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**INTERNATIONAL COMMISSION OF JURISTS (ICJ) SUBMISSION
TO THE UN HUMAN RIGHTS COMMITTEE FOR THE PREPARATION
OF A LIST OF ISSUES FOR THE EXAMINATION OF MALTA'S SECOND
AND THIRD PERIODIC REPORTS UNDER
THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

Submitted December 2013

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

ICJ's submission to the Human Rights Committee for a List of Issues for Malta

ICJ's submission to the UN Human Rights Committee for the preparation of a List of Issues for the examination of the Second and Third Periodic Reports of Malta

1. During its 112th session, scheduled for 13 to 31 October 2014, the Human Rights Committee (the Committee) will undertake its examination of the consolidated report combining Malta's second and third periodic reports on the implementation of the International Covenant on Civil and Political Rights ("the Covenant").
2. Ahead of this, during its 110th session, from 10 to 28 March 2014, the Committee will prepare and adopt a List of Issues. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the Committee's preparation of the List of Issues.
3. In this submission, the ICJ draws the Committee's attention to questions about the following issues:
 - the continuing necessity of Malta's reservations to the Covenant;
 - the compliance of Malta's immigration laws, policies and practice with the State's obligations under articles 6, 7, 9, 10 and 13;
 - laws criminalizing abortion in the light of the State party's obligations under articles 2, 3, 6, 7 and 26; and
 - the enjoyment of Covenant rights in connection with sexual orientation and gender identity.

RESERVATIONS TO THE COVENANT

4. Upon its accession to the Covenant in 1990, Malta entered reservations to articles 13, 14, 19, 20 and 22 of the Covenant.
5. In its 1993 Concluding Observations on Malta's first periodic report under Covenant, the Committee recommended that the "Government review, with a view to withdrawing, the reservations made upon ratification of the Covenant, particularly those concerning article 13 and 14 of the Covenant".¹ The Committee's recommendation was based on its observations that the:
*reservations entered by Malta upon ratification of the Covenant with respect to a number of provisions have an adverse effect on the effective implementation of the Covenant. No convincing reasons have been offered for the reservations to article 13 and article 14, paragraph 6. Additionally, given the actual situation of human rights protection in Malta, some reservations may now have become obsolete.*²
6. Notwithstanding the Committee's concern and recommendation, and the elapse of more than 20 years, Malta has maintained all of the reservations it entered upon accession to the Covenant in 1990.³
7. Malta's reservation to article 13 stated that although the Government of Malta endorses the principles laid down in article 13 "...in the present circumstances it cannot comply entirely with the provisions of this article".⁴ Similarly its reservation to article 14(6) stated: "While the Government of Malta accepts the principle of compensation for wrongful imprisonment, it is not possible at this time to implement such a principle in accordance with article 14, paragraph 6, of the

¹ Concluding Observations of the Human Rights Committee on Malta, U.N. Doc. CCPR/C/79/Add.29, 5 November 1993, para. 13.

² *Ibid*, para. 10.

³ See the United Nations Treaty Collection, as of 4 December 2013, available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

⁴ *Ibid*, Reservation no. 1.

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Covenant".⁵

8. Significantly, since making these reservations to the Covenant, Malta has ratified, **without reservations**, both Protocol 4 and Protocol 7 to the European Convention on Human Rights, which, *inter alia*, enshrine rights equivalent to those under article 13 regarding the prohibition of collective expulsions and concerning expulsion proceeding⁶ and article 14(6) of the Covenant regarding compensation for wrongful conviction.⁷
 9. Finally, the ICJ considers that reservations must be, by their very nature, temporary. In this regard, the ICJ refers to this Committee's statement that:
*It is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires to render its own laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant. States should also ensure that the necessity for maintaining reservations is periodically reviewed, taking into account any observations and recommendations made by the Committee during examination of their reports. Reservations should be withdrawn at the earliest possible moment.*⁸
- Further, the ICJ notes that the State's consolidated report makes no mention of any measures undertaken or contemplated to bring Malta into a position where it would withdraw its reservations.
10. The ICJ therefore considers that the reservations entered by Malta to articles 13 and 14 upon accession to the Covenant in 1990 are, as the Committee noted in 1993, "obsolete". The fact that Malta never refers to them in its State report whenever it addresses its obligations under articles 13 and 14(6) of the Covenant is a further indication of their obsolescence.
 11. In addition, the ICJ considers that Malta should review the continuing necessity and appropriateness of its reservations to Articles 14(2), 19, 20 and 22.
 12. In light of the above, the ICJ recommends that the Committee's List of Issues for the examination of Malta's consolidated report should address Malta's reservations to the Covenant.
 13. In particular, the organization makes the following suggestions for questions that the Committee could include in the List of Issues:
 - **What is Malta's present position with regard to each of its reservations to the Covenant?**
 - **Does Malta consider, in the light of existing and planned legislation as well as obligations under other treaties, including Council of Europe treaties, that each reservation is still necessary?**
 - **In light of Malta's ratification without reservations of Protocols 7 and 4 to the European Convention on Human Rights, does the government plan to withdraw the reservations to Articles 13 and at a minimum 14(6)?**
 - **Does the government plan to withdraw the reservations to Articles 14(2), 19, 20 and 22?**

⁵ *Ibid*, Reservation no. 3.

⁶ Articles 3 and 4 of [Protocol 4 to the European Convention on Human Rights](#), Article 1 of [Protocol 7 to the European Convention on Human Rights](#).

⁷ Article 3 of [Protocol 7 to the European Convention on Human Rights](#).

⁸ Human Rights Committee, General Comment 24 (52), General comment on 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, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 20, available at: <http://www.unhcr.ch/tbs/doc.nsf/0/69c55b086f72957ec12563ed004ecf7a?Opendocument>.

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- ***In particular, would Malta plan to withdraw any of its reservations to the Covenant before the examination of its consolidated report by this Committee?***
- ***When is the next review of the necessity and appropriateness of each reservation scheduled?***

LEGISLATION AND MIGRATION IN MALTA

14. Malta faces frequent large-scale "irregular" arrivals of people on its shores due to its geographical position at the centre of the Mediterranean Sea and because it is a point of entry to the European Union. Reportedly, the average number of "irregular" arrivals is equivalent to 45% of Malta's annual birth rate.⁹ In 2012, 1,890 persons are reported to have arrived by boat after perilous journeys crossing the Mediterranean, one of the highest rates of arrivals since 2002, but still within the average levels of the previous ten years.¹⁰
15. While acknowledging the difficulties that large-scale migration flows present, the ICJ recalls that Malta's immigration legislation and practice must respect its international obligations, including those under the Covenant.
16. The organization is particularly concerned at aspects of Maltese legislation, policy and practice on administrative detention of "prohibited immigrants", including asylum-seekers. In Maltese law, the term "prohibited immigrants"¹¹ refers to foreign nationals who enter the territory "irregularly". Since most asylum-seekers enter the country "irregularly", they appear to be automatically characterized as "prohibited immigrants". As such, the majority of asylum-seekers are generally subjected to the same measures, in particular administrative detention, as all other foreign nationals that arrive on Maltese shores "irregularly". In this context, the ICJ considers that Maltese legislation, policy and practice on administrative detention contravene Malta's international obligations, including under international refugee law;¹² the European Convention on Human Rights; and under both the EU Charter of Fundamental Rights and the EU asylum *acquis*.

