

# NOT HERE TO STAY

REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS  
ON ITS VISIT TO MALTA ON 26-30 SEPTEMBER 2011



INTERNATIONAL COMMISSION  
OF JURISTS

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## 1. Introduction

“Not here to stay” is a telling expression for a country like Malta. The country has undergone several migratory waves in the last ten years and still lives under the assumption that it is a “hub” for migration to the European Union rather than a destination in itself, an assumption that may well be correct but one which is also fostered by public policy objectives. The immigration policy of this small yet geographically important EU Member State is centred on this idea: migrants do not want to live in Malta, they just want to leave.

Malta is a country of three islands, situated in the middle of the Mediterranean Sea. Since 2004, it has been a Member State of the European Union. This condition and its geographical position put the country at a junction of migration routes towards mainland Europe and, in particular, Italy. Furthermore, the country is in an unfavourable position in respect of the Dublin II Regulation, which governs the assignment of responsibility to a single EU Member State for the examination of asylum claims. That State must usually be the country of first entrance in the EU space. Because of its geographical location, Malta is usually at the receiving end of this EU policy, with few possibilities for migrants passing through the country to continue their trip to mainland Europe. For reasons of solidarity in burden-sharing with Malta, in 2009 the EU Member States began a pilot resettlement project (EUREMA) to transfer recognised refugees and beneficiaries of subsidiary protection from Malta to certain other Member States, which had volunteered to assist. The programme was renewed in April 2011, again on a voluntary basis.

Since 2002 at least, Malta has been facing significant arrivals of undocumented migrants on its shores, mainly due to its geographical position at the centre of the Mediterranean Sea and because it constitutes an entry door to the European Union. Reportedly, in the years 2006-2008, the average number of arrivals of third country nationals in general was equivalent to 45 percent of Malta’s annual birth rate and, if compared with the national population, one immigrant arriving into Malta corresponds to 140 immigrants arriving in Italy or 205 in Germany.<sup>1</sup> A 2008 report by the Today Public Policy Institute estimated that there were about 11,500 arrivals in Malta between 2002 and September 2008.<sup>2</sup>

Faced with the practical reality of significant migration, Malta lives a sort of contradiction. Most of the migrants and asylum seekers arriving to its shores have genuinely not planned to settle in Malta, but are aiming to reach mainland Europe. This situation creates a frame of mind in which migration arrivals are still, after ten years, considered as a temporary “emergency” situation and not as an ordinary longer-term reality which the country must address in accordance with its international human rights law obligations. As will be shown throughout the report, many if not most of the solutions adopted seem to be driven by this “emergency” attitude. Malta correctly sees itself as a “victim” of the EU Dublin system, which obliges it to manage a quantity of migrants disproportional to its population and its capacities. Voluntary programmes of resettlement, which can temporarily relieve some of the stresses on the State, fall within this “emergency” paradigm, but are not a stable solution.

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<sup>1</sup> See, LIBE Committee of the European Parliament (LIBE), *Report on the visit to the administrative detention centers in Malta*, 30 March 2006, p. 4; Council of Europe’s Parliamentary Assembly (PACE), *Europe’s “boat people”: mixed migration flows by sea into southern Europe*, Doc. 11688, 11 July 2008, paragraph 23.

<sup>2</sup> *Managing the Challenge of Irregular Migration in Malta*, the Today Public Policy Institute, November 2008, available at <http://www.tppi.org.mt/cms/reports/Irregular-Migration/Report.pdf>, para 4.

This frame of mind causes a vicious circle in which establishing permanent structures and measures to protect migrants' human rights are not primary considerations of the Maltese authorities, but are secondary to the objective of ensuring that other European Union Member States share more equitably in the burden of the arrivals.

This vicious circle can be ended only if both Malta and the European Union accept responsibility for securing these migrants' human rights. This requires Malta to revise the fundamentals of its policies of detention and reception, centring them on the human rights of migrants and on the idea that arrivals are an ordinary reality and not an "emergency". Under international human rights law, the difficult situation the country is facing cannot serve as justification in breaching its core human rights obligations. On the other side, the European Union and its Member States cannot exempt themselves from sharing responsibility for the burden Malta is facing. They must also move away from an "emergency" approach to migrant arrivals and accept long-term responsibility for a proportion of resettlements, and not only as a voluntary gesture. Article 80 of the Treaty on the Functioning of the European Union states that the Union's policies on border checks, asylum and immigration and their implementation "shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States".

The crisis for migrants in Malta is not of the Maltese authorities making alone. It is the combined result of Maltese and EU regulations and policies. Consequently, only a solution based on shared responsibility will be able to ensure effective protection of the human rights of migrants and asylum seekers arriving in these islands, the forefront of the EU in the Mediterranean Sea.

The International Commission of Jurists undertook a week-long study mission in Malta from 26 to 30 September 2011. The mission delegation was composed by Róisín Pillay, Senior Legal Advisor of the ICJ Europe Programme, and Massimo Frigo, Legal Advisor of the ICJ Europe Programme. They were accompanied by Niel Falzon, Director of the Maltese NGO aditus foundation.

The ICJ delegation visited the administrative detention centres for undocumented migrants of Safi Barracks and Lyster Barracks. It also visited the following open reception centres: the Marsa Open Centre, the Hal-Far Reception Centre, Hal-Far Hangar Open Centre HOC, and the Dar il-Liedna Open Centre. The ICJ delegation held meetings with Mr Alexander Tortell, Operations Director of the Agency for the Welfare of Asylum Seekers, Mr Mario Debattista, Permanent Secretary of the Ministry for Justice and Home Affairs, and the Director General of Operations of the same Ministry, Mr Mario Caruana.

The International Commission of Jurists wishes to thank the Maltese authorities for their collaboration, for their openness in meeting with the ICJ delegation and in particular for granting access to the open and closed centres for migrants. The ICJ would like also to thank the personnel of the open centres and of the closed centres for their willingness to receive the mission, despite the often difficult circumstances in which they worked and the other pressing demands on their time.

This report draws on the meetings and visits held in Malta in September 2011, as well as on analysis of Maltese immigration law and policy, in light of international law and standards. It does not offer a comprehensive analysis of all aspects of Maltese migration law and policy, but focuses on those issues which were raised by interlocutors during the visit. In particular it addresses:

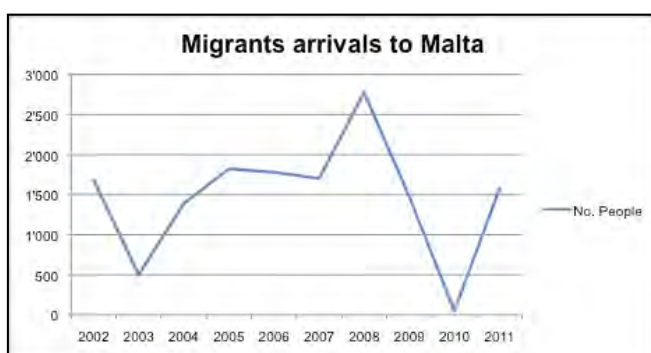
- The legal system governing “prohibited immigrants” and their return (section 3);
- Detention of migrants and conditions of detention (section 4);
- Open centres for the accommodation of migrants and living conditions there (section 5).

On each of these matters, the report makes recommendations for reform of law or policy. While these recommendations are based on the situation prevailing in September 2011, immediately following a particularly high level of migrant arrivals, they remain highly relevant today. Experience has shown, and geography dictates, that Malta is likely to face significant inflows of migration again: when it does so, both the Maltese authorities, and the European Union, need to have the systems and capacity to respond in ways that comply with their obligations under international human rights law.

## 2. Statistics

The year 2011 was an exceptional year with regard to arrivals of migrants and asylum seekers to European countries. This expansion may be largely attributable to the Arab Spring events in Maghreb countries, and, in particular for Malta, to the armed conflict which took place in Libya. The first arrivals of the year from Northern Africa occurred on 28 March 2011 and amounted to around 500 people.<sup>3</sup> According to UNHCR, in 2011, 1,574 people arrived in Malta.<sup>4</sup> In retrospect, this number is consistent with the figures from most years since 2002 and lower than in 2002, 2005, 2006, 2007, and 2008.

According to the National Statistics Office of Malta, in 2010 only two boats with 47 people on board reached Malta, the lowest number of immigrants in a decade. This also naturally led to a drop of 92.6 per cent in the number of applications for asylum.<sup>5</sup> However, the statistics of the same Office show that, in 2009, 1,475 people reached Malta's shores, and 2,775 had done so the year before.



Year	No. People
2002	1,686
2003	502
2004	1,388
2005	1,822
2006	1,780
2007	1,702
2008	2,775
2009	1,475
2010	47
2011	1,574

Source: NSO from 2002 to 2010;<sup>6</sup> UNHCR for 2011<sup>7</sup>

As is apparent from the statistics above, which are based on data assembled by the National Statistic Office and UNHCR Malta, the exceptional year was not 2011, but 2010. The explanation for this phenomenon must be seen in connection with the Friendship Treaty between Italy and Libya in 2008, which signalled the beginning of a "push-back" policy by Italy on migration. The Italian policy following this treaty consisted in the interception of boats, carrying migrants and asylum seekers, in international waters before they could reach Italian shores, and in "accompanying" them back to the Libyan territorial waters. This practice has been recently held by the European Court of Human Rights in the case *Hirsi v. Italy* to be in breach of the internationally recognised principle of *non-refoulement* and of the prohibition of collective expulsion, and closed, in practice, the Libyan route to Europe. As this is the same migration route which runs through Malta, the policy had the direct effect of reducing arrivals. It is therefore clear that it is not an exceptional situation to have 1,500 people arriving in one year. The arrival of only 47 in one year constituted the exception, while other previous flows were the norm.

<sup>3</sup> See, news report in "500 Migrants Reach Malta from Libya: First Arrivals in 2011", Blog Migrants at Sea, 28 March 2011, available at <http://migrantsatsea.wordpress.com/2011/03/28/500-migrants-reach-malta-from-libya-first-arrivals-in-2011/>.

<sup>4</sup> *Mediterranean takes record as most deadly stretch of water for refugees and migrants*, UNHCR, Briefing Note, 31 January 2012, available at <http://www.unhcr.org/4f27e01f9.html>.

<sup>5</sup> News Release of 11 June 2011, National Statistic Office, Malta, available at [http://www.nso.gov.mt/statdoc/document\\_file.aspx?id=3053](http://www.nso.gov.mt/statdoc/document_file.aspx?id=3053).

<sup>6</sup> News Release of 11 June 2011, National Statistic Office, Malta, available at [http://www.nso.gov.mt/statdoc/document\\_file.aspx?id=3053](http://www.nso.gov.mt/statdoc/document_file.aspx?id=3053).

<sup>7</sup> *Mediterranean takes record as most deadly stretch of water for refugees and migrants*, UNHCR, Briefing Note, 31 January 2012, available at <http://www.unhcr.org/4f27e01f9.html>.



It is important to stress this point, because, as it will be made clear throughout this report, the detention and reception policies of Malta rely very much on the idea that migration flows are exceptional, rather than an everyday reality.

**Box no. 1. Treaties and declaratory standards related to Malta**

Malta is party to the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *International Covenant on Civil and Political Rights* (ICCPR),<sup>8</sup> of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT), the *Convention on the Rights of the Child* (CRC) and its two Optional Protocols. Malta has accepted the competence to hear individual applications of the Committee on the Elimination of Racial Discrimination (CERD), of the Human Rights Committee (CCPR), of the Committee against Torture (CAT).

Malta has not accepted in the *European Social Charter (revised)* obligations in relation to the right to housing (Article 31); the obligation to “eliminate risks in inherently dangerous or unhealthy occupations, and where it has not yet been possible to eliminate or reduce sufficiently these risks, to provide for either a reduction of working hours or additional paid holidays for workers engaged in such occupations” and to “ensure that workers performing night work benefit from measures which take account of the special nature of the work” (Article 2(4) and (7)); the obligation to “provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose” (Article 8(3)); the obligation to “establish or maintain a system of social security” (Article 12(1)); the obligations to “apply existing regulations in a spirit of liberality”, “to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers”, and “to liberalise, individually or collectively, regulations governing the employment of foreign workers” (Article 18(1), (2) and (3)); the right of migrant workers and their families to protection and assistance (Article 19); the right to information and consultation (Article 21); the right to take part in the determination and improvement of the working conditions and working environment (Article 22); and the right to protection against poverty and social exclusion (Article 30).

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<sup>8</sup> Malta introduced a purported reservation on Article 13 ICCPR, in relation to the expulsion of non-nationals according to which “[t]he Government of Malta endorses the principles laid down in article 13. However, in the present circumstances it cannot comply entirely with the provisions of this article”. However the validity of this reservations is questionable in light of the UN Human Rights Committee’s *General Comment no. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6, 11 April 1994.

### 3. Legislation on Immigration and Return in Malta

The legislation regulating the situation of undocumented migrants not nationals of a European Union Member States – or, as they are called by the EU, “third country nationals” – is contained in two main pieces of legislation. One is a piece of primary legislation, the *Immigration Act 1970*, which was amended several times, most recently in 2009. The other is a regulation, i.e. a piece of secondary legislation, called Subsidiary Legislation no. 217.12 and entitled *Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations*,<sup>9</sup> in which Malta transposed into national law the EU Return Directive no. 2008/115/EC in March 2011. Together, the two laws govern Malta’s system of rights and procedures for expulsion and detention of undocumented third country nationals, including a framework of special procedural guarantees which affect only a very small part of this group.

Primary and secondary legislation in Malta is subordinated to the Constitution of Malta and to the European Convention of Human Rights, whose rights and freedoms are enshrined in the *European Convention Act 1987*.<sup>10</sup> Any legislation in conflict with these sources of law may be declared void by the Constitutional Court.

#### 3.1. The “prohibited immigrant” definition

The Maltese migration system is centred on the notion of the “prohibited immigrant”. According to the *Immigration Act*, this is “[a]ny person, other than one having the right to entry, or of entry and residence, or of movement or transit [...] may be refused entry, and if he lands or is in Malta without leave from the Principal Immigration Officer.”<sup>11</sup>

#### 3.2. The ordinary “removal” system

Any prohibited immigrant may be subject to a removal order by the Principal Immigration Officer (PIO),<sup>12</sup> which, according to the law, must be in accordance with Malta’s international obligations concerning the country of destination and must not prejudice the migrant’s right to asylum.<sup>13</sup> This rule incorporates implicitly the principle of *non-refoulement* both under international human rights law and international refugee law (See, Box no 2 on *Non Refoulement*). The Principal Immigration Officer is presently the Commissioner for Police,<sup>14</sup> who answered, at the time of the visit, to the Minister for Justice and Home Affairs. On 6 January 2012, the Ministry was split in two different offices: the Ministry for Justice, Dialogue and the Family (MJDF) and the Ministry for Home and Parliamentary Affairs (MHPA).<sup>15</sup> It is this latter ministry which is responsible for migration, in particular, expulsion and detention policies, and to which the Commissioner for Police answers.

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<sup>9</sup> Legal Notice no. 81 of 2011.

<sup>10</sup> *European Convention Act 1987*, Cap. 319, available at: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8795&l=1>.

<sup>11</sup> Article 5.1, *Immigration Act 1970*. The Principal Immigration Officer is appointed by the Prime Minister, and heads the Immigration Police.

<sup>12</sup> Article 14.1, *Immigration Act 1970*.

<sup>13</sup> Article 14.4 and 5, *Immigration Act 1970*.

<sup>14</sup> *Managing the Challenge of Irregular Migration in Malta*, the Today Public Policy Institute, November 2008, available at <http://www.tpqi.org.mt/cms/reports/Irregular-Migration/Report.pdf>, para. 10

<sup>15</sup> Press Release of 6 January 2012, Department of Information of Malta, available at [http://www.doi.gov.mt/en/press\\_releases/2012/01/ministers%20portfolios.pdf](http://www.doi.gov.mt/en/press_releases/2012/01/ministers%20portfolios.pdf).

