safeguards

Besides the proper justification of detention, the right to liberty also includes procedural components. The main procedural safeguard is the right to review of detention. It constitutes the very protection from arbitrary detention and, according to the WGAG (2010), its absence may itself render detention arbitrary (2.1). Secondly, the right to liberty entails also the right to a compensation for unlawful or arbitrary detention (2.2). Finally, independent monitoring, although not explicitly provided in human rights treaties, is a widely recognized safeguard against arbitrary detention (2.3).

2.1 Judicial review of detention

The judicial review of detention must be both accessible for detainees (2.1.1) and effective (2.1.2). CAT (Australia, 2014; Cyprus, 2014; Hungary, 2007; Italy, 2007), CCPR (Canada, 2006; Finland, 2013; Lithuania, 2004; Malta, 2014) and CRC (Australia 2005; Greece, 2002; Malta, 2013) systematically address this issue.

2.1.1 Accessible remedies

The Strasbourg court (2002; 2007) interprets the accessibility of remedies in the context of immigration detention as "the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy." Arguably, this interpretation could be applied by analogy to remedies laid down in the ICCPR. The UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Body of Principles),[6] contains several basic guarantees necessary for remedies to be accessible in practice. CCPR (Ireland, 2000; Kuwait, 2011), CMW (Bosnia and Herzegovina, 2012; Tajikistan, 2012), CERD (Bahamas, 2004), and CAT (Luxembourg, 2007) remind states that legal remedies must be available to detainees. The most fundamental guarantees in this respect include information (2.1.1.1), legal assistance (2.1.1.2), and linguistic assistance (2.1.1.3).

2.1.1.1 Information provided to detainees

The right to be informed about one's detention is not only entailed by the requirement for the review of detention to be accessible in practice but it is also a self-standing right embraced in the right to liberty under article 9 of the ICCPR. Pursuant to article 9(2) of the ICCPR, and in similar terms article 16(5) of the ICRMW, "[anyone] who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." As the CCPR stresses in the case of *F.K.A.G. v. Australia* (2013a), the purpose of the

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[6] *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/RES/43/173, (December 9, 1988). The SRHRM repetitively reminded states that the Body of Principles does apply to immigration detention, see SRHRM, "Detention of Migrants in an Irregular Situation", para. 72(e); SRHRM, *Report of the Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro: Human Rights of Migrants Deprived of Their Liberty*, E/CN.4/2003/85, (December 30, 2002), para. 75(k).

obligation to provide information to detainees is to enable them to seek release if they believe the grounds for their detention are invalid or unfounded. The reasons thus must include not only the general legal basis of arrest but also factual reasons.

In order to effectively be able to seek a remedy, immigration detainees should receive broader information than solely on the reasons for their detention. Pursuant to the UN Body of Principles (§13), "[any] person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights." The broader scope of information has been addressed on a few occasions in concluding observations. The CMW recommended that Uruguay (2014) ensure that migrant immigration detainees are informed of their rights to appropriate legal and consular assistance. In turn, the CERD issued a recommendation under article 5 of the ICERD to Malta (2011) to inform immigration detainees about their rights and available legal assistance.

Under article 16(5) of the ICRMW, the information on detention must be conveyed in a language the person understands. Accordingly, non-citizens who are arrested must be informed at the time of arrest as far as possible in a language they understand of the reasons for their arrest and they must be promptly informed in a language they understand of any charges against them.[7] Similarly, according to the UN Body of Principles (§14) a person who does not adequately understand or speak the language used by the authorities responsible for his arrest or detention is entitled to receive this information in a language he understands. In the context of immigration detention, this principle has been reaffirmed by the SRHRM (2002) and WGAD (1998; 1999).

In a few concluding observations, the CMW addressed the requirements under article 16(5) of the ICRMW. The committee urged Turkey (2016) to ensure that immigration detainees are informed about the reasons for their arrest at the time of arrest and are promptly informed about their rights and the charges against them, in a language they understand. Likewise, Mexico was urged (2011) to ensure that migrants in detention are properly informed of their rights in a language they understand, especially with regard to their rights to consular assistance and to seek remedies. Interestingly, the CCPR relied on article 14 of the ICCPR which guarantees the right to a fair trial, including entitlement to information about charges in a language understood by the person, and recommended that Poland (2010) ensure that detained foreigners have easy access to information on their rights, in a language they can understand, even if this requires the provision of a qualified interpreter. CAT has also made recommendations that detainees be informed of their rights in a language they understand (Belgium, 2013).