⁹ 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.

¹⁰ See the 2012 statistics on the UNHCR Malta website at <http://www.unhcr.org/mt/statistics>, accessed on 12 December 2013. See for comparative statistics, ICJ, *Not here to stay: Report of the International Commission of Jurists on its visit to Malta on 26-30 September 2011*, May 2012, p. 8.

¹¹ A "prohibited immigrant" is "any person, other than one having the right to entry, or of entry and residence, or of movement or transit [...]" (Article 5(1), Immigration Act 1970 (Ch. 217)) who did not receive leave by the authority. Moreover, migrants unable to provide for their support and that of their dependants, those suffering from mental disorder or being "mentally defective", those staying in Malta after quarantine, those having committed certain criminal offences, those contravening immigration provisions or regulations, those whose conditions for staying have been breached or elapsed, being a prostitute or a dependant of a "prohibited immigrant" enter automatically within this category.

¹² See UNHCR's Position on the Detention of Asylum-seekers in Malta, 18 September 2013, available at: <http://www.refworld.org/docid/52498c424.html>, accessed on 10 December 2013. In particular, "75. The fundamental right to liberty and security of person, and the correlated right to freedom of movement, are also reflected in international refugee law. Article 26 of the 1951 Convention provides for a general right of free movement for those refugees "lawfully in" the territory of the host State, subject only to necessary restrictions which may be imposed. This provision also applies to asylum-seekers. Persons who are found to be in need of international protection, for example in accordance with Regulation 14162 of the Maltese Procedural Standards in Examining Applications for Refugee Status Regulations are entitled to remain in Malta and are granted residence permits to lawfully reside in Malta, and should therefore be considered to be "lawfully staying" there within the meaning of the 1951 Convention. 76. In addition to Article 26, the 1951 Convention contains a non-penalization

Articles 2(3), 6, 7, 9 and 13: Collective expulsions and respect of the principle of *non-refoulement*

17. Collective expulsions, by their very nature, exclude an individual assessment of the situation of each person in order to determine whether there are reasons militating against removal because of his or her individual circumstances.
18. Hence, collective expulsions impede the respect by States of their *non-refoulement* obligations to prohibit the transfer of someone to a country, territory or other place where there is a real risk that she or he would face a serious violation or abuse of human rights. Additionally, because of their inherent lack of individual assessment, collective expulsions also breach the obligation of a State to provide everyone with an effective remedy against any decision that may infringe the principle of *non-refoulement*, under article 2, paragraph 3 of the Covenant, read in conjunction with other Covenant provisions.
19. Furthermore, this Committee has recognized in its General Comment no. 15 that "article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions".¹³ While article 13 refers exclusively to persons "lawfully within the territory" of the State, by impeding any assessment of the individual situation of each person, including, for example of her or his entitlement to international protection, including from *refoulement*, collective expulsions may result in the removal of persons who are in fact "lawfully within the territory". For these reasons, the ICJ considers that collective expulsions constitute *per se* an egregious breach of article 13 of the Covenant, regardless of the status attributed by domestic law to the individuals concerned.
20. In this regard, the ICJ draws to the Committee's attention two cases of collective expulsion and *prima facie* breaches of the *non-refoulement* principle that have been acknowledged by the Maltese Government in its replies to the fourth report of the European Committee against Racism and Intolerance (ECRI) of the Council of Europe.¹⁴ The Maltese authorities have identified "a particular case [in 2010] where four migrants (including three women and an eight year old child), almost all Eritreans, were taken to Libya". The Maltese authorities also admitted to another incident stating that:
- [a] similar incident happened in July 2010, when 55 Somali nationals travelling from Libya were intercepted at sea by a Maltese military vessel in its SRR [Search and Rescue Region]. 28 were allowed on board and were taken to Malta; the remaining 27 boarded another ship and were returned to Libya, where they were reportedly beaten and tortured. In this particular case, a Maltese unit was already engaged in conducting the rescue at which point a Libyan unit appeared on scene and began to undertake rescue operations simultaneously. No coercion of any sort was exercised by the Maltese Unit. In addition, Malta could not forbid the Libyan unit from providing assistance, in*

clause, which provides that even entry without authorization does not give the State an automatic right to detain under international refugee law. Article 31(1) of the 1951 Convention stipulates that refugees "coming directly" shall not be penalized for their "illegal entry or presence" if they present themselves to the authorities without delay and show good cause for their illegal entry or stay. The prohibition against penalization for illegal entry included in Article 31 applies to asylum-seekers. A policy of prosecuting or otherwise penalizing, including through the use of detention, illegal entrants, those present illegally, or those who use false documentation, without regard to the circumstances of flight in individual cases, and the refusal to consider the merits of an applicant's asylum claim, amount to a breach of a State's obligations under international law. Further, Article 31(2) of the 1951 Convention provides that States shall not apply restrictions to the movement of refugees or asylum-seekers except when it is considered necessary. Such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country", footnotes in the original omitted.

¹³ Human Rights Committee, *General Comment no. 15: The position of aliens under the Covenant*, U.N. Doc. HRI, GEN/1/Rev.1 at 18 (hereinafter "General Comment no. 15"), para. 10.

¹⁴ *ECRI Report on Malta (fourth monitoring cycle)*, "Response of the Maltese authorities", adopted on 20 June 2013, published on 15 October 2013, Doc. No. CRI(2013)37, p. 73.

*accordance with its international obligations.*¹⁵

21. The ICJ considers that these incidents, candidly admitted by the Maltese Government, appear to amount to violations of the Covenant. In the first case, it seems that the Maltese authorities were involved in the return of the Eritrean nationals to Libya without any individual assessment of their situation. As such, this appears to have been a collective expulsion. In addition, it also seems to have been inconsistent with Malta's duty to ensure access of the individuals concerned to an effective remedy against violations of the *non-refoulement* principle. In addition, the ICJ notes that in its April 2009 Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea:

*UNHCR consider[ed] that most Eritreans fleeing their country should be considered as refugees [...UNHCR] advise[d] against return of Eritrean asylum-seekers to countries they may have transited or in which they may have been granted status, but from which there is a risk of refoulement or deportation [...]. Eritreans forcibly returned from Malta in 2002 and Libya in 2004 were arrested on arrival in Eritrea and tortured.*¹⁶

In light of the above, the ICJ is also of the view that the Maltese authorities' removal of the Eritreans to Libya would have constituted a breach of the *non-refoulement* principle.