The migrant has a right to appeal against the removal order to the Immigration Appeals Board, but not to a court of law.<sup>16</sup> The issuance of a removal order also implies the detention of the migrant in order to execute the deportation (See, section no. 4 on administrative detention).<sup>17</sup> The PIO and the police have the power to arrest and take into custody without warrant any “prohibited immigrant” or any person suspected to be a “prohibited immigrant”.<sup>18</sup>

The *Immigration Act 1970* also awards the Minister responsible, in this case the Ministry of Justice and Home Affairs (MJHA), the power to issue a deportation order against anyone if he or she “deems it to be conducive to the public good”, with no remedy available in courts of law against the order and the imposition of mandatory detention with view to expulsion.<sup>19</sup>

The *Subsidiary Legislation no. 217.12* has further supplemented the legislative framework of expulsion and detention of undocumented migrants. In implementation of the EU Return Directive 2008/115/EC, the secondary legislation provides that, as a rule, the PIO must offer the undocumented migrant who is determined to be subject to enforced return, a period of 7 to 30 days to depart voluntarily from Malta, which the PIO can extend or to which he or she can impose corollary obligations to avoid the migrant absconding.<sup>20</sup>

The PIO may refuse to allow a voluntary departure or may decide to shorten the period for voluntary departure for the following reasons:

- When there is a risk of absconding; or
- The migrant’s application for legal stay is considered as manifestly unfounded or fraudulent; or
- The migrant is considered to be a threat to public policy, public security or national security.<sup>21</sup>

In these situations and also when the migrant has not complied with the voluntary departure order, the PIO issues a removal order, which generally implies the detention of the migrant concerned (See, section 4).

The PIO must postpone the migrant’s removal when such removal would violate the principle of *non-refoulement*, or when an appeal has been filed with the Immigration Appeals Board (IAB) within three working days from the removal order. The PIO always maintains the discretionary power to postpone the removal due to the specific circumstances of the case.<sup>22</sup>

The ICJ notes also that the majority of the guarantees included in the implementation of the EU Return Directive have been implemented through secondary legislation. In situations where these provisions may contrast with the *Immigration Act 1970*, which is primary legislation, they could be disapplied. This may occur, for example, in the case of the period of voluntary return, which the PIO might decide not to apply since it is overridden by the more discretionary dictate of the primary legislation. In this case, Malta would be in breach of Article 291 of the

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<sup>16</sup> Article 14.1, Immigration Act 1970.

<sup>17</sup> Article 14.2, Immigration Act 1970.

<sup>18</sup> Article 16.1, Immigration Act 1970.

<sup>19</sup> Article 22, Immigration Act 1970.

<sup>20</sup> Regulations 4.1 to 3, Subsidiary Legislation no. 217.12.

<sup>21</sup> Regulation 4.4, Subsidiary Legislation no. 217.12.

<sup>22</sup> Regulation 6, Subsidiary Legislation no. 217.12, in conjunction with Article 25A.7 of the Immigration Act 1970.

Treaty on the Functioning of the European Union, whenever a conflict of laws was not resolved with preference for EU law. **The ICJ would, therefore, recommend that the Maltese authorities implement the Return Directive, as with all EU Directives which touch upon human rights, by way of primary legislation and through procedures which involve consultation with civil society.**

Finally, the ICJ has examined the expulsion decision communication given to undocumented migrants when they arrive in Malta. The ICJ is particularly concerned at the fact that in such communications contain on the same page the *pro forma* communication of the possibility to apply for voluntary return and an expulsion order on the basis of the rejection of the inexistent voluntary return request. The ICJ finds that the existence of this form and the practice behind it constitute a breach of the EU Return Directive 2008/115/EC. **The ICJ recommends to end the use of these forms and to revise the procedure in order to provide a true possibility of voluntary return as mandated by national and EU law.**

## **Box no. 2. The principle of *non-refoulement***

The principle of *non-refoulement*, prohibiting States to transfer anyone to a country where he or she faces a real risk of persecution or serious violations of human rights, is a fundamental principle of international law and one of the strongest limitations on the right of States to control entry into their territory and to expel aliens as an expression of their sovereignty.

Regarding refugees, whether or not a formal determination of refugee status has been made by the destination country, or whether the determination process is ongoing, or whether there is an intension to apply for asylum, Article 33.1 of the *Geneva Convention relating to the Status of Refugees* of 1951 prohibits the State to “expel or return (*refouler*)” a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.<sup>23</sup> This principle has also been upheld by several international law instruments.<sup>24</sup> It is not subject to derogation.<sup>25</sup>

Nevertheless, the *Geneva Refugee Convention* provides for a restriction on the principle which may not “be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”<sup>26</sup>

The principle of *non-refoulement* is also well established in international human rights law, where it applies to all transfers of nationals or non-nationals, including migrants, whatever their status, as well as refugees. It is an absolute principle which, unlike in international refugee law, admits no exceptions or restrictions. For the principle of *non-refoulement* to apply, the risk faced on return must be real, i.e. be a

<sup>23</sup> See *Conclusion No. 79 (XLVII) General*, ExCom, UNHCR, 47<sup>th</sup> session, 1996, para. (j). See also, *Conclusion No. 81 (XLVIII) General*, ExCom, UNHCR, 48<sup>th</sup> Session, 1997, para. (i); *Conclusion No. 82 (XLVIII) on Safeguarding Asylum*, ExCom, UNHCR, 48<sup>th</sup> Session, 1997, para. (d-i). See also, *Concluding Observations on Portugal*, CCPR, UN Doc. CCPR/CO/78/PRT, 17 September 2003, para. 83.12.

<sup>24</sup> See, Articles III and V, *Revised Bangkok Declaration*; Article 3, *Declaration on Territorial Asylum* of 1967, UNGA resolution 2132(XXII), 14 December 1967; Article II.3, *OAU Refugee Convention*; Article 22.8 ACHR; *Cartagena Declaration on Refugees*, Section III, para. 5.

<sup>25</sup> *Conclusion No. 79*, UNHCR, *op. cit.*, fn. 23, para. (i). See also, UNGA resolution 51/75, UN Doc. A/RES/51/75, 12 February 1997, para. 3.

<sup>26</sup> Article 33.2, *Geneva Refugee Convention*.

foreseeable consequence of the transfer, and personal, i.e. it must concern the individual person claiming the *non-refoulement* protection.<sup>27</sup>

To date, the principle of *non-refoulement* has been found by international courts and tribunals to apply to risks of violations of the prohibition of torture and cruel, inhuman or degrading treatment or punishment; the right to life, and flagrant denial of fair trial and arbitrary detention. It is also likely that the prohibition would apply to the most serious violations of other human rights.

For more information, see Chapter 2 of the Practitioners Guide no. 6 of the International Commission of Jurists, *Migration and International Human Rights Law*.

### 3.3. The “residual” removal system

Part IV of Subsidiary Legislation no. 217.12 incorporates in Maltese Law most of the guarantees of procedural protection for migrants provided for by the EU Return Directive. This system (hereinafter, “Chapter IV system”) establishes the right of the third country national to have the entry-ban decision and the removal order in writing and stating the reasons in fact and in law and the legal remedies available, although with possible restrictions when there are reasons of “national security, public policy, and the prevention, detection, investigation and prosecution of criminal offences”.<sup>28</sup> The return decision must be given in a standard form written in at least five designated languages which the third country national may reasonably be supposed to understand,<sup>29</sup> and the PIO has to provide, upon request, a written or oral translation of the main elements of the return decision and information on legal remedies in a language that he or she may reasonably be supposed to understand.<sup>30</sup> The Immigration Appeals Board (IAB) may review the return decision and temporarily suspend the enforcement.<sup>31</sup> Migrants are entitled to a legal adviser and to free legal aid when necessary, before the Appeals Board.<sup>32</sup> Guarantees on contact with family members, emergency health and essential treatment of illness, access to state education for minors, and on special needs of vulnerable persons, apply either during the period of voluntary departure or the period during which removal is postponed.<sup>33</sup>

In practice this system is of limited applicability in Malta. The law explicitly says that this Chapter does not apply to those who have been the object of a refusal of entry or to those “who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by sea or air of the external borders of Malta and who have not subsequently obtained an authorisation or a right to stay in Malta”.<sup>34</sup> This exception mirrors Article 2.2(a) of the EU Return Directive and devises a system which is residual to the one applicable to all “prohibited immigrants”. However, it should be noted that Article 12 of the *Procedural Standards in Examining*

<sup>27</sup> General Comment No. 31, *Nature of the General Legal Obligations Imposed on State Parties to the Covenant*, Human Rights Committee (CCPR), UN Doc. CCPR/C/21Rev.1/Add.13, 26 May 2004, para. 12; *Na v. United Kingdom*, ECtHR, Application no. 25904/07, 17 July 2008, paras. 109, 113; *Saadi v. Italy*, ECtHR, GC, Application No. 37201/06, Judgment of 28 February 2008, para. 125; *Nnyanzi v. United Kingdom*, ECtHR, Application No. 21878/06, 8 April 2008, para. 51; *Cruz Varas and Others v. Sweden*, ECtHR, Plenary, Application No. 15576/89, 20 March 1991, para. 69; *Chahal v. United Kingdom*, ECtHR, Grand Chamber, Application no. 22414/93, 16 November 1996, para. 74; *Soering v. United Kingdom*, ECtHR, Plenary, Application no. 14038/88, 7 July 1989, paras. 85-91.

<sup>28</sup> Regulation 11.2 of S.L. 217.12

<sup>29</sup> Regulation 11.3 of S.L. 217.12

<sup>30</sup> Regulation 11.6 of S.L. 217.12

<sup>31</sup> Regulations 11.4 and 12.1 of S.L. 217.12

<sup>32</sup> Regulation 11.5 of S.L. 217.12

<sup>33</sup> Regulation 11.7 of S.L. 217.12

<sup>34</sup> Regulation 11.1 of S.L. 217.12

*Applications for Refugee Status Regulations 2008*<sup>35</sup> states that any asylum seeker “shall be allowed to enter or remain in Malta pending a final decision of his application.” The ICJ considers that, as a consequence of this authorization by law to stay, asylum seekers may be protected by the Return Directive guarantees.

If the exception does apply however, then it renders the guarantees of the Directive of residual application, while they were meant to constitute the general system applicable to return and detention of undocumented migrants in the EU Member States. It is apparent that, in the situation of a small island like Malta, where most arrivals are by sea, the large majority of people entering the country in an undocumented fashion will fall under the exception.

The International Commission of Jurists is concerned at the creation, through the exercise of the discretion afforded by the EU Return Directive, of a two-tier migration system and at the exclusion of large amounts of migrants arriving in Malta from the guarantees offered by this same Directive.

It should be emphasised that international human rights law applies to everyone without discrimination (see, paragraph 3.1) who is subject to the jurisdiction, i.e. the space or persons over which a State has authority and for which the State is therefore internationally responsible. This follows from the basic principle of international human rights law that States must guarantee, secure and protect the human rights of everyone within their jurisdiction.<sup>36</sup> Therefore, irrespective of the restrictions in national law on the application of the Returns Directive, international human rights law applies to all third country nationals in Malta, regardless of the means of their arrival.

The exception provided for by the Return Directive, and on which Malta has decided to base the implementation of this EU law in its domestic system, runs contrary to the principle of non-discrimination in the enjoyment of human rights, and, in particular, right of migrants to be informed in a language they understand of the reasons for their removal, the right to legal representation and legal aid, guaranteed by the Return Directive. **For these reasons, the International Commission of Jurists calls on the Maltese authorities to delete the exception and apply the whole range of guarantees offered by the Directive to all migrants whatever their status and the means of their entry into Maltese jurisdiction.**

### 3.4. Legal aid

The ICJ considers that limiting free legal assistance and representation to the appeal stage, in return proceedings, or in other proceedings affecting the human rights of migrants, contravenes international human rights law. The Human Rights Committee has indicated that, in accordance with Article 13 of the International Covenant on Civil and Political Rights (ICCPR), States should grant “free legal assistance to asylum-seekers during all asylum procedures, whether ordinary or extraordinary”.<sup>37</sup> It has also affirmed that States should “ensure that all asylum-seekers have access to counsel, legal aid and an interpreter”.<sup>38</sup> Article 47 of the EU

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<sup>35</sup> L.N. 243 of 2008.

<sup>36</sup> Article 2.1 ICCPR; Article 2.1 CRC; Article 1 ECHR.

<sup>37</sup> *Concluding Observations on Switzerland*, CCPR, UN Doc. CCPR/C/CHE/CO/3, 29 October 2009, para. 18; *Concluding Observations on Ireland*, CCPR, UN Doc. CCPR/C/IRL/CO/3, 30 July 2008, para. 19.

<sup>38</sup> *Concluding Observations on Japan*, CCPR, UN Doc. CCPR/C/JPN/CO/5, 18 December 2008, para. 25.

Charter guarantees the right to a fair trial in expulsion and detention procedures, which includes the right to legal assistance.

Under general international human rights law and standards, detained asylum seekers have the right to prompt access to a lawyer, and must be promptly informed of this right.<sup>39</sup> Detainees should have access to legal advice and facilities for confidential consultation with their lawyer at regular intervals thereafter. Translation of key legal documents, as well as interpretation during consultations with the lawyer, should be provided where necessary. Facilities for consultation with lawyers should respect the confidentiality of the lawyer-client relationship.<sup>40</sup>

**The ICJ recommends that the right to free legal assistance in expulsion, detention and asylum procedures for all migrants and asylum seekers be fully guaranteed in primary legislation and be secured in practice in all situations of detention of migrants and asylum seekers.**

### *3.5. Means of appeal*

Decisions on detention or removal may be appealed to the Immigration Appeals Board within three days from the decision itself.<sup>41</sup> The Appeals Board is composed of at least three people, among whom are a lawyer and an expert in immigration matters, appointed by the President under advice of the Minister for Justice and Home Affairs.<sup>42</sup> The members are appointed for a period of three years and are eligible for re-appointment.<sup>43</sup>

The IAB's decisions are final except with respect to points of law, from which the decision can be appealed to the Court of Appeal (Inferior Jurisdiction) within ten days of a decision.<sup>44</sup>

The IAB also has jurisdiction to hear or determine applications from persons in detention requesting release pending determination of applications for international protection, but it may order release only when the detention is unreasonable as regards duration or because there is no reasonable prospect of deportation within a reasonable time.<sup>45</sup>

Under Article 25A.11 of the Immigration Act, the Board is not authorised to grant a release when the identity, including the nationality, of the applicant has yet to be verified, and, in particular, when the applicant has destroyed his travel or identification documents or used fraudulent documents; when determination of certain elements on which the application is based cannot be achieved without

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<sup>39</sup> *Concluding Observations on Australia*, CCPR, Report of the Human Rights Committee to the General Assembly, 55<sup>th</sup> Session, Vol.I, UN Doc. A/55/40 (2000), para. 526. See also, Article 17.2(d), CPED; UN Working Group on Arbitrary Detention (WGAD), *Annual Report 1998*, UN Doc. E/CN.4/1999/63, 18 December 1998, para. 69, Guarantees 6 and 7; WGAD, *Annual Report 1999*, UN Doc. E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5 "Situations regarding immigrants and asylum-seekers", Principle 2; *Guidelines on human rights protection in the context of accelerated asylum procedures*, adopted by the Committee of Ministers of the Council of Europe on 1 July 2009 at the 1062nd meeting of the Ministers' Deputies (European Guidelines on accelerated asylum procedures), Guideline XI.5 and 6.

<sup>40</sup> *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, UNHCR, 26 February 1999 ("UNHCR Revised Guidelines on Detention"), Guideline 5(ii); *Body of Principles for the Protection of all persons deprived of their liberty*, Principle 18.

<sup>41</sup> Articles 25A.5 and 7, Immigration Act 1970.

<sup>42</sup> Article 25A.1, Immigration Act 1970.

<sup>43</sup> Article 25A.3, Immigration Act 1970.

<sup>44</sup> Article 25A.8, Immigration Act 1970.