2.1.1.2 Legal assistance

Pursuant to the UN Body of Principles (§ 17(1)), "[a] detained person shall be entitled to have the assistance of a legal counsel." A detainee is entitled to communicate and consult with his legal counsel and be allowed adequate time and facilities for consultations with his legal counsel. Interviews between a detained person and his legal counsel may be within sight, but not within hearing, of a law enforcement official (§ 18).

In a few concluding observations, treaty bodies have focused on access to legal assistance. For instance, the CCPR urged the UK (2015) to provide for effective safeguards against arbitrariness and for effective access to justice, including to legal aid. Similarly, the CERD recommended that the US ensure access to legal representation (US, 2014). Compared to other committees, the CMW regularly urges states to ensure that immigration detainees have access to legal aid

[7] The duty to provide this information in the language the person understands is provided in two regional instruments, including the ECHR (art. 5(2)) and Arab Charter (art. 14(3)).

(Belize, 2014; Bosnia & Herzegovina, 2012; Cape Verde, 2015; Nicaragua, 2016; Uruguay, 2014).

In the above quoted recommendations, the treaty bodies were not precise whether they addressed the access to legal advice in general or legal advice offered by states. According to the UN Body of Principles (§17(2)), "[if] a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay." Arguably, in the context of immigration detention the interests of justice will frequently require that detainees are to be afforded legal assistance free of charge. More often than not, migrants lack resources to pay legal counsel, without which it is frequently impossible to appeal detention. Indeed, the SRHRM (2002; 2012) and WGAD (1998) maintain that if immigration detainees lack sufficient means, they should be afforded legal assistance free of charge in order to avail themselves of their right to seek review of their detention. Treaty bodies do not frequently address the requirement of legal aid granted by the state. A notable exception appears to be the CAT, which urged states parties to ensure that asylum seekers in detention have access to free legal aid (Croatia, 2014; Cyprus, 2014; Liechtenstein, 2010; Turkmenistan, 2011) and CCPR which recommends free access to legal aid for asylum seekers and unaccompanied minors (France, 2008; Malta, 2014; Spain, 2009; Rwanda, 2016; UK, 2008).

If a state lacks financial resources to offer legal assistance to immigration detainees, it is encouraged to explore other options to ensure that detainees have access to legal aid to challenge their detention. The SRHRM (2002) urged states to provide immigration detainees with lists and telephone numbers of lawyers and organizations offering pro bono services and to set up mechanisms, including toll-free numbers, to inform detainees about the status of their case. At the same time, the Rapporteur encouraged states to conclude agreements with non-governmental organizations, universities, and volunteers to provide immigration detainees with legal assistance.

2.1.1.3 Linguistic assistance

Without being able to understand the proceedings, immigration detainees are precluded from seeking a remedy. This is recognized in the ICRMW which provides in article 16(8) that in appeal or review proceedings, immigration detainees must have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used. Pursuant to the Body of Principles (§14) "[a] person who does not adequately understand or speak the language used by the authorities responsible for his […] detention […] is entitled to […] have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest. Within the context of immigration detention, the SRHRM (2002; 2012) advocates that linguistic assistance should be ensured to immigration detainees who lack the knowledge of the language used by the authorities and the means to afford paying for it. According the SRHRM (2002), if a state cannot afford granting assistance of a professional interpreter it should, on the one hand, cooperate with non-governmental organizations, universities, and volunteers so that they provide detainees with translation assistance and, on the other, provide detainees with telephone numbers of such organizations.

It is contented that absence of a linguistic assistance necessary for applying for review of detention and presenting one's arguments during the review proceedings may result in individual being effectively deprived of accessible and effective remedies in breach of article 9(4) of the ICCPR. However, treaty bodies make scant or no recommendations to this effect (CAT, Bosnia and Herzegovina, 2011; CAT, Bulgaria, 2011; CCPR, Ukraine, 2013; CERD, Ukraine, 2011).