22. With regard to the second case, it appears from the Government's account to ECRI that the Maltese authorities were first on the scene and, as such, the Somalis fell within Malta's authority or control, and hence within its jurisdiction.¹⁷ Furthermore, the Government itself stated that the events occurred within its Search and Rescue Region, where the international Law of the Sea assigns rescue responsibilities to Malta. For these reasons the ICJ considers that, on the basis of the statement provided by the Government, the Maltese authorities breached the *non-refoulement* principle in this case too.
23. Additionally, on 9 July 2013, a group of 102 people, reportedly comprising mainly Somali citizens and including 41 women and two children, was intercepted by the Armed Forces of Malta (AFM) in the Mediterranean Sea and brought to Malta. During the day, Maltese media reported that the Government intended to transfer the male adults of the group to Libya during the night of 9-10 July.¹⁸ However, following the issuance of an interim measure by the European Court of Human Rights, the Maltese authorities desisted. The ICJ considers that, if it had been carried out, this group transfer would have constituted a collective expulsion and would have breached the *non-refoulement* principle due to the then-prevailing situation in Libya and the risk of chain *refoulement* to Somalia and other countries.
24. The above-described events, two of which occurred in 2010 and one in 2013, give rise to concern regarding Malta's commitment to abide by its obligations under the Covenant related to the *non-refoulement* principle, including the duty to provide an effective remedy in cases of potential breaches of this principle and the obligation not to carry out and to prohibit collective expulsions. For these reasons, the ICJ is concerned that Malta is not living up to, *inter alia*, its obligations under articles 6, 7, and 9; article 2(3) read in conjunction with articles 6, 7, and 9; and article 13 of the Covenant.

¹⁵ *Ibid.*

¹⁶ UN High Commissioner for Refugees (UNHCR), *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea*, April 2009, p. 10 and 34, available at: <http://www.refworld.org/docid/49de06122.html>, accessed on 9 December 2013.

¹⁷ See, *Hirsi Jamaa and Others v. Italy*, European Court of Human Rights, Grand Chamber, Application no. 27765/09, 23 February 2012, paras. 79-82.

¹⁸ For a complete description of the events, please see the statement of facts in the case *Abdi Ahmed and Others v. Malta*, currently pending before the European Court of Human Rights, at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-127198>.

25. In light of the above, the ICJ recommends that the following questions be included in the List of Issues for the examination of Malta:

- **What measures has Malta taken in its legislation, regulations and practices to prohibit any collective expulsion from being carried out?**
- **What are the measures undertaken to prevent violations of the non-refoulement principle, including consistently with Malta's obligations under articles 2, 6 and 7?**
- **With regard to the specific case referred above of the return of four Eritrean nationals to Libya in 2010, can Malta give information as to the role the Maltese authorities played in this incident and on whether an individual assessment of the situation of each individual had been carried out before removal?**
- **Is there a national judicial procedure (remedy)/mechanism that has power to suspend any expulsion that may risk violating the prohibition of collective expulsion or the non-refoulement principle? If so, how often has it been used? Are there any statistics available? Do individuals have the right to legal aid to access this procedure? How and when are individuals who may face removal or transfer informed of the remedy and their right to counsel? Does filing a petition with the body or court automatically suspend the removal pending the final decision on the case?**

Articles 9, 10 and 12: Administrative detention of "irregular migrants"

26. As mentioned above, as a general policy, "prohibited immigrants", including asylum-seekers who make an "irregular" arrival are in practice automatically subjected to mandatory, administrative detention on their arrival on Maltese territory. Under immigration legislation, executive authorities have the power to order their deportation and removal and to arrest and detain them.¹⁹

Automatic mandatory nature and length of administrative detention (article 9)

27. The ICJ is concerned at Malta's automatic resort to mandatory administrative detention of "irregular migrants", including the majority of asylum-seekers who arrive on Maltese shores irregularly.²⁰

28. The organization is additionally concerned at the excessive length of such detention. Maltese legislation does not provide for a maximum time limit to the administrative detention for "prohibited immigrants", asylum-seekers included.²¹

¹⁹ See, articles 14(1) and (2), 16 and 22, Immigration Act.

²⁰ In its September 2013 "Position on the Detention of Asylum-seekers in Malta", UNHCR stated "In Malta, there are no specific legislative provisions regulating the administrative detention of asylum-seekers. Under Maltese immigration law, detention is the automatic consequence of a refusal to grant admission to national territory or the issuance of a removal order in respect of a particular individual. The Immigration Act does not provide for differential treatment to be accorded to asylum-seekers who fall under these circumstances. In addition, the Immigration Act does not make a direct reference to the *non-refoulement* provision found in the Refugees Act. Under the Immigration Act, the position of asylum-seekers who enter irregularly is, thus identical to that of any other migrant. The authorities, the Immigration Appeals Board and the courts do not consider the *non-refoulement* provision in the Refugees Act to affect the application of the Immigration Act as regards the decision to detain asylum-seekers." In the same paper UNHCR provided the following statistics: "Over a ten-year period (2002–2012) 16,617 individuals, of 46 different nationalities, the vast majority single men from Somalia and Eritrea, arrived in Malta by boat in an irregular manner, and almost all were immediately detained upon arrival. The Office of the Refugee Commissioner received 15,832 asylum applications between January 2002 and December 2012", footnotes in the original omitted, *op. cit.*, pp. 4 and 10.

²¹ The European Committee against Racism and Intolerance (ECRI) has highlighted in its fourth report on Malta that "Government policies have no legal force; therefore the risk that persons

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Nevertheless, Government policy states that such detention should be no longer than eighteen months,²² and the maximum length of detention of "prohibited immigrants" is for up to twelve months, while asylum procedures are pending.²³ In 2011, Subsidiary Legislation 217.12 introduced the guarantees included in the EU Return Directive 2008/115/EC,²⁴ but their application is excluded for all those arriving irregularly to Malta by sea. This includes almost all "prohibited immigrants" and most asylum-seekers²⁵ who have therefore not benefited from this reform.²⁶

29. The use of mandatory administrative detention for "prohibited immigrants", including asylum-seekers, is automatic, apart from certain categories of "vulnerable people", *inter alia*, elderly people, children and survivors of torture and other ill-treatment.²⁷ Further, as UNHCR has noted,