<sup>45</sup> Article 25A.9-10, Immigration Act 1970.

detention; and where the release could pose a threat to public security and public order.<sup>46</sup>

The person released pending the asylum procedure must report periodically, and no less often than once every week, to the immigration authorities.<sup>47</sup>

Under international human rights law, where an individual is threatened with expulsion that gives rise to an arguable case of real risk of violation of human rights, there is a right to a remedy that is effective, impartial and independent, and capable of suspending or reversing a decision to expel.<sup>48</sup>

For a remedy to be effective it should be made by a judicial body. If an administrative, rather than judicial remedy is substituted, the remedy must in any case fulfil the requirements of effectiveness. Those requirements include that the adjudicating body have the power to bring about cessation of the violation and appropriate reparation, including, where relevant, to overturn the expulsion order, and that it have qualities of impartiality and independence.<sup>49</sup> The remedy must be prompt and effective in practice as well as in law, and must not be unjustifiably hindered by the acts of State authorities.<sup>50</sup> In cases of *non-refoulement* to face a risk of torture or ill-treatment, the absolute nature of the rights engaged further compels the right to an effective remedy.<sup>51</sup> In such cases, this means that the decision to expel must be subject to close and rigorous scrutiny.<sup>52</sup> The Committee against Torture has affirmed that a State should “provide for judicial review of the merits, rather than merely of the reasonableness, of decisions to expel an individual where there are substantial grounds for believing that the person faces a risk of torture.”<sup>53</sup>

The European Court of Human Rights has held that, in order to comply with the right to a remedy, a person threatened with an expulsion which arguably violates another Convention right must have:

- access to relevant documents and accessible information on the legal procedures to be followed in his or her case;
- where necessary, translated material and interpretation;
- effective access to legal advice, if necessary by provision of legal aid;<sup>54</sup>
- the right to participate in adversarial proceedings;
- reasons for the decision to expel (a stereotyped decision that does not reflect the individual case will be unlikely to be sufficient) and a fair and reasonable opportunity to dispute the factual basis for the expulsion.<sup>55</sup>

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<sup>46</sup> Article 25A.11, Immigration Act 1970.

<sup>47</sup> Article 25A.13, Immigration Act 1970.

<sup>48</sup> *Alzery v. Sweden*, CCPR, Communication no. 1416/2005, 10 November 2006, para. 11.8. In the same case, the Committee did not find a violation of Article 13 ICCPR, therefore demonstrating the more extended guarantees provided to by the principle of *non-refoulement*. See also, *Zhakhongir Maksudov and Others v. Kyrgyzstan*, CCPR, Communications 1461-1462-1476-1477/2006, 31 July 2008, para. 12.7; *Agiza v. Sweden*, CAT, Communication no. 233/2003, 24 May 2005, para. 13.7; *Shamayev and Others v. Georgia and Russia*, ECtHR, *op. cit.*, fn. 414, para. 460; *M.S.S. v. Belgium and Greece*, ECtHR, Grand Chamber Application no. 30696/09, 21 January 2011, para. 293; *C.G. and Others v. Bulgaria*, ECtHR, Application no. 1365/07, 24 April 2008, para. 56; *Čonka v. Belgium*, ECtHR, Application no. 51564/99, 5 February 2002, paras.77-85. A thorough analysis of the right to a remedy is to be found in, International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations – A Practitioners’ Guide*, Geneva, December 2006 (ICJ Practitioners’ Guide No. 2).

<sup>49</sup> See, ICJ, *Practitioners’ Guide No.2*, *op. cit.*, fn. 48, pp. 49-54.

<sup>50</sup> *Muminov v. Russia*, ECtHR, Application no. 42502/06, 11 December 2008, para. 100; *Isakov v. Russia*, ECtHR, Application no. 14049/08, 8 July 2010, para. 136; *Yuldashev v. Russia*, ECtHR, Application no. 1248/09, 8 July 2010, paras. 110-111; *Garayev v. Azerbaijan*, ECtHR, Application no. 53688/08, 10 June 2010, paras. 82 and 84.

<sup>51</sup> *Agiza v. Sweden*, CAT, *op. cit.*, fn. 48, para. 13.8.

<sup>52</sup> *Jabari v. Turkey*, ECtHR, Application no. 40035/98, 28 October 1999, para. 39.

<sup>53</sup> Concluding Observations of the Committee against Torture: Canada, UN Doc. CAT/C/CR/34/CAN, 7 July 2005, paragraph 5(c).

<sup>54</sup> *M.S.S. v. Belgium and Greece*, ECtHR, Grand Chamber Application no. 30696/09, 21 January 2011, para. 301.

<sup>55</sup> *Ibid.*, para. 302; *C.G. and Others v. Bulgaria*, ECtHR, *op. cit.*, fn. 48, paras. 56-65.



To provide an effective remedy, the appeal must be suspensive of the expulsion measure from the moment the appeal is filed, since the notion of an effective remedy requires that the national authorities give full consideration to the compatibility of a measure with human rights standards, before the measure is executed.<sup>56</sup> A system where stays of execution of the expulsion order are at the discretion of a court or other body does not guarantee the right to an effective remedy, even where the risk that a stay will be refused is minimal.<sup>57</sup>

The ICJ also notes that the European Court of Human Rights in the case *Louled Massoud* has found that the system of the Immigration Appeal Board did not constitute an effective remedy to guarantee the detainee's right under Article 5.4 to challenge his or her detention (see, Box no. 3).

The ICJ also recalls that the right to an effective remedy and to a fair trial is reaffirmed in Article 47 of the Charter of Fundamental Rights of the European Union (EU Charter), and that the matters of expulsion procedures, administrative detention of migrants and asylum-seekers, reception conditions, and asylum are covered by EU law and, as such, subject to the binding force of the EU Charter (Article 51 EU Charter).

Article 47 of the EU Charter explicitly provides that the right to an effective remedy must be satisfied by a judicial body (tribunal), and that the guarantees of a fair trial and legal aid apply in all cases in which "rights and freedoms guaranteed by the law of the Union are violated". The provision is wider in scope than its equivalents in Article 6 ECHR, which addresses fair trial rights in relation to "civil rights and obligations or criminal charges". Since most of the competences of the European Union involve administrative law matters rather than civil rights and obligations or criminal law, and in light of Article 52(3) of the Charter, fair trial rights under Article 47 are fully applicable to administrative procedures, such as asylum procedures and expulsion procedures.

The ICJ considers that the system of appointment and reappointment of the members of the Board by the Executive does not assure the independence of the body, meaning that it cannot be considered to be a court or a tribunal.

The ICJ also notes that the term to present an appeal before the board, three days, is insufficient for the applicant to properly prepare his or her case and undermines the efficacy of the remedy, particularly in light of the practical situation in Malta's

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<sup>56</sup> *Jabari v. Turkey*, ECtHR, *op. cit.*, fn. 52, para. 50; *Conka v. Belgium*, ECtHR, *op. cit.*, fn. 48, para. 79; *Gebremedhin v. France*, ECtHR, Application No. 25389/05, Judgment of 26 April 2007, paras. 58, 66; *Muminov v. Russia*, ECtHR, *op. cit.*, fn. 50, para. 101; *Concluding Observations on France*, CAT, UN Doc. CAT/C/FRA/CO/3, 3 April 2006, para. 7; *Concluding Observations on Belgium*, CCPR, UN Doc. CCPR/CO/81/BEL, 8 December 2004, para. 21; *Concluding Observations on Morocco*, CCPR, UN Doc. CCPR/CO/82/MAR, 1 December 2004, para. 13; *Concluding Observations on Uzbekistan*, CCPR, UN Doc. CCPR/CO/83/UZB, 26 April 2005, para. 12; *Concluding Observations on Thailand*, CCPR, UN Doc. CCPR/CO/84/THA, 8 July 2005, para. 17; *Concluding Observations on Ukraine*, CCPR, UN Doc. CCPR/C/UKR/CO/6, 28 November 2006, para. 9; *Concluding Observations on Libyan Arab Jamahiriya*, CCPR, UN Doc. CCPR/C/LBY/CO/4, 15 November 2007, para. 18; *Concluding Observations on Belgium*, CAT, UN Doc. CAT/C/BEL/CO/2, 19 January 2009, para. 9; *Concluding Observations on Yemen*, CAT, UN Doc. CAT/C/YEM/CO/2, 19 November 2009, para. 22; *Concluding Observations on Belgium*, CAT, Report of the Committee against Torture to the General Assembly, 58<sup>th</sup> Session, UN Doc. A/58/44 (2003), p. 49, paras. 129 and 131. See also, *Concluding Observations on Cameroon*, CAT, UN Doc. CAT/C/CR/31/6, 5 February 2004, para. 9(g); *Concluding Observations on Monaco*, CAT, UN Doc. CAT/C/CR/32/1, 28 May 2004, paras. 4(c) and 5(c); *Concluding Observations on Mexico*, CAT, UN Doc. CAT/C/MEX/CO/4, 6 February 2007, para. 17; *Concluding Observations on South Africa*, CAT, UN Doc. CAT/C/ZAF/CO/1, 7 December 2006, para. 15; *Concluding Observations on Australia*, CAT, UN Doc. CAT/C/AUS/CO/3, 22 May 2008, para. 17; *Concluding Observations on Azerbaijan*, CAT, UN Doc. CAT/C/AZE/CO/3, 8 December 2009, para. 22; *Concluding Observations on Canada*, CAT, UN Doc. CAT/C/CR/34/CAN, 7 July 2005, para. 5(c). See also, *C.G. and Others v. Bulgaria*, ECtHR, *op. cit.*, fn. 48, para. 62.

<sup>57</sup> *Conka v. Belgium*, ECtHR, *op. cit.*, fn. 48, paras. 81-85.

detention centres where difficulties have been reported in accessing legal representation.

The ICJ also considers that the procedure available under the Immigration Appeals Board is not a remedy capable of reviewing and, if necessary reversing, the authority's decisions on detention, due to the limitations imposed on it by Article 25A.11, Immigration Act 1970.

Finally, the limitation to points of law of the grounds of appeal to a court of law against the IAB's decision precludes a full and adequate judicial review of the merits in light of the procedural aspects of the principle of *non-refoulement* and risks undermining the right to an effective remedy, as well as the right to a fair hearing under Article 47 EU Charter.

**The ICJ considers that there is a need for substantial reform of the system of immigration appeals, including by entrusting a court of law to review in full the decisions taken by executive immigration authorities, or, at least, to review in full the IAB's decision, with an automatic suspensive effect on the execution of the expulsion.**

#### **Box no. 3. The *Louled Massoud* Case**

In the case *Louled Massoud v. Malta*, the European Court of Human Rights ruled on three aspects of Malta's migration detention policy.

First, the Court ruled that the remedy offered by the Immigration Appeals Board is insufficient to meet the obligations of Malta under Article 5.4 of the European Convention on Human Rights, namely the right to challenge one's detention. The Court held that "even assuming that it could be considered as a judicial authority competent to grant release, the relevant legal provision is limited by the fact that a request for release from custody has no prospect of success in the event that the identity of the detainee, including his nationality, has yet to be verified, in particular where he has destroyed his travel or identification documents or used fraudulent documents in order to mislead the authorities".<sup>58</sup> It had also found that the alternative remedies of *habeas corpus* through Article 409A of the Criminal Code and through constitutional actions did not satisfy this requirement.<sup>59</sup>

The European Court of Human Rights, after having found the detention not to be in compliance with Article 5.1.f. because the prospects of deportation of the applicant were not realistic, dealt also with the whole detention regime itself. The Court pointed out that it found it "hard to conceive that in a small island like Malta, where escape by sea without endangering one's life is unlikely and fleeing by air is subject to strict control, the authorities could not have had at their disposal measures other than the applicant's protracted detention to secure an eventual removal in the absence of any immediate prospect of his expulsion."<sup>60</sup>

Finally, the Court also examined the detention policy of Malta in light of the principle of legality, according to which the grounds and the length of detention must be provided for in primary legislation. The Court found that "the Immigration

<sup>58</sup> *Louled Massoud v. Malta*, ECtHR, Application no. 24340/08, 27 October 2010, para. 44.

<sup>59</sup> *Louled Massoud v. Malta*, ECtHR, Application no. 24340/08, 27 October 2010, paras. 43 and 45.

<sup>60</sup> *Louled Massoud v. Malta*, ECtHR, Application no. 24340/08, 27 October 2010, para. 68.

Act applied no limit to detention and that the Government policies have no legal force. In consequence, the applicant was subject to an indeterminate period of detention”,<sup>61</sup> in contravention of the requirements of Article 5.1 of the European Convention on Human Rights.

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<sup>61</sup> *Louled Massoud v. Malta*, ECtHR, Application no. 24340/08, 27 October 2010, para. 71.

## 4. Administrative detention of migrants

The ICJ visited two detention centres for undocumented migrants on Wednesday 28 September 2011: the Safi Barracks and the Lyster Barracks. Within the Safi Barracks, the ICJ delegation visited Warehouse One and B Block, which are detention facilities located in the middle of the military base. Another detention centre is also located within a military base, the Lyster Barracks. In this detention facility, the ICJ delegation visited a section reserved for couples on the first floor of the building. In both visits, the delegation was accompanied by one or two guards who followed the delegation at a distance, did not interfere with the delegation's visit or interactions with detainees, and maintained a certain distance with the members of the delegation during the visits within the detention facilities.

The Ministry of Justice and Home Affairs declared on 28 September 2011 that there were around 750 migrants and asylum seekers in all Malta's detention centres at that time of the ICJ visit.<sup>62</sup> The ICJ delegation notes that it did not receive information in relation to any allegations of deliberate ill-treatment of detainees.

### Box no. 4. A look into the detention centres

The **Warehouse One** of the **Safi Barracks** consists of a large block which is accessed through a small guards office. The entrance gate gives onto the common area with tables, benches and a TV. On the left side of the common area are the "dormitories" where bunk beds are located very near to each other. At the end of the common area there is an exit to a small open-air recreation room, closed with wire.

The **B-Block** is a separate centre within the **Safi Barracks** military compound. This ward is considerably smaller than Warehouse One. It is on two floors. The first floor of the detention centre, which was visited by the ICJ delegation, constitutes one corridor along which there is a kitchen cell with electric stoves, a common bathroom, a common room linked with a small courtyard, and furnished with a TV, tables and benches. Finally along the corridor there are the bedrooms, which each contain several beds.

The detention complex of **Lyster Barracks** is located in another military compound not far from the Safi Barracks. The detention facility is smaller than Safi Warehouse One. The Lyster Barracks host couples in one of its sections, single women in another and single men in a third area. The ground floor hosts the soldiers' offices. The first floor constitutes the detention section for couples, which the ICJ delegation visited. Outside there is a fenced recreation area. The entrance of the detention ward gives onto a corridor. On the left run of the corridor are the dormitories. In front of the entrance are a kitchen room with stoves and the bathroom. On the left of the corridor is the common room with tables, benches and a television.

### 4.1 Events preceding the visit: the riots in Warehouse One (Safi Barracks)

In the Warehouse One of the Safi Barracks, a serious violent disruption took place on 16 August 2011, after several detainees in the centre were told of the rejection of their

<sup>62</sup> "750 migrants from Libya in detention", *The Times of Malta*, 28 September 2011: <http://www.timesofmalta.com/articles/view/20110928/local/750-migrants-from-Libya-in-detention.386714>.

asylum claims.<sup>63</sup> According to press reports, the protest was quelled with tear-gas in an operation involving, besides detention staff, 85 army personnel and 120 police officers. Twenty-three migrants were arrested and brought to court.<sup>64</sup> Rubber bullets were allegedly used in the operations. Several NGOs called for an inquiry into the necessity and proportionality of the use of force.<sup>65</sup> The Ministry of Justice and Home Affairs rejected the calls for an inquiry and defended the use of baton rounds, as the rubber bullets are known, saying they were considered a “legitimate form of non-lethal force” in the circumstances and were only used when other options to quell the riots were exhausted.<sup>66</sup> During the court hearing for the 23 migrants arrested, detention officers denied under oath that they had used rubber bullets.<sup>67</sup> The migrants accused have been released on bail after six months of detention in the prison “Corradino Correctional Facility” and transferred back to the Safi detention centre. The time spent in prison is not calculated within the maximum time to be spent in administrative detention under the immigration legislation and practice.