2.1.2 Effective remedies

By virtue of article 9(4) of the ICCPR, as mirrored in articles 16(8) of the ICRMW and 37(d) of the CRC, "[anyone] who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." While considering individual complaints against immigration detention, the CCPR frequently stressed that detention should be open to periodical review to reassess the necessity of detention (2006a; 2006b).

The review of immigration detention systematically appears in concluding observations. The CCPR frequently urged states to ensure judicial review of immigration detention (Angola, 2013; Canada, 2006; Denmark, 2016; Finland, 2013; Japan, 2014; Kazakhstan, 2016; Kuwait, 2011, 2016; Malta, 2014). In turn, recently the CMW recommends state parties to ensure that in administrative and judicial proceedings, including detention proceedings, non-citizens are guaranteed due process on an equal basis with nationals of the state party before the courts and tribunals (Sri Lanka, 2016; Timor Leste, 2015; Turkey, 2016; Uganda, 2015). The CRC also systematically recommends states to ensure that detention of migrant children is subject to judicial review, including periodic reviews of continued detention (Australia, 2005, 2012; Germany, 2014; Greece, 2002; Malta, 2013). Interestingly, based on article 5 of the ICERD, the CERD recommended Morocco ensure that immigration detainees benefit from all legal safeguards and have access to the courts. The CAT makes fewer references to the entitlement of detainees to challenge their detention; however, on one occasion the committee formulated such a recommendation (Cyprus, 2014).

The review of detention must be not only accessible but also effective. The individual complaint procedure has allowed the CCPR to explain the required scope of the review of immigration detention. In several cases brought against Australia, the CCPR held that a formal assessment of whether the detainee is a migrant without entry permit, which warranted detention under the Australian immigration legislation, falls short of substantial judicial review required under article 9(4) of the ICCPR. Under this provision, the judicial review is not limited to mere formal compliance of the detention with domestic law governing custodial measure. In particular, the review must be "real and not merely formal". Thus, judicial review of the lawfulness of detention must include the possibility to order release if detention is not compatible with article 9(1) of the ICCPR (1997; 2006b; 2003; 2006a; 2007; 2013a; 2013b).

2.2 Right to compensation for unlawful detention

The right to liberty of a person entails also the right to compensation. Article 9(5) of the ICCPR, and in analogous terms article 16(9) of the ICRMW, provides that "[anyone] who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." To the authors' knowledge, neither the CCPR nor the CMW have addressed the right to compensation in their concluding observations, despite a clear legal basis for such a recommendation. The CCPR however focuses on the right to compensation in its complaint procedure. Finding that applicants have been subjected to unlawful detention in breach of article 9(1) and/ or 9(4) of the ICCPR, the committee requires that the state provide the persons with an effective remedy, including compensation. Interestingly, the CCPR derives the right to compensation for unlawful immigration detention from the right to effective remedy under article 2(3) of the ICCPR rather than article 9(5) (1997; 2006a; 2002; 2006b). When reviewing the Netherlands's report in 2013, CAT addressed the issue of compensation for victims.

2.3 Independent monitoring
According to the SMR, besides internal inspections, detention facilities should be subject to external inspections conducted by a body independent of the administration of the facility, which may include competent international and regional bodies (§ 83). In particular, "[inspectors] shall have the authority: (a) To access all information on the numbers of prisoners and places and locations of detention, as well as all information relevant to the treatment of prisoners, including their records and conditions of detention; (b) To freely choose which prisons to visit, including by making unannounced visits at their own initiative, and which prisoners to interview; (c) To conduct private and fully confidential interviews with prisoners and prison staff in the course of their visits; (d) To make recommendations to the prison administration and other competent authorities" (§ 84).