*Maltese law does not contain guarantees to ensure compliance with Article 31 (on non-penalization of refugees who enter or stay illegally in the country of refuge) of the 1951 [Refugee] Convention. Asylum-seekers arriving in Malta without leave from the Principal Immigration Officer are termed as "prohibited migrants" [...] asylum-seekers who arrive in an irregular manner are still systematically and routinely detained, at times facing tough detention conditions in immigration detention facilities, some of which are lacking basic minimum standards in several respects. UNHCR is concerned that asylum-seekers are subject to prolonged periods in detention without access to adequate avenues to challenge effectively their detention. There is also no general mechanism in place to consider alternative and less coercive measures than detention at the time of the decision to detain, and the bail system, the only alternative available, is not effective nor generally accessible to asylum-seekers. In view of the above, UNHCR is particularly concerned that the current practice in Malta is not in line with Article 31 of the 1951 Convention, and the fundamental right to liberty and security of person, as enshrined in international and European human rights instruments. On this basis, it is UNHCR's position that although founded on immigration regulations, the Maltese practice of detaining, for the purposes of removal, all asylum-seekers, who arrive on the territory in an irregular manner, is both unlawful as well as arbitrary in terms of well-established international law standards.*²⁸

30. Although under Maltese law, a period of voluntary departure must be offered to "prohibited immigrants" before they can be detained on the grounds of enforcing

detained under the Immigration Act are deprived of their liberty for an indeterminate period, cannot be entirely ruled out", *ECRI Report on Malta (fourth monitoring cycle)*, *op. cit.*, para. 84.

²² *Irregular Immigrants, Refugees and Integration: Policy Document*, Ministry of Justice and Home Affairs and Ministry for the Family and Social Solidarity, 2005, Part I, point 5, p. 11, see at http://www.mjha.gov.mt/downloads/documents/immigration_english.pdf. Council of Europe Commissioner for Human Rights (CoEComm), *Follow-Up Report on Malta (2003-2005)*, CommDH(2006)14, 29 March 2006, paragraph 14. See also, European Commission against Racism and Intolerance (hereinafter, ECRI), *Third Report on Malta*, CRI(2008)22, 14 December 2007, paragraph 33. PACE, *op.cit.*, para. 60. Medecins du Monde, "Everybody just tries to get rid of us", November 2007, p. 9. CoEComm, *op.cit.*, fn 5, para. 6-9. CPT, *op. cit.*, fn 6, para. 11. LIBE, *op.cit.*, fn 1, point 2, p.2.

²³ Reportedly, the Maltese Government asserts the legal ground of this detention's term based on Directive 2003/9/EC of the Council of the European Union of 27 January 2003, Article 11. See, Council of Europe's Committee for the Prevention of Torture (CPT), *Report on the visit to Malta from 15 to 21 June 2005*, CPT/Inf(2007) 37, 10 September 2007, paragraph 11.

²⁴ Legal Notice no. 81 of 2011. Under the Directive detention may not exceed six months; states can extend this period in certain circumstances for a period not exceeding a further twelve months.

²⁵ Regulation 11.1, S.L. 217.12

²⁶ ICJ, *Not here to stay: Report of the International Commission of Jurists on its visit to Malta on 26-30 September 2011*, May 2012, p. 13.

²⁷ 2005 Policy Document, pp. 11-13.

²⁸ UNHCR's Position on the Detention of Asylum-seekers in Malta, footnotes in the original omitted, *op. cit.* pp.4 and 5.

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their expulsion (Subsidiary Legislation 217.12), in practice this is not afforded to individuals. Instead, according to information available to the ICJ, the vast majority of those who are classified under the law as "prohibited migrants" do not benefit from the right to leave Malta voluntarily and are detained without being offered this possibility. Typically, people are presented with a document that both informs them of their right to voluntary departure without resort to detention, and simultaneously refuses it in their case, ordinarily for stereotypical reasons. The same document also orders the individual's detention and expulsion.²⁹

31. The ICJ recalls that, in the Committee's jurisprudence under article 9 of the Covenant, administrative detention to prevent unauthorized entry on the territory or to facilitate deportation should not be automatic but should be provided for only if no less intrusive measures are available, according to the principle of proportionality,³⁰ as a measure of last resort.³¹ It should be imposed only where other less restrictive alternatives, such as reporting requirements or restrictions on residence, are not feasible in the individual case. Moreover, administrative detention must not be indefinite, its length must be provided for in primary legislation,³² be proportionate to the stated purpose/s sought in respect of the individual case,³³ and subject to periodic review of its grounds by independent and impartial courts.³⁴
32. The European Court of Human Rights, in *Louled Massoud v. Malta*, ruled that the mandatory detention policy was inconsistent with Malta's obligations under Article 5 of the European Convention on Human Rights as 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."³⁵ Furthermore, the ICJ draws the Committee's attention to two recent judgments of the European Court of Human Rights delivered on 23 July 2013: in the cases of *Suso Musa v. Malta* and *Aden Ahmed v. Malta*. In both cases, the European Court ruled that detention ordered both with the purpose of preventing irregular entry and to execute an expulsion under

²⁹ ICJ, *Not here to stay: Report of the International Commission of Jurists on its visit to Malta on 26-30 September 2011*, May 2012, p. 13.

³⁰ Human Rights Committee (HRC), *Omar Sharif Baban vs. Australia*, CCPR/C/78/D/1014/2001, 18 September 2003, para. 7.2. See also, HRC, *Saed Shams and others vs. Australia*, CCPR/C/90/D/1255 and others, 11 September 2007, 7.2; HRC, *C vs. Australia*, CCPR/C/76/D/900/1999, 13 November 2002, para. 8.2; HRC, *D and E and their two children vs. Australia*, CCPR/C/87/D/1050/2002, 9 August 2006, para. 7.2; HRC, *A vs. Australia*, CCPR/C/59/D/560/1993, 30 April 1997, paras 9.2 and 9.3; HRC, *Danyal Shafiq vs. Australia*, CCPR/C/88/D/1234/2004, para. 7.2; ECHR Article 5.1.f, ECtHR, *Amuur vs. France*, Case no. 17/1995/523/609, 20 May 1996, para. 43 (relative to ECHR); ECtHR, *Saadi vs. United Kingdom*, Application no. 13229/03, 29 January 2008, para. 67. UN Working Group on Arbitrary Detention (WGAD), *Annual Report*, E/CN.4/1999/69, 18 December 1998, para. 69, guarantee 13.

³¹ 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, 28th Session, 1975, para. e. See also, *Conclusion No. 44 (XXXVII) Detention of Refugees and Asylum-Seekers*, ExCom, UNHCR, 37th Session, 1986, para. B; *Concluding Observations on Bahamas*, CERD, UN Doc. CERD/C/64/CO/1, 28 April 2004, para. 17.

³² ECtHR, *Amuur v France*, Case no. 17/1995/523/609, 20 May 1996, para. 50. WGAD, *op.cit.*, fn 9, guarantee 10. CoEComm, *op.cit.*, fn 5, paragraph 16; *Abdolkhani and Karimnia v. Turkey*, ECtHR, Application no. 30471/08, 22 September 2009.