The conduct of both parties was condemned by several NGOs and UNHCR and it was stressed by all these actors that the conditions of detention in Safi Barracks and the automatic detention policy of Malta made a riot foreseeable.<sup>68</sup> Detainees expressed their utter frustration at the 18 months detention policy of Malta and insisted that their demands were for freedom and respect for their human rights.<sup>69</sup>

The UN Committee on the Elimination of Racial Discrimination (CERD) recommended, on 14 September 2011, that Malta “take appropriate measures to improve detention conditions and refrain from resorting to excessive use of force to counter riots by immigrants in detention centres, and also to avoid such riots.”<sup>70</sup>

<sup>63</sup> “Migrants riot as police and army fight back”, *The Times of Malta*, 17 August 2011: <http://www.timesofmalta.com/articles/view/20110817/local/Migrants-riot-as-police-and-army-fight-back.380561>

<sup>64</sup> They have been charged with:

- damage to government property;
- gathering of more than ten persons gathered with the intention of committing a crime that was not provoked;
- violent resistance of public officers carrying out their legal duties;
- offended or threatened public officers, namely members of the Police Corps and of the Armed Forces of Malta (AFM) when they were acting in their public and lawful capacity;
- refusal to obey legitimate orders from responsible officers;
- slight bodily harm of some members of the police and AFM;
- threw stones and other hard objects on the property of others;
- disruption of public peace and good order.

See also, “Migrants arraigned after Safi riot”, *The Times of Malta*, 17 August 2011: <http://www.timesofmalta.com/articles/view/20110817/local/migrants-arraigned-after-safi-riot.380639> ; “Safi riot suspects to be held in custody in prison”, *The Times of Malta*, 18 August 2011:

<http://www.timesofmalta.com/articles/view/20110818/local/Safi-riot-suspects-to-be-held-in-custody-in-prison.380655> ; “Safi riot not entirely surprising – UNHCR”, *The Times of Malta*, 18 August 2011:

<http://www.timesofmalta.com/articles/view/20110818/local/Safi-riot-not-entirely-surprising-UNHCR.380656> ; “Aditus condemns violence, urges government not to ignore immigrants’ pleas”, *The Times of Malta*, 18 August 2011:

<http://www.timesofmalta.com/articles/view/20110818/local/aditus-condemns-violence.380780> ; “Ministry defends detention policy”, *The Times of Malta*, 18 August 2011:

<http://www.timesofmalta.com/articles/view/20110818/local/ministry-defends-detention-policy.380804> ; “Riot no way to criticise detention policy, says government”, *The Times of Malta*, 19 August 2011:

<http://www.timesofmalta.com/articles/view/20110819/local/Riot-no-way-to-criticise-detention-policy-says-government.380880> .

<sup>65</sup> “Migrants driven to tears”, *The Sunday Times*, Malta, 21 August 2011: <http://www.timesofmalta.com/articles/view/20110821/editorial/Migrants-driven-to-tears.381096> ; “Forces fired rubber bullets”, *The Sunday Times*, Malta, 21 August 2011:

<http://www.timesofmalta.com/articles/view/20110821/local/Forces-fired-rubber-bullets.381073>

<sup>66</sup> “No inquiry into use of rubber bullets in Safi riot – government”, *The Times of Malta*, 22 August 2011: <http://www.timesofmalta.com/articles/view/20110822/local/No-inquiry-into-use-of-rubber-bullets-in-Safi-riot-government.381264> .

<sup>67</sup> “Detention officers deny use of rubber bullets”, *The Times of Malta*, 30 August 2011: <http://www.timesofmalta.com/articles/view/20110830/local/Detention-officers-deny-use-of-rubber-bullets.382453> .

<sup>68</sup> <http://www.unhcr.org/mt/index.php/news-and-views/news/402-unhcr-continuous-to-call-for-improvements-after-detention-centre-protest> [http://www.aditus.org.mt/aditus/News/Entries/2011/8/18\\_aditus\\_issues\\_press\\_statement\\_following\\_migrant\\_riots\\_at\\_Safi\\_Detention\\_Centre.html](http://www.aditus.org.mt/aditus/News/Entries/2011/8/18_aditus_issues_press_statement_following_migrant_riots_at_Safi_Detention_Centre.html)

<sup>69</sup> <http://www.timesofmalta.com/articles/view/20110820/local/It-s-all-about-a-plea-for-freedom.380972>

<sup>70</sup> *Concluding Observations of CERD: Malta*, 14 September 2011, UN Doc. CERD/C/MLT/CO/15-20, para. 14.

The delegation of the International Commission of Jurists found that the detainees held in Warehouse One at the time of the visit were visibly on edge, which may have been a legacy of the riots which had occurred some two weeks before the visit. Most of the detainees sought to communicate their call for “freedom” from a detention regime which they felt to be unjust and unfair, particularly in the absence of any criminal accusations. It was abundantly clear from the statements and the behaviour of the detainees that their constant preoccupation was finding a way to leave the detention centre, to find a job and provide for themselves. Most detainees expressed outrage that someone who had not committed any crime would be locked up for up to 18 months with no possibility to work and earn a living. The same feelings of frustration and demands for freedom were expressed by the detainees the ICJ delegation met in B-Block and in Lyster Barracks.

**While deploring the violence of the riots, the ICJ urges the Maltese authorities to institute an independent investigation into the incidents of 16 August 2011, in particular in order to establish whether unlawful, including excessive force was used in the quelling of the riots.**

#### *4.2. Grounds for detention*

The Constitution of Malta provides, in Article 34.1(j), that a person may be detained “for the purpose of preventing the unlawful entry of that person into Malta, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Malta or the taking of proceedings relating thereto or for the purpose of restraining that person while he is being conveyed through Malta in the course of his extradition or removal as a convicted prisoner from one country to another.”

According to the *Immigration Act 1970*, any “prohibited immigrant” subject to a removal order “shall be detained until he is removed from Malta”, unless the person is subject to criminal proceedings for a crime punishable with imprisonment or is serving a sentence, in which case the Minister for Justice and Home Affairs can direct that the concerned person serves the sentence before removal.<sup>71</sup> The detention of undocumented migrants is therefore considered the rule and not the exception or a measure of last resort. Any “prohibited immigrant”, or anyone suspected to be such, “may be taken into custody without warrant by the Principal Immigration Officer or by any Police Officer and while he is so kept in custody he shall be deemed to be in legal custody.”<sup>72</sup> The “prohibited immigrant” can always decide to voluntarily leave Malta.<sup>73</sup>

Article 5 of S.L. 217.12 provides that “where it is necessary for the Principal Immigration Officer to confirm the identity of the third country national concerned, to obtain the necessary documents, or it is possible to return the third country national concerned he shall place in custody the third country national who does not return within the period granted to him in the return decision.”

A migrant must not be detained before the elapse of the voluntary departure order, unless the option has been refused on one of the grounds specified in paragraph

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<sup>71</sup> Article 14.2, *Immigration Act 1970*.

<sup>72</sup> Article 16, *Immigration Act 1970*.

<sup>73</sup> Article 14.3, *Immigration Act 1970*.

3.2.<sup>74</sup> The removal order is accompanied by an entry ban, which may also be issued in cases of serious threat to public policy, national security or public security, or at the discretion of the PIO. The entry ban must not exceed five years.<sup>75</sup>

According to the law, detention and other coercive measures to ensure deportation must be proportionate and must amount to reasonable use of force; where applicable, such measures must be executed “taking into account” fundamental rights; and they must be carried out with due respect for the dignity and physical integrity of the migrant.<sup>76</sup>

The migrant must be treated as a person awaiting trial.<sup>77</sup> The migrant has the right to establish in due time contact with a legal representative, family members and competent consular authorities, upon request and subject to paying the relevant costs.<sup>78</sup> Vulnerable persons are entitled to emergency healthcare and essential medical treatment.<sup>79</sup> The detained migrant must also be provided with information concerning the rules applied in the detention facility, his or her rights and obligations, and his or her entitlement to contact competent national, international and non-governmental organisations and bodies, which have the right to visit detention facilities upon the PIO’s authorisation.<sup>80</sup>

Unaccompanied minors may be detained only as a measure of last resort and for the shortest possible time, and shall, as far as possible, be provided with accommodation in an institution appropriate to their needs.<sup>81</sup> Minors in general must have access to leisure activities, including play and recreational activities, and state education.<sup>82</sup> The best interests of the child must be a primary consideration in the detention of the minors.<sup>83</sup> Finally, families in detention must be provided with special accommodation guaranteeing adequate privacy.<sup>84</sup>

The 2005 Policy Document of the Government *Irregular Immigrants, Refugees and Integration* (hereinafter “the 2005 Policy Document”), which has been instrumental in shaping the public policies on these categories of migrants, states that: “[a]lthough by landing in Malta without the necessary documentation and authorisation irregular immigrants are not considered to have committed a criminal offence, in the interest of national security and public order they are still kept in detention until their claim to their country of origin and other submissions are examined and verified. Irregular immigrants who, by virtue of their age and/or physical condition are considered to be vulnerable are exempt from detention and are accommodated in alternative centres.”<sup>85</sup>

In the cases where the Chapter IV system applies (see paragraph 3.3), the grounds of detention are limited to the risk of absconding and to when the third country national avoids or hinders the return or removal procedure, but only when other sufficient and less coercive measures are not applicable and only in order to carry

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<sup>74</sup> Regulation 5.2, Subsidiary Legislation no. 217.12.

<sup>75</sup> Regulation 7, Subsidiary Legislation no. 217.12.

<sup>76</sup> Regulation 5.3, Subsidiary Legislation no. 217.12.

<sup>77</sup> Article 34, Immigration Act 1970.

<sup>78</sup> Regulation 9.1 and 2, S.L. 217.12.

<sup>79</sup> Regulation 9.3, S.L. 217.12.

<sup>80</sup> Regulation 9.4 and 5, S.L. 217.12.

<sup>81</sup> Regulation 10.1 and 4, S.L. 217.12.

<sup>82</sup> Regulation 10.3, S.L. 217.12.

<sup>83</sup> Regulation 10.5, S.L. 217.12.

<sup>84</sup> Regulation 10.2, S.L. 217.12.

<sup>85</sup> *Irregular Immigrants, Refugees and Integration*, p. 11.

out the return or removal procedure. Detention must be for the shortest time as possible and only for as long as the removal procedure is in progress and is executed with due diligence.<sup>86</sup> The detention order included in the removal order must state reasons of fact and law and the third country national has the right to challenge its lawfulness before the Immigration Appeals Board, a right of which he or she must be immediately informed.<sup>87</sup> The third country national must be released if the Board finds the detention unlawful, if the removal cannot take place due to legal or other considerations, or if the grounds of detention no longer persist; or if reasonable prospects of removal no longer exist.<sup>88</sup>

Under international human rights law, detention of asylum seekers or undocumented migrants, either on entry to the country or pending deportation, must not be arbitrary and must be carried out pursuant to a legal basis.<sup>89</sup> International standards establish that, in immigration control, detention should be the exception rather than the rule, and should be a measure of last resort,<sup>90</sup> to be imposed only where other less restrictive alternatives, such as reporting requirements or restrictions on residence, are not feasible in the individual case.

For detention of a migrant to have a sufficient basis in national law, the national law must clearly provide for deprivation of liberty in the applicable circumstances. The law must provide for time limits that apply to detention, and for clear procedures for imposing, reviewing and extending detention.<sup>91</sup> Furthermore, there must be a clear record regarding the arrest or bringing into custody of the individual.<sup>92</sup>

The Commissioner for Human Rights of the Council of Europe, Thomas Hammarberg, determined in his 9 June report that the Maltese policy of mandatory detention is “irreconcilable with the requirements of the European Convention on Human Rights (ECHR) and the case-law of the Strasbourg Court, especially following the latter’s July 2010 judgment in the case of *Louled Massoud*.”<sup>93</sup>

The ICJ likewise considers the immigration detention policy of Malta to be incompatible with its obligations under international human rights law. Mandatory detention of undocumented migrants is clearly contrary to the European Convention on Human Rights and the International Covenant on Civil and Political Rights. As the European Court pointed out (see, Box no. 3), the grounds of detention in Maltese law are not clear enough and allow too much discretion to the Principal Immigration Officer. The ICJ underscores the view of the European Court of Human Rights that, due to the small size of Malta, other alternatives to detention must be possible, as flight from the island is highly unlikely. Furthermore, the ICJ believes that the policy of mandatory detention for up to 18 months may lead to situations of degrading treatment in breach of Article 3 ECHR, Article 7 ICCPR and Article 16 CAT. **The ICJ calls on the Maltese authorities to revise the policy of mandatory detention and to**

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<sup>86</sup> Regulation 11.8 of S.L. 217.12

<sup>87</sup> Regulations 11.9-11 of S.L. 217.12

<sup>88</sup> Regulations 11.12-13 and 16 of S.L. 217.12

<sup>89</sup> Article 9 ICCPR, Article 5 ECHR.

<sup>90</sup> UN Working Group on Arbitrary Detention (WGAD), *Annual Report 2008*, UN Doc. A/HRC/10/21, 16 February 2009, paras. 67 and 82; *European Guidelines on accelerated asylum procedures*, CMCE, *op. cit.*, fn. 39, principle XI.1. See also, *Conclusion No. 7 (XXVIII) Expulsion*, UNHCR, ExCom, 28<sup>th</sup> Session, 1975, para. e. See also, *Conclusion No. 44 (XXXVII) Detention of Refugees and Asylum-Seekers*, ExCom, UNHCR, 37<sup>th</sup> Session, 1986, para. B; *Concluding Observations on Bahamas*, CERD, UN Doc. CERD/C/64/CO/1, 28 April 2004, para. 17.

<sup>91</sup> *Abdolkhani and Karimnia v. Turkey*, ECtHR, Application no. 30471/08, 22 September 2009.

<sup>92</sup> *Tehrani and Others v. Turkey*, ECtHR, Applications Nos. 32940/08, 41626/08, 43616/08, Judgment of 13 April 2010.

<sup>93</sup> Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Malta from 23 to 25 March 2011, Coe Doc. CommDH(2011)17, Strasbourg, 9 June 2011, Summary.



**apply administrative detention on a case-by-case basis and only where necessary as a last resort.**

#### 4.3. Length of administrative detention

The 2005 Policy Document provides that in all cases the maximum length of administrative detention is 18 months for undocumented migrants and 12 months for asylum seekers. It maintains that “[i]rregular immigrants will remain in closed reception centres until their identity is established and their application for asylum processed. No immigrant shall, however, be kept in detention for longer than eighteen months.”<sup>94</sup>

It also declares that “[a]sylum seekers who have exhausted all legal remedies to their application under the Refugees Act (Cap 420) will be considered prohibited immigrants in terms of the Immigration Act (Cap 217) and shall be detained in custody until such a time as they are removed from Malta in terms of the conditions laid down in the same Act.”<sup>95</sup> The maximum length of 12 months detention for asylum seekers is derived from the obligation to allow the asylum seeker to work after one year from his or her application, expressed in Article 10 of the *Reception of Asylum Seekers (Minimum Standards) Regulation*.<sup>96</sup>

The maximum length of administrative detention in the Chapter IV system is of 18 months, which is six months extendable to 18 months, where there is lack of cooperation, delays in obtaining the necessary documents, or at the discretion of the Principal Immigration Officer.<sup>97</sup> The S.L. provides for the possibility to prolong the times of judicial review in cases of large arrivals of third country nationals or when detention is extended.<sup>98</sup>

As outlined in the previous paragraph, international human rights law requires that the primary legislation framing the detention legal regime must provide for time limits that apply to detention, and for clear procedures for imposing, reviewing and extending detention.<sup>99</sup> Both the ICCPR and the ECHR require that the length of detention be as short as possible, and the more detention is prolonged, the more it is likely to become arbitrary.<sup>100</sup> Excessive length of detention, or uncertainty as to its duration, may also raise issues of cruel, inhuman or degrading treatment, and the Committee against Torture has repeatedly warned against the use of prolonged or indefinite detention in the immigration context.<sup>101</sup> In order for detention to be justified, the State must establish that deportation is being pursued with due diligence.<sup>102</sup>

The European Court of Human Rights has challenged the mandatory detention policy on the grounds of the respect of the principle of legality (see, Box no. 3). The Parliamentary Assembly of the Council of Europe in 2008 recommended that

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<sup>94</sup> 2005 Policy Document, p. 11

<sup>95</sup> 2005 Policy Document, p. 15

<sup>96</sup> Available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10662&l=1>

<sup>97</sup> Regulations 11.14-15 of S.L. 217.12

<sup>98</sup> Regulations 11.17-18 of S.L. 217.12

<sup>99</sup> *Abdolkhani and Karimnia v. Turkey*, ECtHR, op. cit., fn. 91.