Treaty bodies have recognized the vital role that monitoring of places of immigration detention plays in ensuring proper treatment and standards of detention. The CAT frequently recommends that states ensure monitoring of places of detention (Croatia, 2014; Japan, 2013; Mauritania, 2013; Netherlands, 2013; Nicaragua, 2009; Saudi Arabia, 2016; Turkey, 2011; Qatar, 2013; United States, 2014) mainly through the National Preventive Mechanisms (NPMs) created by the 2002 Optional Protocol to the Convention against Torture (OPCAT), now ratified by 87 countries. OPCAT is deemed "the most powerful mandate for torture prevention that has yet been devised by the global community."[8] Regrettably, the CCPR (Italy, 2006; Korea, 2015) and CRC (Indonesia, 2014; Ukraine, 2011) appear to place less emphasis than CAT on independent monitoring in relation to immigration detention. However, the CMW expands the scope of bodies capable of monitoring to include civil society (Turkey, 2016), ombudspersons (Nicaragua, 2016; Turkey, 2016) and lawyers (Sri Lanka, 2016).

3. Emerging trends
Over the years, treaty bodies interpret core human rights treaties as living instruments (Peters, 2012). Systematic analysis of concluding observations unveils a few new trends in terms of subjects raised by the treaty bodies, including growing disapproval of detention of children (3.1), duty to uphold human rights standards when detention is carried out beyond state's borders (3.2), and detention in relation to readmission agreements and criminalization (3.3).

3.1 Precluding detention of children
The CRC is at the forefront of the evolution of treaty bodies positions on detention of children. This is likely due to two factors. First, the near universal ratification of the Convention on the Rights of the Child puts the CRC in a unique position to review situations in all countries (except the United States), as opposed for instance to the CMW – that monitors a treaty with stronger provisions on immigration detention but a low ratification score. Second, article 45 of the CRC foresees a special role for NGOs which began supplying information soon after the creation of the CRC. As for other treaty bodies, civil society submissions ahead of review of state reports has been pivotal in raising concerns and abuse as states generally omit to report on problem areas. CRC first adopted strong safeguards as early as 2005 in its General Comment No.6 which stated that unaccompanied children "should not, as a rule, be detained." concluding observations in the early 2000s recommend that detention be used "as a last resort" and "for the shortest possible time" (Lebanon, 2006; Malaysia, 2007; Netherlands, 2004; United Kingdom, 2002, 2008). Gradually, CRC recommends that states "ensure" that children are not detained or "avoid" detention. From 2005 onwards, CRC also repeatedly refers to the principle of best interest of the child including in relation to detention. Following the 2012 Day of General

[8] Statement by Sir Malcolm Evans, Chairperson of the Subcommittee on prevention of torture and other cruel, inhuman or degrading treatment or punishment at the 71st session of the General Assembly, 18 October 2016.

Discussion on Children in Migration, language has become much stronger and concluding observations from 2013 onwards call on states to "cease" detention of not only asylum/seekers and refugee children but also based on broader immigration status (China/Hong Kong, 2013; France (in waiting zones), 2016; Indonesia, 2014, 2016; Israel, 2013; Malta, 2013; Slovakia, 2016; United Kingdom, 2016). CRC has been adapting its recommendations to a context of increased immigration detention, but references to alternatives to detention for children do not appear to have followed pace with its calls to put an end to detention (Austria, 2012; Belgium, 2010; Czech Republic, 2011; Finland, 2011; France, 2016; Poland, 2015; Saudi Arabia, 2006; Slovakia, 2016).

According to CCPR General Comment No. 35 (2014), "Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests […] and also […] the extreme vulnerability and need for care of unaccompanied minors." CCPR has questioned the detention of children including unaccompanied in overseas territories under a state's jurisdiction (France, 2008) and in transit areas (France 2015). It insists that detention be exceptional (Cyprus, 2015) and only used as a measure of last resort (Czech Republic 2013; FYROM, 2015).

CAT also focuses on last resort, the best interest of the child, and the shortest period of detention possible after alternatives to detention have been examined (Australia, 2014; Belgium, 2014; Cyprus, 2014; Netherlands, 2013). At times, the committee takes a stronger position against children in detention than CCPR (Czech Republic, 2004 and 2012).