³³ *Op. cit.* 9; WGAD, *op.cit.*, fns 5 and 8, guarantee 3; ECtHR, *Saadi v United Kingdom*, Application no. 13229/03, 29 January 2008, para. 72, 74; Resolution 1521(2006) on Mass Arrival of Irregular Migrants on Europe's Southern Shores, Parliamentary Assembly of the Council of Europe, 5 October 2006, para. 16.4.

³⁴ HRC, *A v Australia*, CCPR/C/59/D/560/1993, 30 April 1997, para. 9.4.

³⁵ *Louled Massoud v. Malta*, ECtHR, Application no. 24340/08, 27 October 2010, para. 68.

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Malta's immigration laws was arbitrary.³⁶ The Court expressed "reservations as to the Government's good faith in applying an across-the-board detention policy (save for specific vulnerable categories) with a maximum duration of eighteen months".³⁷ The European Court of Human Rights also noted "a series of odd practices on the part of the domestic authorities, such as the by-passing of the voluntary departure procedure ... and the across-the-board decisions to detain, which the Government considered did not require individual assessment".³⁸

33. In 2011, the Commissioner for Human Rights of the Council of Europe, also expressed concern about the Maltese authorities' policy of mandatory administrative detention of all arriving "irregular" migrants, including asylum seekers.³⁹ The ICJ considers that both the *Louled Massoud* judgment and the Commissioner for Human Rights' opinion provide authoritative guidance for this Committee's consideration of Malta's compliance with and implementation of its obligations under article 9 of the Covenant.
34. The ICJ considers the immigration detention policy of Malta to be incompatible with its obligations under article 9(1) of the Covenant. In particular, the organization is of the view that, by stipulating a maximum length of detention of people subject to immigration control only in policy documents, rather than in primary legislation, Malta is acting contrary to the principle of legality under article 9(1) of the Covenant that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".
35. Furthermore, the ICJ considers that a period 18 months' administrative detention is *per se* contrary to the requirement of proportionality under article 9 of the Covenant, as no deportation procedure lasting so long can be said to have been undertaken with due diligence and any reason provided for the resort to detention cannot stand the proportionality test which requires prior consideration of alternatives measures to detention. Whatever the individual circumstances, it cannot be said that detention remains the only necessary and proportionate measure to enforce someone's removal, even when the individual concerned may be refusing to cooperate with the removal process. While the interest of immigration control may, depending on the circumstances justify a resort to detention when this in turn is both necessary and proportionate, 18 months' detention cannot be said to be consistent with the right to liberty, particularly when consideration is given to the fact that the persons concerned have committed no crime. In light of this, the state interest, that is immigration control, must yield to the right to liberty and the state should be obliged to take other less restrictive measures to enforce removal.
36. In addition, the ICJ believes that the policy of mandatory detention for up to 18 months may lead *per se* to situations of degrading treatment, contrary to Malta's obligations under articles 7 and 10 of the ICCPR.
37. For these reasons, the ICJ recommends that the following questions be included in the List of Issues for the examination of the periodic report of Malta:
 - **Has Malta undertaken or is it planning to undertake reforms to abandon its system of mandatory and automatic detention of "irregular" migrants? Is it planning to extend the guarantees provided by the EU Return Directive 2008/115/EC to all "irregular" migrants arriving in Malta?**
 - **Has Malta stopped its practice of providing migrants arriving in Malta**

³⁶ *Suso Musa v. Malta*, European Court of Human Rights, Application no. 42337/12, 23 July 2013, paras 59-61 and 106-107; *Aden Ahmed v. Malta*, European Court of Human Rights, Application no. 55352/12, paras. 122-124 and 145-146.

³⁷ *Suso Musa v. Malta*, *op. cit.*, para. 100.

³⁸ *Ibid.*

³⁹ 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.

"irregularly" with orders for expulsion based on generalizations and stereotypes, instead of on the basis of an individual assessment of their circumstances?

- **Has Malta introduced or is it considering introducing in its legislation and practice provisions obliging the authorities to consider alternatives to detention for "irregular" migrants before resorting to detention?**
- **Does Malta consider detention of "irregular" migrants as a measure of last resort? If so, how is that reflected in its legislation? How is it reflected in practice?**
- **Has Malta introduced or is it planning to introduce terms of maximum length of detention that are consistent with the right to liberty, into its primary or constitutional law?**
- **If so will that legislation clarify that the necessity and proportionality of the need for detention must be assessed regularly throughout the period of detention and are the only legal basis for continuing detention?**
- **What measures is Malta taking to comply with the rulings of the European Court of Human Rights regarding its law, policy and practice of automatic mandatory administrative detention of "irregular" migrants?**

Shortcomings in judicial review of administrative detention (article 9(4))

38. Maltese immigration law allows the detainee to apply for judicial review of a removal, deportation or detention order to the Immigration Appeals Board, whose decision is final. However, the same Board can decide to grant an appeal on points of law to the ordinary Court of Appeal.⁴⁰ The Board may grant release on grounds of unreasonableness of the order concerning duration of detention and lack of real prospect of deportation.⁴¹ However, in a considerable number of cases, including many cases where the identity of the detainee cannot be ascertained, it cannot order the release of the person even when it finds his or her detention unreasonable.⁴²
39. Serious doubts arise as to the independence and impartiality of the Immigration Appeals Board, in particular since its members are appointed by the President on advice of a Minister and serve for renewable three-year terms.⁴³ Moreover, the legislation provides for cases when the Executive authorities can re-apply administrative detention on the "prohibited immigrant", notwithstanding the order of the Board.⁴⁴
40. The European Court of Human Rights has held that this procedure is not a sufficient remedy to meet the standards of the right to *habeas corpus* and to periodic review of the detention's lawfulness.⁴⁵ The ICJ notes that Malta's consolidated report does not acknowledge the European Court's judgment.
41. The organization is also concerned at allegations from detainees that publicly appointed lawyers do not always provide effective representation to detained migrants.⁴⁶ In the last Universal Periodic Review of Malta in October 2013, Malta

⁴⁰ See, Article 25A(1), (5), (8) and (9), Immigration Act. See also, ECRI, *op.cit.*

⁴¹ See, Article 25A(10), Immigration Act.

⁴² See, Article 25A(10), Immigration Act. The Board must not release a migrant whose identity has not been verified, in particular, but not only, when the migrant contributed to obstructing the research of his/her identity by, for instance, destroying his/her documents; when elements grounding the application for Refugee status cannot be achieved in the absence of detention; and "when the release of the applicant could pose a threat to public security or public order".

⁴³ See, Article 25A (1)(a) and (4), Immigration Act.