<sup>100</sup> See, WGAD, *Annual Report 1998*, op. cit., fn. 39, para. 69, Guarantee 10; WGAD, *Annual Report 1999*, op. cit., fn. 39, Principle 7; UN Working Group on Arbitrary Detention (WGAD), *Annual Report 2008*, UN Doc. A/HRC/10/21, 16 February 2009, paras 67 and 82.

<sup>101</sup> *Concluding Observations on Sweden*, CAT, UN Doc. CAT/C/SWE/CO/2, 4 June 2008, para. 12; *Concluding Observations on Costa Rica*, CAT, UN Doc. CAT/C/CRI/CO/2, 7 July 2008, para. 10.

<sup>102</sup> *Chahal v. United Kingdom*, ECtHR, op. cit., fn. 27, para.113; *Kolompar v. Belgium*, ECtHR, Application No. 11613/85, Judgment of 24 September 1992, paras. 40-43.

“Malta should re-examine its policy of systematic and excessive periods of detention which can be for up to 18 months for irregular migrants and 12 months for asylum seekers”<sup>103</sup>

The ICJ considers that by expressing a maximum length of detention only in policy documents rather than in primary legislation, Malta is acting contrary to the principle of legality under international law, since in law there is no defined limit to the period for which a migrant may be detained. **The ICJ recommends that maximum terms for administrative detention be defined in primary legislation.**

The ICJ also considers that the period 18 months of administrative detention is *per se* contrary to the requirement under Article 5.1.f of the European Convention on Human Rights and with the proportionality requirement of Article 9 ICCPR, as no deportation procedure lasting that long can be said to have been undertaken with due diligence. The ICJ is mindful that such length is provided for by the EU Return Directive, but only as an option. **The ICJ recommends that Malta reduce the period of maximum detention and that it link, in primary legislation, the length of detention with effective due diligence in deportation procedures.**

#### *4.4. Conditions of Detention*

The Maltese Constitution provides that “[a]ny person who is arrested or detained shall be informed at the time of his arrest or detention, in a language that he understands, of the reasons for his arrest or detention: provided that if an interpreter is necessary and is not readily available or if it is otherwise impracticable to comply with the provisions of this sub-article at the time of the person’s arrest or detention, such provisions shall be complied with as soon as practicable.”<sup>104</sup>

Article 36.1 of the Constitution enshrines the right that “[n]o person shall be subjected to inhuman or degrading punishment or treatment.”

According to Maltese law, a third country national “shall be provided with information concerning the rules applied in the detention facility, his rights and obligations, and his entitlement under Maltese law to contact”<sup>105</sup> national, international and non-governmental organisations. Secondary legislation provides that vulnerable persons “shall be provided with emergency health care and essential treatment of illness.”<sup>106</sup>

A third country national is “allowed on request and subject to costs to be borne by him to establish in due time contact with legal representatives, family members and competent consular authorities.”<sup>107</sup> S.L. 217.12 provides that, subject to the authorisation of the Principal Immigration Officer, “the competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities.”<sup>108</sup>

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<sup>103</sup> Europe’s “boat people”: mixed migration flows by sea into southern Europe, Parliamentary Assembly of the Council of Europe, Doc. 11688, 11 July 2008, available at <http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ID=777>.

<sup>104</sup> Article 34.2, Constitution.

<sup>105</sup> Regulation 9.5 of S.L. 217.12; see also, *Detention Centre Rules and Standing Instructions*, September 2006, Article 11.

<sup>106</sup> Regulation 9.3 of S.L. 217.12

<sup>107</sup> Regulation 9.2 of S.L. 217.12

<sup>108</sup> Regulation 9.4 of S.L. 217.12

The same secondary legislation provides that unaccompanied minors and families with minors “shall only be detained as a measure of last resort and for the shortest period of time possible.”<sup>109</sup> An unaccompanied minor must be placed, as far as possible, in an institution provided with personnel and facilities which take into account the needs of a person of his or her age.<sup>110</sup> A minor must have access to leisure activities and state education, “depending on the length of his stay”.<sup>111</sup> S.L. 217.12 provides that the best interest of the child “shall be a primary consideration in the detention of minors pending removal.”<sup>112</sup>

It also provides that a family shall be placed in separate accommodation guaranteeing adequate privacy.<sup>113</sup>

#### 4.4.1. General Principles

Facilities where migrants are detained must provide conditions that are sufficiently clean, safe, and healthy to be compatible with freedom from torture or other cruel, inhuman or degrading treatment (“ill-treatment”) and the right to be treated with humanity and with respect for the inherent dignity of the human person (Article 10 ICCPR). Economic pressures or difficulties caused by an increased influx of migrants cannot justify a failure to comply with the prohibition on torture or other ill-treatment, given its absolute nature.<sup>114</sup> The threshold of inhuman or degrading treatment, which is prohibited under Article 16 CAT, as well as Article 3 ECHR, Article 7 ICCPR, and Articles 1 and 4 EU Charter can also be met in the following cases:

- poor or overcrowded conditions of detention;<sup>115</sup>
- inadequate healthcare or access to essential medicines for detainees;<sup>116</sup>
- continued detention, where the mental health condition of a detainee is caused or exacerbated by his or her detention, and where the authorities are aware of such conditions;<sup>117</sup>
- inadequate mental healthcare, alone or in combination with other inappropriate conditions of detention;<sup>118</sup>
- finally, the cumulative effect of a number of poor conditions may lead to violation of the prohibition on ill-treatment.<sup>119</sup> The longer the period of detention, the more likely that poor conditions will cross the threshold of ill-treatment.<sup>120</sup>

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<sup>109</sup> Regulation 10.1 of S.L. 217.12

<sup>110</sup> Regulation 10.4 of S.L. 217.12

<sup>111</sup> Regulation 10.3 of S.L. 217.12

<sup>112</sup> Regulation 10.5 of S.L. 217.12

<sup>113</sup> Regulation 10.2 of S.L. 217.12

<sup>114</sup> *M.S.S. v. Belgium and Greece*, ECtHR, *op. cit.*, fn. 48, paras. 223-224.

<sup>115</sup> *The CPT Standards*, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CoE Doc. CPT/Inf/E (2002) 1 - Rev. 2010, Strasbourg, December 2010 (“CPT Standards”), Safeguards for Irregular Migrants Deprived of their Liberty, Extract from the 19th General Report [CPT/Inf (2009) 27], p. 61, paras. 85-89.

<sup>116</sup> *Hurtado v. Switzerland*, ECtHR, Application No. 17549/90, Judgment of 28 January 1994; *Mouisel v. France*, ECtHR, Application No. 67263/01, Judgment of 14 November 2002, para. 40; *Keenan v. United Kingdom*, ECtHR, Application No. 27229/95, Judgment of 3 April 2001, para. 111; *Aleksanyan v. Russia*, ECtHR, Application No. 46468/06, Judgment of 22 December 2008, para. 137; *Kotsaftis v. Greece*, ECtHR, Application no. 39780/06, 12 June 2008.

<sup>117</sup> *C. v. Australia*, CCPR, Communication no. 900/1999, 13 November 2002, para. 8.4.

<sup>118</sup> *Musial v. Poland*, ECtHR, Application No. 28300/06, Judgment of 20 January 2009, para. 96; *Madafferi and Madafferi v. Australia*, CCPR, Communication no. 1011/2001, 26 August 2004.

<sup>119</sup> *Dougoz v. Greece*, ECtHR, Application No. 40907/98, Judgment of 6 March 2001; *Z.N.S. v. Turkey*, ECtHR, Application No. 21896/08, Judgment of 19 January 2010; *Charahili v. Turkey*, ECtHR, Application no. 46605/07, 13 April 2010; *M.S.S. v. Belgium and Greece*, ECtHR, *op. cit.*, fn. 48, paras. 230-233.

<sup>120</sup> *Riad and Idiab v. Belgium*, ECtHR, Applications Nos. 29787/03 and 29810/03, Judgment of 24 January 2008, para. 107.

Furthermore, adequate conditions of detention must also be guaranteed under the State's obligation to respect, protect and fulfil the right of everyone to an adequate standard of living (Article 11 of the *International Covenant on Economic, Social and Cultural Rights*), which also includes the right to adequate housing, to water and to food.

Under international human rights law and standards, the authorities are required to ensure that sufficient information is available to detained persons in a language they understand, regarding the nature of their detention, the reasons for it, the process for reviewing or challenging the decision to detain. For the information to be accessible, it must also be presented in a form that takes account of the individual's level of education, and legal advice may be required for the individual to fully understand his or her circumstances.<sup>121</sup>

International human rights law imposes further constraints on the place and regime of detention of migrants, the conditions of detention, and the social and medical services available to detainees.<sup>122</sup> Article 10.1 ICCPR makes specific provision for the right of detained persons to be treated with humanity and respect for their dignity.<sup>123</sup>

#### 4.4.2. Location

The Safi Barracks' detention centres, Warehouse One and B-Block, and the Lyster Barracks detention centres are located in the two military bases and subject to military jurisdiction. The International Commission of Jurists notes that the situation of such detainees in such military bases at odds with international law and standards. Guidance of the Committee for the Prevention of Torture (CPT) stipulates that, except for short periods, detained migrants should be held in specifically designed centres in conditions tailored to their legal status and catering for their particular needs.<sup>124</sup> Furthermore, holding a detainee in a facility which is inappropriate in respect of the grounds on which he or she is held (for example for the prevention of unlawful entry or pending deportation under Article 5.1(f)) may violate the right to liberty.<sup>125</sup> In general, under international human rights law, it has been recognised that the detention of migrants in unsuitable locations, including police stations or prisons, may lead or contribute to violations of freedom from torture or cruel, inhuman or degrading treatment.<sup>126</sup>

The ICJ considers that the very location of these administrative detention centres for undocumented migrants, in military barracks, is in conflict with the purpose of the detention, which is strictly to prevent unlawful entry or with a view to deportation, and that the continued, long-term use of a military barracks for immigration detention is likely to mean that that detention is not "lawful" under Article 5.1.f of the ECHR. **The ICJ recommends that Maltese authorities identify promptly and, in conformity with international standards on the treatment of detainees, make**

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<sup>121</sup> *Nasrulloev v. Russia*, ECtHR, Application No. 656/06, Judgment of 11 October 2007, para. 77; *Chahal v. United Kingdom*, ECtHR, *op. cit.*, fn. 27, para. 118; *Saadi v. United Kingdom*, ECtHR, Grand Chamber, Application no. 13229/03, 29 January 2008, para. 74; *Abdolkhani and Karimnia v. Turkey*, ECtHR, *op. cit.*, fn. 583, paras.131-135; *Amuur v. France*, ECtHR, *op. cit.*, fn. 45; *Soldatenko v. Ukraine*, ECtHR, *op. cit.*, fn. 91. See also, WGAD, *Annual Report 1998*, *op. cit.*, fn. 39, para. 69, Guarantees 1 and 5; WGAD, *Annual Report 1999*, *op. cit.*, fn. 39, Principles 1 and 8; WGAD, *Annual Report 2008*, *op. cit.*, fn. 100, paras. 67 and 82.

<sup>122</sup> See, Articles 2, 11, and 16 CAT; Article 7 ICCPR; Article 3 ECHR;

<sup>123</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights Commentary*, 2<sup>nd</sup> Revised Edition, N.P. Engel Publisher, 2005 (Nowak, *ICCPR Commentary*), pp.245-250.

<sup>124</sup> *CPT Standards*, *op. cit.*, fn. 115, page 54, Extract from 7<sup>th</sup> General Report [CPT/Inf (97) 10], para. 29; *European Guidelines on accelerated asylum procedures*, CMCE, *op. cit.*, fn. 39, Principle XI.7.

<sup>125</sup> *Aerts v. Belgium*, ECtHR, Application No. 25357/94, Judgment of 30 July 1998, para. 46.

<sup>126</sup> Under Article 7 and 10.1 ICCPR; Article 3 ECHR.

**operational alternative places of administrative detention outside of military facilities and expeditiously take measures to transfer the detainees to the non-military facilities.**

#### 4.4.3. Overcrowding and privacy

The ICJ delegation found the conditions of Warehouse One of the Safi Barracks to be overcrowded. Even without the possibility of counting the number of detainees held there, the delegation was readily struck by its plain unsuitability in respect of the amount of detainees it held. The distance between the lines of bunk beds was just enough for one person to stand in. There were no cells or bedrooms, the detention centre being constituted of a single open space. There was absolutely no space for even a minimal level of privacy. A lesser, though still worrisome, situation of overcrowding existed in B-Block of the Safi Barracks at the time of the ICJ visit. While this centre was provided with open cells, these were overcrowded with bunk beds, and the only privacy was that which had been tentatively achieved through hanging blankets from the top of the bunks.

The European Commissioner for Human Rights had visited the Safi Barracks in March 2011, several months prior to the ICJ's visit, and despite his relatively positive findings due to the low number of detainees there, he estimated that "most of the persons (approximately 1 100) who have arrived from Libya since his visit have been placed in detention centres. This is naturally bound to have a significant impact on the adequacy of the conditions in these centres."<sup>127</sup>

The facility for couples at the Lyster Barracks did not exhibit such serious overcrowding. According to statements of the detainees, the rooms have a bed-capacity of around 20 people each and were hosting at the moment around 16-18 persons per room. Although the situation did not reach the level of overcrowding, the centre still presented problematic situations for the respect of the detainees' right to privacy, particularly in consideration of the fact that they were couples and that privacy could only be "ensured" by blankets hanging from the superior bunk bed.

#### 4.4.4. Hygienic conditions

In the Warehouse One, the ICJ delegation noted that hygienic needs of the detainees were provided for only by a couple of basins, located in the external recreation-yard. These basins were the main source of water for the detainees, which they used to clean, wash items and drink. There were also plastic showers without hot water. In the same external space were located plastic chemical toilets, which appeared unsanitary despite the fact that one of the detainees volunteers to clean them. The number of toilets and showers appeared to the delegation to be insufficient in comparison to the number of people detained. In B-Block, the kitchen and the bathroom, in this case located at the interior of the detention yard, appeared rather dirty. By contrast, the Lyster Barracks facility visited did not appear to present serious problems of hygienic maintenance.

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<sup>127</sup> Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Malta from 23 to 25 March 2011, Coe Doc. CommDH(2011)17, Strasbourg, 9 June 2011, paragraph 20.

#### 4.4.5. Lack of leisure facilities

The ICJ delegation found a lack of leisure facilities in all three detention facilities visited. In Warehouse One, the only entertainment was provided by a single television in the main common room and by the recreation-yard. In B-Block, there was also a recreation-yard, although of rather limited dimensions, and the detainees expressly complained of the lack of means of recreation, claiming that they had only one ball at their disposal. No books seemed to be present in the detention facilities. In the Lyster Barracks there was also a small recreation yard, but without direct access from the detention section. Detainees had two hours per day of “air” in the courtyard. They reportedly seldom receive visits from outside, apart from the occasional NGO.

#### 4.4.6. Other material conditions

While B-Block and the Lyster Barracks detention centre, at the time of the ICJ visit, had at their disposal very basic cooking facilities, the migrants detained in Warehouse One had their food brought from external providers and had no facilities for cooking. This was, in particular, due to the structure of the detention centre, which does not allow for a kitchen big enough for all detainees to be established.