CMW also calls for detention of children to cease, for best interest determination (Belize, 2014), and for unaccompanied migrant children in transit or destination countries and minors with family members not to be separated from families (El Salvador, 2014). CMW has moved from detention carried out in accordance with the law and used only as a last resort and for the shortest possible time (Mexico 2006 and 2011) to calls for expeditious and complete halt of detention of children on the basis of their or their parents' immigration status (Nicaragua, 2016; Niger, 2016; Sri Lanka, 2016; Turkey, 2016). In turn, CERD focuses on alternative open accommodation centres for families (Malta, 2013; Netherlands, 2010) and shorter periods of detention (Greece, 2009).

3.2 Extraterritorial detention

The responsibility of states under international human rights law to fulfil their obligations beyond the geographical limits of their national territories is clearly spelled out in articles 2 of ICCPR, CAT and CRC, article 7 of ICRMW and article 3 of ICERD. By virtue of article 2 of the ICCPR, each state party must ensure the Covenant's rights to "all individuals within its territory and subject to its jurisdiction." Focusing on the concept of jurisdiction, the CCPR stressed in its General Comment No. 31 (2004) that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." States must respect and ensure to all individuals under their jurisdiction - without distinction - the rights spelled out in these treaties. In the last decade, within their respective ambits, treaty bodies have reminded states that they cannot skirt their responsibilities by detaining non-citizens outside their territory. In fact, some governments have adopted laws, policies and practices spurred by the increased perception that pressure at their maritime and land boundaries are a source of risk, oblivious of the need to respect standards of international protection included in human rights and refugee law. Treaty bodies' interpretation of human rights treaties keep pace with the emergence of new concepts and euphemisms such as "off-shore" and "excised" places of detention and "hotspots" (Grange, 2013).

CAT has stated that all asylum seekers or persons in need of international protection "under the effective control" of Australia after transfer to centres run "with its financial assistance and with the involvement of private contractors of its choice enjoy the same protection from torture and ill-treatment under the Convention (arts. 2, 3 and 16)" […] "regardless of their mode and/or date of arrival" (Australia, 2014). Likewise CRC also asked Australia to "abandon its attempted policy of so-called "offshore processing" of asylum claims and "refugee swaps" and evaluate reports of hardship suffered by children returned to Afghanistan without a best interests determination" (Australia, 2012). In an unusual "cross-country" recommendation, CERD urged New Zealand "to refrain from sending asylum seekers to the Australian off-shore detention facilities until the conditions meet international standards" (New Zealand, 2013). A few years before, CCPR had already asked Australia to consider closing the off-shore detention facility at Christmas Island, over 1500 kilometres from mainland Australia (Australia, 2009).

3.3 Other

There are other instances of treaty body reactivity to new forms or trends in immigration detention. This confirms the ability of treaty bodies to interpret norms and their applicability in the face of new policies and practices. In June 2016, CAT recommended that Turkey refrain from detaining asylum seekers and irregular migrants following the March 2016 agreement with the EU. The CAT independent experts observed that "Readmission agreements signed by the State party with other States reinforce the Committee's concern (art.3)" (Turkey, 2016). CERD also reacted and asked Greece to "eliminate the automatic detention of migrants arriving on the islands" following the EU agreement (Greece, 2016). Likewise, CCPR made a recommendation on conditions in the new "hot spots" in the Mediterranean (Greece, 2016). Already in 2006, CCPR requested information on readmission agreements concluded between Italy and other countries, in particular Libya 2006 (Italy, 2006).

Another issue of growing concern is addressed by CMW only. CMW recommends decriminalizing irregular migration. In accordance with its General Comment No. 2 (2013) on the rights of migrant workers in irregular situation and members of their families, the committee has observed that staying in a country in an unauthorized manner or without proper documentation or overstaying a residence permit should not constitute a criminal offence (Guinea, 2015; Senegal, 2016). It recalls that irregular entrance into a country or expiration of authorization to stay is an administrative infraction, not a criminal offence and that such situation cannot imply a punitive sanction (Belize, 2014). However, the "full breadth of potential application of the ICRMW safeguards during administrative detention of migrants remains to be tested as countries with the largest immigration detention estates evade scrutiny of their policies and practice through non-ratification of the Convention" (Grange, forthcoming).