⁴⁴ See, Article 25A(12), *ibidem*.

⁴⁵ *Louled Massoud v. Malta*, ECtHR, Application no. 24340/08, 27 October 2010, para. 44. See also, *Suso Musa v Malta*, *op. cit.*, and *Aden Ahmed v. Malta*, *op. cit.*

⁴⁶ ICJ, *Not here to stay: Report of the International Commission of Jurists on its visit to Malta on 26-30 September 2011*, May 2012, p. 33.

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referred to the narrow scope of the review of detention by the Immigration Appeals Board to justify the lack of provision of free legal aid to detained migrants: "Given that the Immigration Board reviews only the reasonableness of the duration of administrative detention, it is not considered that the absence of free legal assistance in this context can operate to the disadvantage of those subject to detention".⁴⁷

42. The ICJ recalls that under Article 9(4) of the Covenant, administrative detention must be subject to judicial review both as regards the procedure that leads to it and the merits of the detention itself in light of domestic and international law.⁴⁸ The judicial review on the lawfulness of detention must be provided to the person subjected to administrative detention "without delay"⁴⁹. Migrants in detention have the right of prompt, regular and confidential access to a lawyer.⁵⁰

43. For these reasons, the ICJ recommends that the following questions be included in the List of Issues for the examination of the periodic report of Malta:

- ***Is Malta considering reforming the system of judicial review of administrative detention for immigration purposes?***
- ***If so, what kind of reforms are foreseen or are being pursued?***
- ***Is Malta considering measures to ensure the availability of free legal assistance by suitably qualified, competent lawyers with the relevant training and expertise for migrants in immigration detention in order to ensure that they can enjoy their right to challenge the lawfulness of their detention effectively?***
- ***What is Malta doing to address the violations of the right to judicial review of detention found by the European Court of Human Rights in the cases *Louled Massoud, Suso Musa and Aden Ahmed*?***
- ***What measures have been and are being undertaken by Malta to ensure prompt, regular and confidential access to a lawyer to migrants in detention?***

ARTICLES 7 AND 10

Conditions of detention of people detained for immigration purposes, including asylum-seekers

44. The European Committee for the Prevention of Torture carried out a visit to Malta in September 2011. With regard to the detention centres for "prohibited migrants", located within the military compounds of Safi Barracks, the Committee found that "material conditions of detention were still appalling in the two Warehouses at Safi Barracks. In particular, at Warehouse No. 1, foreign nationals were being held in extremely crowded conditions and the sanitary facilities consisting of seven mobile toilets (without a flush) and seven mobile shower boots, located in the outdoor exercise yard, were in a deplorable state. In fact, the Warehouses are not suitable for accommodating persons for prolonged periods, but should only be used in the

⁴⁷ See, UN Doc. A/HRC/12/7/Add.1/Rev.2, para. 29.

⁴⁸ HRC, *Omar Sharif Baban vs. Australia*, CCPR/C/78/D/1014/2001, 18 September 2003, para. 7.2. See also, HRC, *Saed Shams and others vs. Australia*, CCPR/C/90/D/1255 and others, 11 September 2007, paras. 7.2 and 7.3; HRC, *C vs. Australia*, CCPR/C/76/D/900/1999, 13 November 2002, paras. 8.2 and 8.3; HRC, *D and E and their two children vs. Australia*, CCPR/C/87/D/1050/2002, 9 August 2006, para. 7.2; HRC, *A vs. Australia*, CCPR/C/59/D/560/1993, 30 April 1997, paras 9.2, 9.3 and 9.5; HRC, *Danyal Shafiq vs. Australia*, CCPR/C/88/D/1234/2004, paras. 7.2 and 7.4; ECHR Article 5.4; ECtHR, *Amuur vs. France*, Case no. 17/1995/523/609, 20 May 1996, para. 43; ECtHR, *Saadi vs. United Kingdom*, Application no. 13229/03, 29 January 2008, para.67; CoEComm, *op.cit.*, Fn 5, paragraph 20.

⁴⁹ Article 9(4), International Covenant on Civil and Political Rights (ICCPR).

⁵⁰ Concluding Observations on Australia, CCPR, Report of the Human Rights Committee to the General Assembly, 55th Session, Vol.1 UN Doc A/55.40 (2000) para.526; UNHCR Revised Guidelines on Detention, Guideline 5(ii).

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event of an emergency".⁵¹ The Committee recommended that detainees be transferred out of this detention centre and that these Warehouses be used only for short-term detention in emergency situations.⁵² The Committee also found that "conditions of detention in the two warehouses were further exacerbated by the total lack of any organized activities".⁵³ It should be noted that in its replies to the European Committee for the Prevention of Torture of 4 July 2013, the Maltese Government has declared that "Warehouse 1 is currently vacated in order for refurbishment works to commence"⁵⁴ and that "all compounds at Safi have recreational areas, which are accessible to immigrants from sunrise to sunset".⁵⁵

45. In the case of *Suso Musa v Malta*, the inappropriateness of the conditions of detention was one of the factors taken into consideration by the European Court of Human Rights to rule on the arbitrariness of the detention itself.⁵⁶
46. The ICJ also carried out a mission to Malta in September 2011, visiting the detention centres for "prohibited migrants" at Safi Barracks and Lyster Barracks, and several reception centres for asylum seekers.⁵⁷ The organization considered that at the time of its visit to Safi Barracks the cumulative effects of poor detention conditions, including sanitary conditions, the detention of people displaying mental health problems, the lack of leisure facilities, overcrowding and the 18 months' mandatory detention were beyond the threshold of degrading treatment under article 7 of the Covenant.
47. The European Court of Human Rights ruled that the detention of a migrant woman in a vulnerable situation in the Lyster Barracks constituted a violation of the prohibition of degrading treatment under article 3 ECHR.⁵⁸ In its judgment, the Court pointed out that the "detainees were made to suffer the cold and that there were no proper blankets",⁵⁹ it reported "lack of female staff in the centre [as] only two females had been working in the detention centre at the time [and found that] this must have caused a degree of discomfort to the female detainees".⁶⁰ The Court also found that "the exercise yard in question was considerably small for use by sixty people (recreation being available in one zone at a time). It consisted of a rectangular area secured on three sides by wire fencing topped with barbed wire, the fourth side consisting of one of the barrack blocks. In fact, it left much to be desired given that it was the only outdoor access enjoyed by detainees for a limited time daily".⁶¹
48. In the opinion of the ICJ, the conditions of detention in Malta's immigration

⁵¹ European Committee for the Prevention of Torture, *Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 to 30 September 2011*, Doc. No. CPT/Inf (2013) 12, 4 July 2013, para 55.

⁵² *Ibid.*

⁵³ *Ibid.*, para 56

⁵⁴ *Response of the Maltese Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on its visit to Malta from 26 to 30 September 2013*, Doc. No. CPT/Inf (2013) 13, 4 July 2013, p. 24.