In Warehouse One, the detainees complained about the clothing provided to them. According to them, clothes were given to them through charity and some of them were wearing very worn out t-shirts.

Finally, in Warehouse One, detainees complained about the maintenance of the detention space. Some detainees told the ICJ delegation that the detention centre had been recently cleaned up and that a window (from which water entered during rain) had been repaired just a couple of days before the visit.

#### 4.4.7. Conclusions on conditions of detention

The ICJ considers that in Safi Barracks, the accumulation of poor conditions of detention, including sanitary conditions, together with the apparent existence of cases of psychological instability, with the lack of leisure facilities, the overcrowded conditions and the mandatory length of 18 months of detention **brought, at the time of the visit, the situation in the detention centre beyond the threshold of degrading treatment, and therefore in violation of Article 3 ECHR, Articles 1 and 4 EU Charter, Article 7 ICCPR and Article 16 CAT.** It should be stressed that this situation did not appear to be due the actions of the detention personnel, who, on the contrary, showed concern for the interests of the detainees, and a willingness to do their best for detainee’s welfare within the constraints of their situation. The ICJ also accepts that the effects of the detention regime were not created intentionally by the Maltese authorities. It was however, a situation created by the authorities’ lack of capacity and preparedness to deal with a sudden rise in the number of migrant arrivals, together with the policy of mandatory detention. **The ICJ recommends that the Government ameliorate the conditions of detention in the administrative detention centres, and in particular in the Safi barracks, by:**

- improving and increasing the number of sanitary facilities such as toilets, washbasins and showers;
- ensuring at least a minimal level of privacy to detainees;
- improving the leisure facilities and access to recreation;

- **avoid overcrowding by reforming the system of detention in light of the recommendations in section 4.2.**

**Beyond these immediate measures, the Maltese authorities should reduce dependence on detention through an effective plan of alternatives to detention, with detention being only the last recourse. As regards those detainees who do remain in detention, Malta should plan for a shift from detention in military camps to other facilities outside of military compounds and run by civilians.**

#### *4.5. Mental health cases, healthcare and screening*

In its 2005 Policy Document, the Ministry for Justice and Home Affairs and the Ministry for the Family and Social Solidarity declared that “[i]rregular immigrants who, by virtue of their age and/or physical condition, are considered to be vulnerable are exempt from detention and are accommodated in alternative centres.”<sup>128</sup> It also stated that “[a]dministrative procedures are in place to release such irregular immigrants from detention once their identification has been determined and they have been medically screened and cleared.”<sup>129</sup> More specifically, it is provided that “[v]ulnerable persons such as elderly persons, persons with disability, lactating mothers and pregnant women shall, where appropriate, not be kept in detention but will be provided with alternative accommodation. Monitoring is to be conducted on particular cases to confirm whether detention remains admissible.”<sup>130</sup>

The screening of vulnerable people in detention in order to ensure their immediate release is carried out by a Vulnerable Adults Assessment Team and an Age Assessment Team, to identify children, who are under the authority of the Agency for the Welfare of Asylum Seekers, which inherited this competence from the Organisation for the Integration and Welfare of Asylum Seekers (OIWAS).<sup>131</sup> Assessment and verification of those being considered vulnerable is reportedly based on in-depth interview observations and consulting with mainly medical professionals.

The Government of Malta, in its replies to the report by the European Commissioner for Human Rights of June 2011, affirmed that “In the case of large-scale arrivals, human and material resources come under pressure. It is crucial to provide a controlled environment to facilitate prioritizing vulnerable cases. If migrants were released directly into the community on their arrival many would probably end up without access to basic needs, housing and the labour market and would be open to abuse and exploitation. Those who do not qualify for protection and face eventual deportation would be tempted to abscond the island or ‘get lost’ in the country. The Maltese authorities are satisfied that irregular immigrants have more than adequate access to medical services and are not aware of a single case of homelessness. The policy of detention contributes this orderly state of affairs.”<sup>132</sup>

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<sup>128</sup> 2005 Policy Document, p. 11.

<sup>129</sup> 2005 Policy Document, p. 12.

<sup>130</sup> 2005 Policy Document, p. 13.

<sup>131</sup> See reference in the governmental document: Malta’s Multi Annual Programme for 2008-2013 for the European Refugee Fund, under the ‘Solidarity and Management of Migration Flows’ framework programme, 2007, p. 9.

<sup>132</sup> Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Malta from 23 to 25 March 2011, Coe Doc. CommDH(2011)17, Strasbourg, 9 June 2011.

The *Detention Centre Rules and Standing Instructions*<sup>133</sup> are considered by the Government of Malta as the administrative regulations concerning treatment of detainees, including persons held in administrative detention centres for undocumented migrants. These rules recall that “[t]he purpose of detention centres shall be to provide for the secure but human accommodation of detained persons in a relaxed regime with as much freedom of association as possible, consistent with maintaining a safe and security environment [and that] [d]ue recognition will be given to the need for awareness of the particular anxieties to which detained persons may be subject and the sensitivity that this will require, especially when handling issues of ethnic and cultural diversity.”<sup>134</sup>

Under international human rights law and standards, detention of persons rendered vulnerable by their age, state of health or past experiences may, depending on the individual circumstances of the case, amount to cruel, inhuman or degrading treatment. This principle can be particularly significant in relation to detention of asylum seekers, who may have suffered torture or ill-treatment or other traumatic experiences, sometimes with physical or mental health implications.<sup>135</sup>

In Warehouse One and in B-Block, the ICJ delegation witnessed some of the detainees appearing to show signs of mental instability or weakness. **Although the ICJ delegation has no particular expertise to evaluate the existence or the level of mental stress among detainees, there appeared to be a need for greater attention to the psychological effects of detention for prolonged periods in these facilities and conditions, and for appropriate mental healthcare to be provided to the detainees.**

In B-Block, the ICJ delegation was approached by one detainee showing a medical certificate stating that he was not fit to stay in detention with the doctor asking for him to be transferred to an open centre. Apparently the certificate, though communicated to the authorities, had not assured his release or transfer at the time of the visit.

In the Lyster Barracks, detainees raised problems with the granting of health treatment, including emergency care. A detainee attested that, when a doctor is called, it might take up to four days before the medical consultation actually takes place. Another issue was centred on vulnerability assessments or, better, the lack of them. A woman was said to have undergone significant surgery twice but still remained in detention. There were some detained women who were clearly pregnant. Another detainee showed the delegation a medical certificate attesting that he should be released, but, despite this fact having been communicated to the authorities, he had not yet been released. Detainees made reference to cases of TB, anxiety and also gynaecological problems. The ICJ delegation also identified the presence of quite elderly couples among the detainees.

Given the importance of ensuring that vulnerable persons are not detained, as provided by national and international law, the ICJ **recommends that screening procedures be conducted frequently, at regular and periodic intervals, and that communications regarding medical and other serious concerns by detainees are addressed with the utmost priority.**

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<sup>133</sup> Available at <http://www.cpt.coe.int/documents/mlt/2011-06-inf-annex5b.pdf>.

<sup>134</sup> Detention Centre Rules and Standing Instructions, September 2006, Article 10.

<sup>135</sup> See, UNHCR Revised Guidelines on the Detention of Asylum Seekers, Guideline 7.



#### 4.6. Access to lawyers and legal assistance

During the visit in B-Block of the Safi Barracks, the ICJ delegation was told by the detainees that they were not provided with appropriate and effective legal aid and that the lawyers sometimes failed to ask about or listen to their individual accounts.

The ICJ emphasises that, under international human rights law, migrants brought into detention have the right to prompt access to a lawyer, and must be promptly informed of this right.<sup>136</sup> Under international standards, detainees should have access to legal advice and facilities for confidential consultation with their lawyer at regular intervals thereafter. Where necessary, free legal assistance should be provided. Translation of key legal documents, as well as interpretation during consultations with the lawyer, should be provided where necessary. Facilities for consultation with lawyers must be such as to ensure respect the confidentiality of the lawyer-client relationship.<sup>137</sup>

The ICJ is concerned at allegations heard from detainees that public lawyers do not always provide effective representation to detained migrants. It was suggested that lawyers sometimes spoke only very briefly to detainees, and did not, or did not have time to, advise them in detail or gather sufficient information on their cases. While it was not suggested that this problem applied to all legal representation for detained migrants, the ICJ **recommends that measures and policies be implemented to ensure that migrants and asylum seekers be guaranteed thorough and effective legal representation for their asylum claims, including for any other legal issues that may arise from their detention.**

#### **Box no. 5. Detention Monitoring Mechanisms**

Malta is a party to the *Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and to the *European Convention for the Prevention of Torture and Other Inhuman or Degrading Treatment or Punishment*.

In relation to the detention of migrants, Malta has instituted on 18 September 2007 with Subsidiary Legislation 217.08 the Board of Visitors for Detained Persons, a body which is meant to be the National Prevention Mechanism (NPM) under OPCAT.

The Board of Visitors is empowered to visit places of detention at any time and also without previous notice. It is in charge, for the purpose of detention monitoring, to:

- Control the treatment of detainees, the state of the detention centres premises and their administration;
- Monitor the disciplinary system, including attending disciplinary hearings; and
- Inquire and report on any matter they deem proper or the minister requests them to.

The Board must visit and inspect detention centres not less than once a month, interview detainees, asking them if they have complaints, and it must interview any

<sup>136</sup> *Concluding Observations on Australia*, CCPR, Report of the Human Rights Committee to the General Assembly, 55<sup>th</sup> Session, Vol.I, UN Doc. A/55/40 (2000), para. 526. See also, Article 17.2(d), CPED; WGAD, *Annual Report 1998*, *op. cit.*, fn. 39, para. 69, Guarantees 6 and 7; WGAD, *Annual Report 1999*, *op. cit.*, fn. 39, Principle 2; *European Guidelines on Accelerated Asylum Procedures*, CMCE, *op. cit.*, fn. 39, Guideline XI.5 and 6.

<sup>137</sup> *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 40, Guideline 5(ii); *Body of Principles for the Protection of all persons deprived of their liberty*, Principle 18.

detainee wishing to make a complaint. It keeps records of visits and complaints and deals with the latter without undue delay.

The Board's decisions on complaints are not binding on the Head of detention, which has, however, the duty to take serious cognizance of the recommendations and to enter into a dialogue with the Board. When the Head of detention deems that the recommendations of the Board cannot be implemented for "reasons which are in the best interest of the detention centre administration", he or she must inform in writing the Board and the Minister.

The Board must inform immediately the Minister of any abuses which come to its knowledge and has the power to recommend the appropriate disciplinary actions to be taken against any officer.

## 5. Reception Centres

Once a migrant who arrived in an undocumented fashion to Malta has “served” his or her term of detention of 12 months, in the case of an asylum seeker, or of 18 months, in the case of a rejected asylum seeker or undocumented migrant, the system provides that he or she be released from administrative detention. If a removal order has been directed against the migrant, this would mean that it was not possible to execute his or her deportation in the 18 months preceding the release. Otherwise, the release, including if it was granted before the term’s expiration, would mean that the migrant had been recognised as entitled to some form of international protection. This protection could take the form of refugee status, subsidiary protection or other forms of humanitarian protection. A migrant could also be released on account of his or her vulnerable status, i.e. because of being sick, elderly or pregnant, or under 18 years of age.

In all these situations, the primary concern of the migrant and of the State administration is that of accommodation. In Malta, migrants are hosted in “open centres”, i.e. reception centres. As this section of the report will show, open centres differ greatly, sometimes according to the group of people they accommodate, but other times also depending on those responsible for their administration. Although there is a common legal and policy framework, the issues and conditions in each centre differ. This chapter will therefore first consider the national legal framework and policy basis for reception centres, and then summarise relevant international human rights standards, before assessing the situation in the reception centres visited, in light of these standards.

### 5.1 National legislation

The legislation related to reception centres, conditions and guarantees is very limited and generally confined to the implementation of the EU Reception Directive 2003/9/EC, enacted by Subsidiary Legislation 420.06 entitled *Reception of asylum seekers (Minimum Standards) Regulations* of 2005, keeping also in mind that most of the persons hosted in the open centres are not asylum seekers and, hence, are not covered by such legislation. Most of the standards and policy concerning residents in open centres are contained in Governmental guidelines or administrative practices.

The legislation states that, for asylum seekers in reception centres, “material reception conditions shall be such as to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence; the authorities [...] shall moreover ensure that that standard of living is met in the specific situation of persons who have special needs [...] as well as in relation to the situation of persons who are in detention.”<sup>138</sup>

These material conditions and health care are “subject to the condition that applicants do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence.”<sup>139</sup>

The adequate standard of living criterion is also valid when accommodation is provided in kind.<sup>140</sup> Authorities responsible for such accommodation must ensure

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<sup>138</sup> Subsidiary Legislation 420.06, *Reception of asylum seekers (Minimum Standards) Regulations* of 2005, Regulation 11.2.

<sup>139</sup> Subsidiary Legislation 420.06, *Reception of asylum seekers (Minimum Standards) Regulations* of 2005, Regulation 11.3.

protection of the residents' family life and the possibility to communicate with relatives, legal advisers and UNHCR and NGO representatives.<sup>141</sup>

Finally, the law provides that "account shall be taken of the specific situation of vulnerable persons which shall include minors, unaccompanied minors and pregnant women, found to have special needs after an individual evaluation of their situation."<sup>142</sup> The best interests of the child is a primary consideration, but an "unaccompanied minor aged sixteen years or over may be placed in accommodation centres for adult asylum seekers."<sup>143</sup>

To make these legislative provisions operative and supervise their implementation, Subsidiary Legislation 217.11 established an Agency for the Welfare of Asylum Seekers (AWAS). The Agency is responsible for:

- Overseeing the daily management of accommodation facilities either directly or through subcontracting agreements;
- Providing particular services to categories of persons identified as vulnerable;
- Providing information programmes to its "clients" in the areas of employment, housing, education, health and welfare services offered under national schemes;
- Acting as a facilitator with all public entities responsible for providing services to ensure that national obligations to refugees and asylum seekers are accessible;
- Promoting Government policy and schemes on resettlement and voluntary returns;
- Working with public stakeholders and, where possible, offering its services to asylum seekers accommodated in other reception centres not under its direct responsibility.<sup>144</sup>

The regulation also entrusts AWAS with data gathering, reporting, advising on policies and new developments and networking with local organisations in the field of asylum.

## 5.2. International Law

International human rights law applies in its entirety to people accommodated in open centres. Furthermore, migrants and asylum seekers in open centres are not kept in detention, although they may sometimes experience certain restrictions to their freedom of movement. They therefore enjoy fully their right to liberty without the restrictions or conditions attached to it by the power of the State to detain someone to impede unlawful entry or to undertake an expulsion.

Article 13.2 of the Reception Directive (Directive 2003/9/EC) states that "Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of the applicants and capable of ensuring their subsistence".

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<sup>140</sup> Subsidiary Legislation 420.06, *Reception of asylum seekers (Minimum Standards) Regulations* of 2005, Regulation 12.1.

<sup>141</sup> Subsidiary Legislation 420.06, *Reception of asylum seekers (Minimum Standards) Regulations* of 2005, Regulation 12.2.

<sup>142</sup> Subsidiary Legislation 420.06, *Reception of asylum seekers (Minimum Standards) Regulations* of 2005, Regulation 14.1.

<sup>143</sup> Subsidiary Legislation 420.06, *Reception of asylum seekers (Minimum Standards) Regulations* of 2005, Regulation 14.2-3.

<sup>144</sup> Regulation 6, S.L. 217.11.

