

Human Rights Council Working Group on the Universal Periodic Review
17th Session, 21 October to 1 November 2013

ADVOCACY/BRIEFING NOTE
ICJ suggested recommendations: Universal Periodic Review of Malta

This advocacy note is brought to the attention of all Permanent Missions to the United Nations Office in Geneva. This note addresses issues set out below, as further explained in the UPR Stakeholder Submission of the International Commission of Jurists (ICJ). The ICJ's full submission, along with an analysis comparing recommendations in that submission with corresponding first cycle recommendations and commitments, can be found online at: <http://www.icj.org/icj-stakeholder-submission-on-the-universal-periodic-review-of-malta/>.

1. Migration and asylum

Despite calls from several international human rights mechanisms and NGOs, Maltese legislation and policy on migration and asylum has not substantially changed since the first cycle UPR in 2008, as the Government refused to accept relevant recommendations at that time. Of particular concern are the legislation and policies on administrative detention.

Maltese law refers to migrants who have irregularly entered the territory as "prohibited immigrants". Since most asylum-seekers enter the country as "prohibited immigrants", they are generally all subject to the same measures, in particular administrative detention, for up to 18 months. Moreover, although under Maltese law a period for voluntary departure must be offered to "prohibited immigrants" before detention and forced expulsion are imposed, in practice this is not available to most migrants. The ICJ considers 18 months of administrative immigration detention to be *per se* contrary to articles 7, 9 and 10 of the ICCPR as well as article 16 of the CAT. Maltese immigration law allows the detainee to apply for review of a removal, deportation or detention order by the Immigration Appeals Boards. However, the Board may grant release only on grounds of unreasonableness. The European Court of Human Rights (European Court) has held in *Louled Massoud*¹ and in *Suso Musa*² that this mechanism does not satisfy the requirements of the right to *habeas corpus*. In *Suso Musa*, the European Court also expressed concern at conditions of detention for migrants, following a recent European Committee for the Prevention of Torture report, and held that "the national system failed as a whole to protect the applicant from arbitrary detention".³

Finally, on 9 July 2013, the Government raised the possibility that it would collectively expel a group of recently arrived Somali asylum seekers without any examination of their claims. This threatened action, forestalled by the issuance of an interim measure by the European Court, would have risked violations of the obligation of *non-refoulement* and the prohibition of collective expulsions.

Suggested recommendations:

- i) Provide in legislation for alternatives to administrative detention of migrants and asylum seekers, the application of which must be decided on a case-by-case basis;
- ii) Provide in legislation that administrative detention of migrants and asylum seekers may be resorted to only where it is strictly necessary in the particular circumstances of the case, and that it should be subject to a clear maximum duration;
- iii) Provide for regular periodic judicial review of the necessity and proportionality of administrative detention;
- iv) Provide for free legal assistance to those subject to administrative detention and/or

¹ *Louled Massoud v. Malta*, Application No 24340/08 (ECtHR, 27 July 2010)

² *Suso Musa v. Malta*, Application No 42337/12 (ECtHR, 23 July 2013)

³ *Ibid*, para. 106

- alternative measures, regardless of their status of asylum-seeker and of any appeal or review proceedings; and
- v) Give competence and jurisdiction to courts - or in the alternative to other effective, independent and impartial bodies authorised by law to exercise judicial power - to review on the merits, promptly and without delay, the grounds and the procedure of administrative detention, to ensure observance of domestic and international law.
 - vi) Ameliorate the conditions of detention in the administrative detention centres for migrants and asylum seekers;
 - vii) Guarantee thorough and effective legal representation in asylum proceedings;
 - viii) Ameliorate the conditions in the open migrant reception centres;
 - ix) Continue its dialogue with relevant NGOs, in particular on the detention of migrants;
 - x) Reject any form of collective expulsion of migrants, whether on land or on the high seas, and ensure that migrants are informed of their right to apply for asylum.

2. Access to reproductive health and criminalization of abortion

Malta's Criminal Code prohibits the termination of pregnancy, providing that women who terminate pregnancies or medical professionals who perform or assist them, may be held criminally responsible. The law does not envisage any exception and even abortion for therapeutic purposes, including to save the life of the women, remains prohibited. Among other things this undermines Malta's compliance with a range of its international obligations enshrined in the CEDAW, the ICCPR, the CAT and the ICESCR.

Suggested recommendation:

- xi) Decriminalize abortion and ensure that women in Malta have access to safe and legal abortions, at a minimum in those situations where their life or health may be at risk or where ensuring their enjoyment of the right to freedom from torture or cruel, inhuman or degrading treatment or punishment so requires.

3. Recognition of gender identity and marriage

In *Cassar v Malta*, Malta decided to drop its objection to allow transgendered individuals to marry. The decision of the European Court, authorizing a friendly settlement in the case, cited Malta's commitment and obligation to "present and pilot" a Parliamentary bill aiming to make "all necessary amendments" to enable the applicant to marry a person of the opposite sex to the applicant's acquired sex, and "commits itself to applying its best efforts to secure that the said amendments will be adopted and will come into force by the end of 2013".⁴

Suggested recommendation:

- xii) Provide full documentation regarding the commitments made by Malta in the Cassar case, the scope and content of the proposed legislation, and a timetable for the enactment of the proposed legislation.

4. International human rights instruments and mechanisms

Malta is yet to become party to: the OP-ICESCR, the OP-CEDAW, the Third OP-CRC, the ICRMW and the CPED. Malta has adhered to most treaty body reporting but it has not always been timely. It has not submitted its third, fourth, fifth and sixth periodic reports to the Committee against Torture and its second periodic report to the Committee on Economic, Social and Cultural Rights.

Suggested recommendations:

- xiii) Become party to the OP-ICESCR, the OP-CEDAW, the third OP to the CRC, the ICMW and the CPED;
- xiv) Submit without delay its outstanding periodic reports to the Committee against Torture and the Committee on Economic, Social and Cultural Rights;
- xv) Present to the Council, as soon as possible after adoption of the outcome document for the UPR of Malta, a national plan of action for the implementation of accepted recommendations and voluntary pledges and commitments; and
- xvi) Present to the Council, two years after adoption of the outcome document, a mid-term progress report on the status of implementation of recommendations and voluntary pledges and commitments.

The ICJ expresses to all Permanent Missions the assurances of its highest consideration.

⁴ *Cassar v. Malta* (Fourth Section), Application No 36982/11 (ECtHR, 27 March 2013), para. 18(5)