⁵⁵ *Ibid.*, p. 25.

⁵⁶ *Suso Musa, op. cit.*, para 101.

⁵⁷ ICJ, *Not here to stay: Report of the International Commission of Jurists on its visit to Malta on 26-30 September 2011*, May 2012. 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. "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> .

⁵⁸ *Aden Ahmed v Malta, op. cit.*

⁵⁹ *Ibid.*, para. 94.

⁶⁰ *Ibid.*, para. 95.

⁶¹ *Ibid.*, para. 96.

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detention centres give rise to violations of Malta's obligations under article 7 of the Covenant, as far as the Safi detention centre is concerned, and of article 10 of the Covenant at the Lyster Barracks.

49. For these reasons, the ICJ recommends that the following questions be included in the List of Issues for the examination of the periodic report of Malta:
- ***What measure have been taken to improve the conditions in which migrants are detained in Malta?***
 - ***Is Malta considering abandoning the detention of migrants in military compounds in Safi and/or Lyster?***
 - ***What measures, if any, have been taken to ensure access to proper sanitation facilities, provision of facilities respecting the privacy of detainees and to avoid situations of overcrowding in detention?***
 - ***What are the recreational facilities of migrants in detention? What refurbishment works have been undertaken in Warehouse 1 in Safi detention centre?***

ARTICLES 7 AND 10

Living conditions in reception centres

50. During its 2011 mission to Malta, the ICJ found that the cumulative conditions of the reception centres for asylum-seekers it visited at the Hal-Far Hangar centre⁶² amounted to degrading treatment in breach of article 7, in particular in view of the vulnerability of some of the individuals there, including children. While this centre is at present empty and not used, the Maltese authorities have, to the ICJ's knowledge, never publicly declared that it would not longer be used and it is still considered as a centre available for emergency arrivals.
51. For these reasons, the ICJ recommends that the following questions be included in the List of Issues for the examination of Malta:
- ***Has Malta made any use of the Hal-Far Hangar open centre since September 2011?***
 - ***Can Malta give assurances that the Hal-Far Hangar open centre will no longer be used again to host migrants or asylum-seekers?***
 - ***What are the current arrangements for emergency reception of migrants and asylum-seekers in case of large-scale arrivals?***

ARTICLES 2, 3, 6, 7 AND 26

Access to reproductive health and criminalization of abortion

52. Malta's Criminal Code prohibits the termination of pregnancy, specifying that both women who procure miscarriages and medical professionals who perform or assist them may be held criminally responsible.⁶³ The terms of the law do not envisage any exception and, as a result, even abortion for therapeutic purposes, such as to save the life of a pregnant woman, or to protect her health, is subject to this criminal prohibition. Nor does the law provide that abortion may be permitted following situations of rape or incest.
53. These provisions of Maltese criminal law are inconsistent with and may give rise to breaches of the State party's obligations under articles 2, 3, 6, 7 and 26 of the Covenant, including in respect of Malta's obligation to ensure women's enjoyment of the rights to life and freedom from torture and cruel, inhuman or degrading treatment.

54. In its Concluding Observations on Malta in 2010, the Committee on the

⁶² At the time of the ICJ's visit it comprised tents inside an abandoned hangar.

⁶³ Sections 241 and 243, Chapter 9, Criminal Code of the Republic of Malta.

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Elimination of Discrimination against Women expressed concern about the extent of this prohibition and urged Malta to remove the provisions criminalizing women who undergo abortion from its law and to enact exceptions allowing abortion for therapeutic purposes and in cases of rape or incest.⁶⁴ In its 2004 Concluding Observations the Committee on Economic, Social and Cultural Rights expressed concerns about these issues and made similar recommendations to the Maltese authorities.⁶⁵

55. These concerns and recommendations mirror those of this Committee in dealing with the periodic reports of other States with similarly restrictive laws criminalizing abortion without relevant exceptions.⁶⁶

56. For these reasons, the ICJ recommends that the following questions be included in the List of Issues for the examination of Malta:

- **What steps will the State party take to ensure that its laws and practices regarding termination of pregnancy do not continue to impair or jeopardize women's equal enjoyment of their Covenant Rights ?**
- **What is the timeframe in which each of these steps will be taken?**

ENJOYMENT OF COVENANT RIGHTS IN CONNECTION WITH SEXUAL ORIENTATION AND GENDER IDENTITY

57. The ICJ notes the adoption of the Civil Code (Amendment) Act 2013, which removed legal obstacles for individuals who have undergone "a legally recognized sex change" from the sex that was assigned to them at birth to their acquired sex.⁶⁷ The amendment allows recognition of the acquired sex for all civil purposes.⁶⁸ This includes the right to marry a person of the opposite sex to the acquired sex, and to obtain a birth certificate showing the acquired sex subject to some indications being made on that new certificate.

58. However, the ICJ notes that the conditions and procedure to obtain a legal recognition of a change in sex remain unchanged. The law requires an "irreversible sex change".⁶⁹ Moreover, although the law does not specify the necessity of surgical intervention, domestic jurisprudence has interpreted

⁶⁴ Concluding observations of the Committee on the Elimination of Discrimination Against Women, UN Doc.CEDAW/C/MLT/CO/4, paras. 34 and 35.

⁶⁵ Concluding observations of the Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/1/Add.101, 14 December 2004, paras. 23, 41 .

⁶⁶ See for example: Concluding observations of the Human Rights Committee on Ireland, UN Doc CCPR/C/IRL/CO/330 (2008); Concluding observations of the Human Rights Committee on Ireland, 24 July 2000, UN Doc. A/55/40;

Concluding Observations of the Committee against Torture on Peru, UN Doc CAT/C/PER/CO/4 (2006), §23; Concluding Observations of the Committee against Torture on Nicaragua, UN Doc CAT/C/NIC/CO/1 (2009), §16. See also: KL v. Peru, Human Rights Committee Communication 1153/2003, UN Doc CCPR/C/85/D/1153/2003 (2005) V.D.A. v. Argentina, Human Rights Committee Communication No. 1608/2007, CCPR/C/101/D/1608/2007 (2011). And see LC v. Peru, CEDAW Communication 22/2009, UN Doc CEDAW/C/50/D/22/2009 (2011); Report of the Special Rapporteur on the right of everyone on to the enjoyment of the highest attainable standard of physical and mental health, UN Doc A/66/254 (2011); Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/HRC/22/53 (2013).

⁶⁷ Act No. VII of 2013 entitled the Civil Code (Amendment) Act, 2013. See, *The Malta Government Gazette* No. 19, 109, 12 July 2013, p. 2, available at <http://www.gov.mt/en/Government/Government%20Gazette/Documents/2013/07/Government%20Gazette%20-%202012%20July.pdf>.