### 5.2.1. Situations amounting to cruel, inhuman or degrading treatment

The European Court of Human Rights has held that in certain cases where, contrary to standards or duties in its own national law, including its obligations under EU law, the State fails to provide for the basic material needs of asylum seekers, the extreme poverty and destitution that results, in combination with uncertainty as to how long such destitution will continue, will violate the freedom from inhuman or degrading treatment under Article 3 ECHR.<sup>145</sup>

The Court found in *M.S.S. v. Belgium and Greece* that the prohibition of degrading treatment under Article 3 ECHR was violated for an asylum seeker who “spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving.”<sup>146</sup>

The UN Committee against Torture held that particularly poor conditions of housing might amount to cruel, inhuman or degrading treatment under Article 16 CAT and equivalent provisions in other treaties.<sup>147</sup>

A situation of degrading treatment may also touch upon the right to human dignity.<sup>148</sup> This right is expressly included in Article 1 of the EU Charter on Fundamental Rights and its respect can be adjudicated by the Court of Justice of the European Union.<sup>149</sup>

### 5.2.2. Right to an adequate standard of living

Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”<sup>150</sup> Other rights, whose respect and realisation are necessary to the attainment of an adequate standard of living – for example the right to water and sanitation – are also protected by Article 11.<sup>151</sup>

### 5.2.3. The right to water and sanitation

The right to water “entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use.”<sup>152</sup> The right to water is intrinsically linked with the right to life and human dignity, as well as with the right to the highest attainable standard of health, the right to housing and the right

<sup>145</sup> *M.S.S. v. Belgium and Greece*, ECtHR, op. cit., fn. 48, paras.250-263.

<sup>146</sup> *M.S.S. v. Belgium and Greece*, paragraph 254.

<sup>147</sup> *Concluding Observations on Slovenia*, CAT, Report of the Committee against Torture to the General Assembly, 55th Session, UN Doc. CAT A/55/44, p. 34 (2000), para. 211.

<sup>148</sup> See also, *UNHCR conclusion no. No. 93 (LIII) – 2002 on reception of asylum-seekers in the context of individual asylum systems*, (b)(i).

<sup>149</sup> Article 1 EU Charter: “Human dignity is inviolable. It must be respected and protected.” The Court of Justice of the European Union has ruled that “‘It is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed.’” ECJ, Case C-377/98, *the Netherlands*, [2001] ECR I-07079 (judgment of 9 October 2001), para. 70.

<sup>150</sup> Article 11.1 ICESCR. See, Article 14.2(h), ICEDAW; Article 27 CRC. See also, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin*, CRC, UN Doc. CRC/GC/2005/6, 1 September 2005, para. 44; *Concluding Observations on Japan*, CERD, Report of the Committee on Elimination of Racial Discrimination to the General Assembly, 56th Session, UN Doc. A/56/18 (2001), para. 177; *Concluding Observations on Gambia*, CRC, Report of the Committee on the Rights of the Child on its 28th Session, UN Doc. CRC/C/111(2001), 28 September 2001, para. 450.

<sup>151</sup> See, *General comment No. 15, The right to water*, CESCR, UN Doc. E/C.12/2002/11, 20 January 2003., para. 3.

<sup>152</sup> CESCR, *General Comment No. 15, op. cit.*, fn. 151, para. 2. The right to water is also recognized in Article 14.2(h) CEDAW; Article 24.2(c) CRC.

to food.<sup>153</sup> Water must be available, and be of sufficient quality to be safe and healthy.<sup>154</sup> States have an immediate obligation to ensure access to the minimum essential amount of safe water, on a non-discriminatory basis,<sup>155</sup> especially for disadvantaged or marginalised groups.<sup>156</sup> States should give particular attention to those categories of people who have traditionally encountered difficulties in the enjoyment of such right, including refugees, asylum-seekers and migrants.<sup>157</sup>

The right to sanitation is fundamental to human dignity and privacy, and is linked to the right to safe water supplies and resources, as well as to rights to health and housing.<sup>158</sup> It requires States to progressively extend safe sanitation services, taking into account the particular needs of women and children.<sup>159</sup>

#### 5.2.4. The right to food

Article 11.1 ICESCR provides for the right to adequate food. In accordance with the right to be free from hunger under Article 11.2 ICESCR,<sup>160</sup> a State is “obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.”<sup>161</sup> The CESCR has recognised that the right to food is linked to the inherent dignity of the human person and indispensable for the fulfilment of other human rights.<sup>162</sup>

The right to adequate food implies the availability of “food in quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture”, and the accessibility “of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.”<sup>163</sup> The CESCR has emphasised that unjustified discrimination in access to food, or in means of its procurement, will violate Article 11.<sup>164</sup>

#### 5.2.5. Right to adequate housing

The right to adequate housing establishes a right to adequate shelter and accommodation and entails duties to respect, protect and fulfil.<sup>165</sup> The right to housing includes rights to: the right to have adequate housing with facilities essential for health, security, comfort and nutrition; housing that is habitable, safe, protects from the elements and from disease and provides adequate space; housing that is accessible to those entitled to it; and that is located so as to allow access to

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<sup>153</sup> See, *ibid.*, paras. 1 and 3.

<sup>154</sup> See, *ibid.*, para. 12.

<sup>155</sup> See, *ibid.*, para. 13.

<sup>156</sup> See, *ibid.*, para. 37.

<sup>157</sup> See, *ibid.*, para. 16.

<sup>158</sup> See, *ibid.*, para. 29.

<sup>159</sup> See, *ibid.*, para. 29. See also, Article 14.2 CEDAW; Article 24.2 CRC.

<sup>160</sup> Article 11.2 ICESCR. See also Article 24.2(c) CRC; Article 28.1 CRPD.

<sup>161</sup> *General Comment No. 12, The right to adequate food*, CESCR, UN Doc. E/C.12/1999/5, 12 May 1999, para. 14.

<sup>162</sup> *Ibid.*, para. 4.

<sup>163</sup> *Ibid.*, para. 8.

<sup>164</sup> *Ibid.*, para. 18.

<sup>165</sup> See, Article 11.1 ICESCR; Article 25.1 UDHR; Article 5(e)(iii) ICERD; Article 14.2 CEDAW; Article 27.3 CRC; Articles 16 and 31 ESC(r) [Malta did not accept Article 31 of the Charter]; Article 10 of the *Declaration on Social Progress and Development*, GA resolution 2542(XXIV), 11 December 1969; section III (8) of the *Vancouver Declaration on Human Settlements*, 1976 (Report of Habitat: United Nations Conference on Human Settlements (United Nations publication, Sales No. E.76.IV.7 and corrigendum); chap. I); Article 8(1), *Declaration on the Right to Development*, General Assembly resolution No. 41/128, UN Doc. A/RES/41/128, 4 December 1986; and *Workers' Housing Recommendation (R115)*, ILO, adopted on 28 June 1961.

employment, health-care services, schools, child-care centres and other social facilities.<sup>166</sup>

The enjoyment of the right to housing, including the prohibition of arbitrary forced evictions, must not be subject to any form of discrimination, whether caused by actions of the State or of third parties.<sup>167</sup> This principle applies to non-citizens, regardless of their status.<sup>168</sup>

Article 14 of the Reception Directive provides protection for the right to housing which must, at a minimum, ensure the right to family life and the possibility of communicating externally with relatives, UNHCR, and NGOs.

### 5.2.6. The right to health

The right to health<sup>169</sup> encompasses both the liberty to control one's own health and body, and the entitlement to a system of health protection that provides equality of opportunity for people to enjoy the highest attainable level of health.<sup>170</sup> It requires that healthcare be available and accessible to all without discrimination.<sup>171</sup> It must be affordable, including to socially disadvantaged groups, and culturally accessible to minorities.<sup>172</sup> The duty of non-discrimination in regard to the right to health includes discrimination towards migrants and asylum-seekers, regardless of their status.<sup>173</sup>

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<sup>166</sup> *General Comment No. 4, The right to adequate housing*, CESCR, UN Doc. HRI/GEN/1/Rev.9 (Vol.I), 13 December 1991, para. 8. See, *European Roma Rights Centre (ERRC) v. Greece*, ECSR, Complaint No. 15/2003, Merits, 8 December 2004, para. 24 (see §§ 42-43). See also, *ERRC v. Italy*, ECSR, Complaint No. 27/2004, Merits, 7 December 2005, para. 35; *ERRC v. Bulgaria*, ECSR, Complaint No. 31/2005, Merits, 18 October 2006, para. 34; *European Federation of National Organisations Working with the Homeless (FEANTSA) v. France*, ECSR, Complaint No. 39/2002, Merits, 5 December 2007, para. 74; *ERRC v. France*, ECSR, Complaint No. 51/2008, Merits, 19 October 2009, para. 46. See, *ERRC v. Bulgaria*, ECSR, paras. 15-18.

<sup>167</sup> *General Comment No. 4, The right to adequate housing*, CESCR, UN Doc. HRI/GEN/1/Rev.9 (Vol.I), 13 December 1991, para. 6; *General Comment No. 7, The right to adequate housing: forced evictions*, CESCR, UN Doc. HRI/GEN/1/Rev.9 (Vol.I), 20 May 1997, para. 10. See also, *Concluding Observations on Belgium*, CESCR, Report of the Committee on Economic, Social and Cultural Rights to the UN Economic and Social Council, UN Doc. E/1995/22 (1995), p.34, para. 157; *Concluding Observations on Denmark*, CESCR, UN Doc. E/C.12/1/Add.102, 14 December 2004, paras. 21 and 34; *Concluding Observations on Cyprus*, CESCR, UN Doc. E/C.12/CYP/CO/5, 12 June 2009, para. 21; *Concluding Observations on Luxembourg*, CERD, UN Doc. CERD/C/LUX/CO/13, 18 April 2005, para. 17; *Concluding Observations on France*, CERD, UN Doc. CERD/C/FRA/CO/16, 18 April 2005, para. 12.

<sup>168</sup> *General Recommendation No. 30, Discrimination against Non-citizens*, CERD, UN Doc. HRI/GEN/1/Rev.9 (Vol.II), 1 October 2004, para. 32. See, Article 5(e)(iii) ICERD. See also, *Concluding Observations on Luxembourg*, CERD, UN Doc. CERD/C/LUX/CO/13, 18 April 2005, para. 17; *Concluding Observations on France*, CERD, UN Doc. CERD/C/FRA/CO/16, 18 April 2005, para. 12. Council of Europe Committee of Ministers in Recommendation R(88)14 3 of the Committee of Ministers to member states on migrants' housing, adopted by the Committee of Ministers on 22 September 1988 at the 419th meeting of the Ministers' Deputies.

<sup>169</sup> Article 12 ICESCR; Article 25.1 UDHR; Article 5(e)(iv) ICERD; Articles 11.1(f) and 12 CEDAW; Article 24 CRC; Article 11 ESC(r); *Constitution of the World Health Organisation*, adopted 19 June to 22 July 1946. The right to health has been proclaimed by the Commission on Human Rights, as well as in the *Vienna Declaration and Programme of Action* of 1993 and other international instruments.

<sup>170</sup> *General Comment No. 14, The right to the highest attainable standard of health*, CESCR, UN Doc. E/C.12/2000/4, 11 August 2000, para. 8.

<sup>171</sup> *Ibid.*, para. 30.

<sup>172</sup> *Ibid.*, para. 12.

<sup>173</sup> See, *ibid.*, para. 34. See also, *Concluding Observations on Serbia and Montenegro*, CESCR, UN Doc. E/C.12/1/Add.108, 13 May 2005, para. 60; *Concluding Observations on Italy*, CESCR, Report of the Committee on Economic, Social and Cultural Rights to the UN Economic and Social Council, UN Doc. E/2001/22 (2001), p. 34, paras. 123 and 138; *Concluding Observations on Belgium*, CESCR, UN Doc. E/C.12/BEL/CO/3, 3 December 2007, paras. 21 and 35; *Concluding Observations on France*, CESCR, UN Doc. E/C.12/FRA/CO/3, 16 May 2008, paras. 26 and 46. See also, *Concluding Observations on Kyrgyzstan*, CRC, Report of the Committee on the Rights of the Child on its 24<sup>th</sup> Session, UN Doc. CRC/C/97 (2000), p. 51, para. 311; *Concluding Observations on Slovenia*, CRC, UN Doc. CRC/C/15/Add.230, 26 February 2004, paras. 54-55; *Concluding Observations on Oman*, CRC, UN Doc. CRC/C/OMN/CO/2, 29 September 2006, para. 46; *Concluding Observations on the Netherlands*, CRC, UN Doc. CRC/C/NLD/CO/3, 30 January 2009, paras. 51-52; *Concluding Observations on Sweden*, CRC, UN Doc. CRC/C/15/Add.248, 20 March 2005, paras. 60-61. See also, *Concluding Observations on Bhutan*, CEDAW, CEDAW, UN Doc. CEDAW/C/BTN/CO/7, 7 August 2009, paras. 29-30; *General Recommendation No. 26 on women migrant workers*, CEDAW, UN Doc. CEDAW/C/2009/WP.1/R, 5 December 2008, para. 26(i) and (l); *General Recommendation No. 24: Women and Health*, CEDAW, UN Doc. HRI/GEN/1/Rev.9 (Vol.II), 1999, para. 6; CERD, *General Recommendation No. 30, op. cit.*, fn. 168, para. 36 (based on Article 5(e)(iv) ICERD), and CESCR, *General Comment No. 14, op. cit.*, fn. 170, para. 34; *General Comment No. 19, The right to social security*, CESCR, UN Doc. E/C.12/GC/19, 4 February 2008, para. 37.

Article 15.1 of the Reception Directive provides that “Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illness”.

### *5.3. The Marsa Open Centre*

The Marsa Open Centre is a reception centre for single men, located near an industrial area, not far from urbanised areas. This location allows residents at this centre to have more contact with the local population and to find work more easily than those in other open centres.

The centre is run by an NGO (the Foundation for Shelter and Support to Migrants) led by Dr Ahmed Bugre. The open centre, which used to be a school, was set up in 2005 and was not planned for a long-term purpose. Like many aspects of migration in Malta, the solution was thought to be a temporary one for a temporary phenomenon. The present NGO took over management of the centre in 2010. At the time of the ICJ’s visit, the Foundation was undertaking projects to refurbish the centre.

According to the centre’s manager, employees at the centre increased from five to twenty in the last year, principally due to the capacity to attract EU funding. There is a part-time social worker and a 24 hour careworker system. A doctor and a nurse come three times per week. Marsa Open Centre has a budget of 300,000 Euros, which is reportedly a small fraction of what is spent form the other centres which are directly run by AWAS. Most of the budget is spent on day-to-day needs.

According to the manager, the centre has the capacity to accommodate around 400 people, but, at the time of the visit, greater numbers than this were resident. Practically all those living in the centre had come from Sub-Saharan Africa. Reportedly, none of the residents at the time of the visit had an ongoing asylum procedure. Approximately half of the residents had some kind of status, whether subsidiary protection or humanitarian, while the other half was composed by rejected asylum seekers.

The centre is entered by an iron gate and is bounded by a small canal on one side. At the time of the visit, the general atmosphere in the centre was quite relaxed. The delegation could not meet with residents, as most of them were, at the time of the visit, out of the centre seeking work. The residents usually go to the streets in the morning to look for short-term jobs, mainly in the agriculture or constructions fields.

The centre has a chapel, a small mosque, a clinic and an education centre. There are small shops which contribute to a residents fund. The crime rate is reportedly very low. There have been reported cases of abuse of alcohol and psychotropic substances, and cases involving mental health problems.

The residents live in big dormitories filled with bunk beds. Their privacy was assured only by towels hanging from the higher bunks, in this way showing no great difference from the detention centres. The number of beds gave a clear idea of a certain level of overcrowding in the dormitory area. Reportedly, each room accommodated 24 people. The corridors and floors seemed generally clean. The management stated that they were in the process of refurbishing some rooms which



would host fewer numbers of people, and the delegation was shown a refurbished room which demonstrated a considerable improvement.

The access to the centre was relatively controlled. However, at night it was not subject to surveillance and people could enter the centre via the small river to its side. Reportedly, even minors had been clandestinely coming to live at the centre from another centre which did not have the same reception standards.