In 2010, the EU availed itself of article 43 of ICRPD allowing ratification by "regional integration organizations." CRPD adopted a ground breaking recommendation asking the UE to "issue guidelines to its agencies and member States that restrictive detention of persons with disabilities in the context of migration and asylum seeking is not in line with the Convention" (EU, 2015). CED, the other newest treaty body, also warned about a possible crossover between disappearances and immigration detention (France, 2013).

Conclusion

The principal aim of the paper was to demonstrate that immigration detention does not take place in a legal limbo despite the fact that there is no single international instrument that regulates this practice. The relevance and breadth of the international legal framework applicable to immigration detention can be observed through an examination of recommendations by the nine human rights treaty monitoring bodies in their reviews of the situation in states parties. This

observation can, in turn, be used to develop effective advocacy strategies targeting relevant human rights bodies to challenge detention practices that fail to meet international standards.

A first and fundamental observation is that treaty bodies often confirm that provisions of the treaties they monitor apply to immigration detention. The authors quoted half of the 300 concluding observations on immigration detention since 2000 for their analysis covering 77 countries. Secondly, the research discerned some differences between the treaty bodies, in terms of the language used and the issues addressed. Treaty bodies rarely use the language of "arbitrary detention" as such.[9] Only CCPR (for asylum-seekers) (Latvia, 2014) and CERD (for asylum-seekers *and* non-citizens) (Australia, 2010; New Zealand, 2013) did specifically use the "arbitrary detention" language, albeit rarely.

While the main treaty bodies focusing on immigration detention - CAT, CCPR, CRC, CMW and CERD - all underscore the need for alternatives to detention and non-custodial measures, CCPR places more emphasis on the "reasonable, necessary and proportionate" criteria. The majority of concluding observations issued by CAT focus on detention as a last resort (and half of those are addressed to EU member states). CAT, CRC and CERD insist on respect for international norms and standards. In turn, CERD covers many issues including procedural standards, time limits, detention of asylum seekers and children. However, its recommendations tend to be less forceful than CCPR and CAT. CERD does not openly overrule detention of children and only recently highlighted the prohibition of mandatory detention (Australia, 2010; Canada, 2012). Most treaty bodies also call for immigration detention to be as short as possible.

The systematic analysis of the body of concluding observations issued from 2000 to 2016 reveals some emerging trends. The most salient is a move towards a ban on detention of children - both accompanied and unaccompanied – clearly deemed not to be in the best interest of the child. Another trend concerns detention of asylum seekers and refugees. The issue of extraterritoriality and responsibility of states for immigration detention practices in situations under their jurisdiction is increasingly addressed by treaty bodies. Research findings highlight the specificity of the CMW, which provides a more integrated and in-depth protection to persons in immigration detention. In particular, CMW focuses on issues pivotal to the situation of persons placed in immigration detention including access to consular and legal assistance, families, gender and legal segregation, and conditions of detention. Half the reports examined by CMW since its creation contain concluding observations related to immigration detention, even though Western countries – which maintain the largest immigration detention estates - have not ratified the ICRMW as of December 2016 and thus are not subject to CMW review.[10] Western countries received the vast majority of all treaty body recommendations on immigration detention while representing only 14 percent of UN membership.

An attentive reading of countries and dates of concluding observations referenced in each section of this paper provides scholars and human rights advocates with a geopolitical reading of key human rights concerns in different regions and historical trends in the application of norms governing immigration detention. Since the turn of the century, treaty body recommendations have touched upon almost all the elements of the international legal framework governing immigration detention. They also shed light on gaps in norms and standards, as for instance in relation to re-detention. The monitoring procedure of treaty bodies is an essential tool for the protection of the rights of persons placed in immigration detention as committee members track and respond to contemporary forms of abuse and unlawful practices – often thanks to

[9] Data results from Excel comparative tables developed and on file with the authors.
[10] An exception is Turkey, which according to UN unofficial rules for regional groups belongs to both Western and Asian groups.

submissions of information by national and international civil society organizations - and test the applicability and interpretation of long established norms.

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