⁶⁸ The European Court of Human Rights has held that States must recognize a change of gender identity and protect the right to marry of individuals who have changed their gender. See European Court of Human Rights, *Christine Goodwin v. United Kingdom* [GC], Application No. 28957/95, 11 July 2002.

⁶⁹ Civil Code, Article 257A(2).

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"irreversibility" as meaning a permanent change requiring surgery.⁷⁰ Further, the organization remains concerned that the current procedure to obtain legal recognition of one's acquired sex remains costly and intrusive.⁷¹

59. The ICJ is concerned that the continuing requirement of surgery and the remaining procedural hurdles to obtaining legal recognition of a sex change may be inconsistent with the state's obligation under articles 2, 3, 6, 7, 16, 17 and 26.
60. In addition, the ICJ remains concerned that domestic legislation continues to require that individuals wishing to obtain a "legally recognized sex change" must be unmarried.⁷² Requiring married transgendered persons to choose between legal recognition of their gender identity and their marriage is a disproportionate interference with their rights.⁷³ As such, the ICJ considers that this requirement is inconsistent with Articles 2, 16, 19, 23 and 26 of the Covenant, and imposes an unreasonable and discriminatory requirement on the basis of one's gender identity.
61. The ICJ notes the introduction of a Bill⁷⁴ to amend the antidiscrimination provision in the Constitution. By adding the words "or sexual orientation" to the listed prohibited grounds, the Bill introduces an additional protection from discrimination by ensuring that no law shall make any provision that is discriminatory on that ground and that no person will be treated in a discriminatory manner by "any person acting by virtue of the law" or in the performance of public office.
62. The ICJ notes, however, that gender identity does not feature as a prohibited ground in the Constitution, which is of particular concern in view of the historic and on-going discrimination faced by transgendered persons in Malta.⁷⁵ Further, it is regrettable that the proposed amendment to the Constitution does not extend to matters of personal law, and hence does not eliminate discrimination of same-sex couples with regard to the right to marry, on the basis that "this area of law is one that relies heavily on deep-rooted social and cultural connotations".⁷⁶
63. The ICJ considers that the inclusion of sexual orientation as a prohibited discrimination ground in the Constitution must necessarily entail that any limitation of rights based on that ground must be justified. In this context, tradition may offer an explanation for the opposite-sex requirement, but it is not a legitimate objective that can justify the continued discrimination of same-sex couples as regards the right to marry.⁷⁷

⁷⁰ For comparative purposes of decisions to, see Bundersverfassungsgericht (Germany), *1 BvR 3295/07* (11 January 2011); Family Court of Auckland (New Zealand), *"Michael" v. Registrar-General of Births* (9 June 2008).

⁷¹ For more on the costly and intrusive nature of the procedure, see Neil Falzon, *A Proposed Gender Identity act for Malta* (December 2010), pp. 20-22, accessed at http://www.tgeu.org/sites/default/files/Proposed_Gender_Identity_Act_Malta.pdf.

⁷² See Civil Code, Art. 257A(1).

⁷³ For comparative purposes, see Bundesverfassungsgericht (Germany), *1 BvL 10/05* (27 May 2008), which held the same requirement in the *Transsexuellengesetz* to be unconstitutional under German law.

⁷⁴ See Bill No. 18 – Constitution of Malta (Amendment) Bill. The Bill was introduced on 20 June 2013 by Hon. Claudette Buttigieg and is currently in the second reading phase (plenary session of 23 October). The next steps in the legislative process are the Committee phase, Third Reading in plenary and vote, assent by the President, and publication in the Gazette.

⁷⁵ See e.g., European Union Agency for Fundamental Rights, LGBT Survey, conducted between April and July 2012, accessed at <http://fra.europa.eu/DVS/DVT/lgbt.php>.

⁷⁶ See "Objects and reasons" attached to the Bill.

⁷⁷ See Supreme Court of Iowa (United States), *Varnum et al. v. Brien*, No. 07-1499 (3 April 2009); Ontario Court of Appeal (Canada), *Halpern et al. v. Attorney General of Canada et al.*, Docket C39172 and C39174 (10 June 2003).

64. The ICJ notes the introduction of a Bill⁷⁸ on civil unions, and welcomes its underlying rationale of equating these unions – whether between persons of the same or opposite sex – with marriages in terms of procedure and substance, in a manner that guarantees equal rights to parties in a civil union as to spouses in a marriage. However, the ICJ regrets that the institution of marriage remains open only to partners of the opposite sex. Beyond rights and responsibilities, marriage also has a symbolic significance. The withholding of the title of marriage, despite creating a form of partnership that confers the same benefits and responsibilities and that is accessible also to same-sex partners, signals that same-sex couples are inferior and thus perpetuates a “separate but equal” doctrine repugnant to the concept of human dignity for all.⁷⁹
65. The situation as set out above, while an improvement over the previously applicable legal regime, undermines Malta’s compliance with its obligations under the Covenant.
66. The ICJ recommends that the following questions be included in the List of Issues for the examination of Malta:
- **Will Malta consider amending the existing conditions and procedure applicable to obtaining legal recognition of one’s acquired sex to make them consistent with its obligations under the Covenant?**
 - **Will Malta consider taking other measures, including non-legislative, to improve the situation for transgender persons?**
 - **Will Malta consider introducing same-sex marriage thereby abandoning the “separate but equal” doctrine?**

⁷⁸ See Bill No. 20 – Civil Unions Bill. The Bill was introduced on 23 September 2013 by the Minister for Social Dialogue, Consumer Affairs and Civil Liberties, and is currently in the Second Reading phase (plenary sessions of 22 October and 26 November).

⁷⁹ See Constitutional Court of South Africa, joined cases *Minister of Home Affairs et al. v. Fourie et al.*, CCT 60/04, and *Lesbian and Gay Equality Project et al. v. Minister of Home Affairs et al.*, CCT 10/05 (1 December 2005), in particular para. 152-153: “The crucial determinant will always be whether human dignity is enhanced or diminished and the achievement of equality is promoted or undermined by the measure concerned. Differential treatment in itself does not necessarily violate the dignity of those affected. It is when separation implies repudiation, connotes distaste or inferiority and perpetuates a caste-like status that it becomes constitutionally invidious. In the present matter, this means that whatever legislative remedy is chosen must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved. In a context of patterns of deep past discrimination and continuing homophobia, appropriate sensitivity must be shown to providing a remedy that is truly and manifestly respectful of the dignity of same-sex couples”. Also see Supreme Court of Mexico, *Acción de Inconstitucionalidad 2/2010* (10 August 2010); United States District Court for the Northern District of California, *Perry v. Schwarzenegger* (“*Proposition 8*”), No. C 09-2292 VRW (4 August 2010).