**Despite the best efforts of the management and staff at Marsa open centre, which recognised the problems with current conditions, at the time of the ICJ visit, it appeared that living conditions at the centre raised issues in regard to the right to adequate housing and to an adequate standard of living. It appeared however that the management was making good progress towards improving these conditions. This progress should be further supported, financially and administratively, by national and European Union authorities.**

#### *5.4 Hal-Far Reception Centre*

The Hal-Far Reception Centre is a small centre, located near a wholly industrial zone quite far away from urban areas. The centre is dedicated to accommodating single women and their children. The location of the centre is not ideal. The ICJ delegation was told that public transport does not ensure good connections with urban areas. This situation has implications for the possibility of the women to integrate with the local population and for their ability to find jobs. The ICJ delegation was told that women tend to spend most of their day in the centre.

The building hosting the centre is clearly a former prison and it still maintains the prison structure. Bars are present at the ends of corridors and at the entrance of every room. Although the centre is kept open all times, the impression that one is situated in a prison persists. At the time of the visit by the ICJ delegation, the interview room bars were shut, reportedly in order to avoid storage of goods and food.

While the centre appeared to be generally fairly clean, it was in very poor repair. In two rooms the ICJ delegation noticed serious water damage, including in the laundry room, which had rotted the plaster of the walls. The personnel stated that they were slowly trying to replace everything which was not functioning or damaged, but that their capacity to do that depended on time and money. Cleaning was carried out by the residents themselves. The ICJ delegation was told about the possible presence of rats outside the centre.

While the kitchen provided was small and cooking facilities were limited to camp gas instruments, the common room was arranged in the most hospitable way possible with the limited resources available. There was a board with announcements and news, including in relation to the possibility to subscribe to English courses in the centre.

The open centre's bedrooms were mostly furnished with six beds per room with a couple of rooms having eight beds. Every room had a small sink, and one wardrobe with three doors for the whole room. In one location small individual fridges were accessible to all residents. Privacy at the centre seemed slightly better than in Marsa because of the smaller number of people living in each room. However, the

considerably smaller size of the rooms still did allow for a situation in which residents have to protect their privacy through towels hanging from the higher bunks.

The personnel reported problems due to the lack of translators, and stated that often translation had to be provided by the residents themselves.

Despite the best efforts of the administrators of the centre, who were working to ensure the best possible living environment for residents, with inadequate resources, the ICJ considers that, at the time of its visit, **the situation in the Hal-Far Reception Centre did not satisfy fully the requirements under international human rights law and standards to protect and fulfil residents' rights to adequate housing, to health and to an adequate standard of living. In particular, the ICJ stresses that, despite the fact that the bars in the centre were open, their presence could not but impress psychologically on the residents some sense of captivity. The ICJ finds this situation of particular concern in light of Malta's obligations under Article 27 of the UN Convention on the Rights of the Child to ensure the "right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."**

**The ICJ recommends that the Maltese authorities, at a minimum, undertake refurbishment works to improve living conditions of the centre. The ICJ recommends that such refurbishment works include the removal of the bars in the whole building. In the long term, the ICJ also recommends that the Maltese authorities either relocate the centre near a residential or commercial area, or improve the public transport connection system with the centre.**

#### *5.5. Hal-Far Hangar Open Centre HOC*

The Hal-Far Hangar Open Centre consists of an old building with the offices of the personnel, a second building for toilets, showers, kitchen and a common recreational zone, a series of containers and an aircraft hangar which hosts several large tents provided by the Swiss Red Cross. Between the hangar and part of the containers is a small children's playground which has been provided by UNHCR. It was reported to the ICJ delegation that there were 480 people in the centre at the time of the visit.

At the time of the visit, the centre was run by seven staff members from 8 am to 8 pm, Monday to Sunday. Healthcare was provided by a community worker who came once a week. In this centre, unlike in the others visited by the ICJ, the personnel wore uniforms.

The open centre accommodated both families with children and single men. The families and children were mainly accommodated in the tents within the hangar and in some containers, while other containers at the back of the hangar were home to single men. Most of the people living in the centre had reportedly fled the Libyan conflict, and all the people living under the hangar came from Libya.

The tents centre was established in 2006-2007. It was closed in May 2010 when it was gutted by a fire. The hangar was re-opened in 2011 to accommodate the new arrivals from the Libyan conflict.

The hangar and the containers were located in a lower part of the Open Centre, which is at risk of flooding. During its visits, the ICJ delegation was told that the hangar had been partly flooded the day before after heavy rain, which is common in certain seasons in Malta. At the time of the visit, the gutters were obstructed and efforts were being made to unblock them.

The conditions appeared to be very unsanitary. The delegation witnessed children playing on the dirty ground and was told by NGOs that there are rats, in particular at night. The toilets appeared to be quite dirty and their floor was covered with sand. The ICJ was told that many of the smaller children in the hanger had been sick and had required treatment in hospital.

It is apparent and was acknowledged to the ICJ by the authorities that the hangar was not suited for accommodation of families, and efforts were being made to resettle the families elsewhere. Nevertheless, at the time of the visit, families had already been living there for several months. The manager said that there were alcohol and drug problems among the single men staying in the containers. This clearly created inappropriate conditions for families with children, especially given the lack of surveillance at night.

The European Commissioner for Human Rights asserted in his June 2011 report that “material conditions in the hangar are reported to be seriously sub-standard, with lack of adequate bedding, dirty floors, toilets (which are shared by men, women and children), and kitchen, insufficient lighting, and the presence of rats. These conditions are all the more worrying as the Commissioner understands that a number of family units with young children are accommodated there.”<sup>174</sup>

The ICJ recalls that, under international human rights law, particularly poor conditions of housing might amount to cruel, inhuman or degrading treatment under Article 16 CAT and equivalent provisions in other treaties.<sup>175</sup> It also recalls that the European Court of Human Rights has held that in certain cases where, contrary to standards or duties in its own national law, the State fails to provide for the basic material needs of asylum seekers, the extreme poverty and destitution that results, in combination with uncertainty as to how long such destitution will continue, will violate the freedom from inhuman or degrading treatment under Article 3 ECHR.<sup>176</sup>

**The ICJ considers that at the time of its visit, the cumulative unsanitary conditions of the centre, the difficulties inherent in the centre accommodating both families with children and single men, including some with alcohol and drugs problems, the absence of surveillance at night, the nature of the “accommodation” under emergency tents located under a disused hangar, prone to flooding and relatively exposed to the elements, and unprotected against rats, were sufficient to establish degrading treatment under Article 3 ECHR, Articles 1 and 4 EU Charter, Article 7 ICCPR and Article 16 CAT. This is all the more the case, given the vulnerability of some of the residents in the hanger, in particular children.**

**The ICJ also considers aspects of these same conditions to be in breach of the rights to health, to adequate accommodation, and to an adequate standard of living.**

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<sup>174</sup> Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Malta from 23 to 25 March 2011, Coe Doc. CommDH(2011)17, Strasbourg, 9 June 2011, paragraph 22.

<sup>175</sup> *Concluding Observations on Slovenia*, CAT, *op. cit.*, fn. 346, para. 211.

<sup>176</sup> *M.S.S. v. Belgium and Greece*, ECtHR, *op. cit.*, fn. 323, paras.250-263.

Since the time of the visit, the ICJ has learned that all the residents in the Hangar Open Centre have been relocated to third countries and that the hangar itself has been closed. However, the ICJ urges the Maltese authorities to find a suitable alternative to the Hangar centre, in line with international standards, to accommodate people who are deemed to be “temporarily” staying in Malta so as to avoid any possibility to resort to the Hangar Open Centre in future occasions or “emergencies”.

Furthermore, the ICJ recommends that the Maltese authorities undertake the construction of an open centre in line with international human rights standards to use only in the short term and in cases of sudden large numbers of migrant arrivals, that will be capable of accommodating people for whom there would not be place in other more suitable community based residential spaces, where it would be preferable to house migrants. The ICJ encourages the European Union to finance such a project, if presented, on condition of closing the Hal-Far Hangar Open Centre.

#### *5.7. Dar il-Liedna – Open centre for unaccompanied minors and families*

The Dar il-Liedna open centre is located in a house in the middle of a town. It accommodates unaccompanied minors on one floor and families with children on the other. It is the only centre which is hosted in a comfortable and ordinary house and that does not give a feeling of a hangar or of some sort of a detention facility. At the time of its visit, the ICJ delegation was told that there were eight minors between 16 and 18 years of age (younger children go in other centres); and 11 family units.

The personnel consisted of a coordinator, and two community workers: one for family, one for unaccompanied children. There were eight care workers providing service 24 hours, and security personnel. A problem highlighted by the personnel was the need for interpreters.

The centre is a two-story house. There is a common room for television, play, recreational space for children with children’s safety bars, and armchairs. There is careful attention to detail: main doors have also safety bars for children and babies.

**Dar il-Liedna open centre appears to be an exemplary centre for Malta, well run, with sufficient resources at its disposal and where the care of the residents is a primary consideration. The ICJ understands that these conditions are favoured by the small size of the centre and by the small amount of people accommodated.**

#### *5.8. General Conclusions*

The ICJ finds a mixed situation in relation to the system of the open centres as for conditions of reception, treatment and facilities. Generally, the system of open centres does not seem to be managed with consideration of the persistent migration flow, but more with the idea that migration arrivals are a temporary phenomenon to be dealt with on an emergency basis. During the visit, the ICJ delegation was told that one of the main problems in the open centres is lack of a feeling of ownership by the residents. This is deemed to be due from lack of services, but also and mainly from the fact that the migrants hosted there are not in Malta to stay. Almost all of them aspire to reach another European country, and, reportedly, the Government is

not trying to push for more integration in the Maltese communities to counteract this feeling.<sup>177</sup>

The ICJ notes that the statistics provided for by the National Statistic Office, outlined in section 2 of this report, demonstrate that these migration flows are not a temporary phenomenon. It is for this reason that the **ICJ recommends that the Government set up a long-term reception plan, which should include at least the refurbishment and construction of suitable reception centres, the inclusion of alternative means to detention, and a policy of integration of migrants and asylum seekers.**

The ICJ also understands that Malta must cope with migration arrivals that are high in comparison with its population. It also understands that Malta constitutes one of the entry points to the European Union and that, because of the application of the Dublin II Regulation, it sustains an undue burden in comparison to other EU Member States. The ICJ welcomes the extraordinary approval by the European Commission of an additional 1,201,000 Euros in emergency funds under the European Refugee Fund 2011 programme, for improving the living conditions of asylum seekers and beneficiaries of protection in Malta.<sup>178</sup>

Nonetheless, for the abovementioned reasons, the **ICJ recommends that the European Union continue its policy of resettlements from Malta and institutes a permanent EU resettlement programme not on a voluntary but on a binding basis. Resettlements should take place with all due guarantees, such as informed consent, preference for family reunification and family unity, prioritisation of vulnerable migrants, and access to legal advice.**

The ICJ recalls that the need for a EU relocation policy in no way exempts Malta from its obligations under international law towards migrants and asylum seekers, whose rights have to be fully respected, protected and fulfilled, both regarding rights in detention, and on their right to housing, health, and other economic, social and cultural rights. In light of this, the ICJ recommends that the European Union provide financial assistance and that it call on the national Government to increase in a stable way funding for projects of refurbishment and construction which aim at increasing the living conditions of migrants and asylum seekers with a view to integration. It should also seek to verify closely the implementation of such projects including through consultation with the migrants and asylum seekers who will be its final beneficiaries.

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<sup>177</sup> See also, "They want to leave Malta at all costs", *The Times of Malta*, interview with Dr Bugre, 31 October 2011, available at <http://www.timesofmalta.com/articles/view/20111031/local/-They-want-to-leave-Malta-at-all-costs-.391491>.

<sup>178</sup> "European Refugee Fund 2011 programme: Additional 1,201,000 Euros in emergency funds", *The Malta Independent Online*, 7 February 2012, available at <http://www.independent.com.mt/news.asp?newsitemid=139399&>; "EC approves 1.2 million in refugee funds", *Malta Today*, 6 February 2012, available at <http://www.maltatoday.com.mt/en/newsdetails/news/national/EC-approves-1-2-million-in-refugee-funds-20120206?>

## 6. Recommendations

### To the Maltese authorities

On the basis of its findings, the ICJ recommends that the authorities take expeditious measures:

#### *On expulsion procedures*

- to implement the Return Directive by way of primary legislation and through procedures which involve meaningful consultation with civil society;
- to stop the issuance of *pro forma* deportation orders without a real possibility to apply for voluntary return;
- to remove the exception of Regulation 11.1 of Subsidiary Legislation no. 217.12, excluding a large group of migrants from the guarantees provided by the EU Return Directive, and apply the entire range of guarantees offered by the Directive to all migrants whatever their status and the means of their entry into Maltese jurisdiction.
- to guarantee fully the right to free legal assistance in expulsion, detention and asylum procedures to all migrants and asylum seekers in primary legislation and to secure it in practice in all situations of detention of migrants and asylum seekers.
- to substantially reform the system of immigration appeals, including by entrusting a court of law to review in full the decisions by taken by executive immigration authorities.

#### *On detention*

- to institute an independent investigation into the incidents of 16 August 2011 in the Safi Barracks, in particular in order to establish whether unlawful, including excessive force was used in the quelling of the riots.
- to revise the policy of mandatory detention and to apply administrative detention on a case-by-case basis and only where necessary as a last resort.
- to reduce the period of maximum detention and to link, in primary legislation, the length of detention with effective due diligence in deportation procedures.
- to define such maximum terms for administrative detention in primary legislation.
- to identify promptly and, in conformity with international standards on the treatment of detainees, make operational alternative places of administrative detention outside of military facilities and expeditiously take measures to transfer the detainees to the non-military facilities.

- to ameliorate the conditions of detention in the administrative detention centres, and in particular in the Safi barracks, by:
  - improving and increasing the number of sanitary facilities such as toilets, washbasins and showers;
  - ensuring at least a minimal level of privacy to detainees;
  - improving the leisure facilities and access to recreation;
  - avoid overcrowding by giving priority to alternatives to detention.
- to reduce dependence on detention through an effective plan of alternatives to detention, with detention being only the last recourse.
- to plan for a shift from detention in military camps to other facilities outside of military compounds and run by civilians.
- to conduct frequently screening procedures, at regular and periodic intervals, and to address with the utmost priority communications regarding medical and other serious concerns by detainees.
- to adopt policies and take effective measures to ensure that migrants and asylum seekers be guaranteed thorough and effective legal representation for their asylum claims, including for any other legal issues that may arise from their detention.

#### *On open centres*

- to further support the progress towards improving conditions in the Marsa Open Centre, financially and administratively, including through EU financing.
- to undertake refurbishment works to improve living conditions of the Hal-Far Reception Centre for women, including the removal of the bars in the whole building.
- to plan, in the long term, to either relocate the centre near a residential or commercial area, or improve the public transport connection system with the Hal-Far Reception Centre for women.
- to find a suitable alternative to the Hal-Far Hangar Open Centre, in line with international standards, to accommodate people who are deemed to be “temporarily” staying in Malta so as to avoid any possibility to resort to the Hangar Open Centre in the future, including in “emergencies”.
- to undertake the construction of an open centre in line with international human rights standards to use only in the short term and in cases of sudden and unanticipated large numbers of migrant arrivals, that will be capable of accommodating people for whom there would not be place in other more suitable community based residential spaces, where it would be preferable to house migrants.
- to set up a long-term reception plan, which should include at least the refurbishment and construction of suitable reception centres, the inclusion

**of alternative means to detention, and a policy of integration of migrants and asylum seekers.**

To the European Union

On the basis of its findings, the ICJ recommends the following measures:

- **to continue its policy of facilitating resettlements from Malta and to institute a permanent EU resettlement programme not on a voluntary but on a binding basis. Resettlements should take place with all due guarantees, such as informed consent, preference for family reunification and family unity, prioritisation of vulnerable migrants, and access to legal advice.**
- **to provide stable and increased financial assistance for projects of refurbishment and construction which aim at increasing the living conditions of migrants and asylum seekers with a view to integration, and to call on Maltese authorities to carry out these projects as a matter of priority.**
- **to monitor and verify closely the implementation of such projects including through consultation with the migrants and asylum seekers who will be their final beneficiaries.**