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## مجلس حقوق الإنسان

الدورة الثالثة عشرة

البند ٣ من جدول الأعمال

تعزيز وحماية جميع حقوق الإنسان المدنية والسياسية والاقتصادية

والاجتماعية والثقافية، بما في ذلك الحق في التنمية

### تقرير الفريق العامل المعني بالاحتجاز التعسفي\*

إضافة

بعثة إلى مالطة\*\*

(الفترة من ١٩ إلى ٢٣ كانون الثاني/يناير ٢٠٠٩)

موجز

أجرى الفريق العامل المعني بالاحتجاز التعسفي بعثة قطرية إلى جمهورية مالطة في الفترة ما بين ١٩ و٢٣ كانون الثاني/يناير ٢٠٠٩، بدعوة من الحكومة. وقد حظي الفريق العامل بتعاون الحكومة الكامل معه في جميع مراحل الزيارة وفي جميع المجالات المطروقة. وتسنى للوفد زيارة جميع مرافق الاحتجاز ومحادثة جميع المحتجزين الذين طلب محادثتهم في كنف السرية.

وفي هذا التقرير، يشير الفريق العامل إلى عدد من الجوانب الإيجابية فيما يتصل بالمؤسسات والقوانين التي تحمي من التعسف في الحرمان من الحرية. غير أنه يلاحظ، بخصوص العدالة الجنائية، أن الفترات التي يقضيها المتهمون في الاحتجاز رهن المحاكمة

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\*\* يعمم موجز هذا التقرير بجميع اللغات الرسمية. أما التقرير، الوارد في مرفق الموجز، فيعمم كما ورد، باللغة التي قُدِّمَ بها فقط.

طويلة نسبياً وأن نسبة المحتجزين في الحبس الاحتياطي مرتفعة مقارنة بإجمالي عدد السجناء، إضافة إلى أن المحاكم لا تطبق قواعد الإفراج بكفالة على نحو يساوي بين مواطني مالطة والأجانب الموجودين فيها. كما يلاحظ عدم وجود نظام للسراح المشروط؛ غير أن الحكومة تقول إن إرساء هذا النظام بات وشيكاً.

ولا يبدو النظام القانوني للاحتجاز الإلزامي المطبق على من يدخلون البلد بلا تأشيرة ومن يلتصون اللجوء نظاماً متوافقاً مع القانون الدولي لحقوق الإنسان. إذ يخضع المهاجرون في أوضاع غير قانونية للاحتجاز الإلزامي دون أن يتسنى لهم حقاً وفعالاً اللجوء إلى محكمة. ولا يحدد القانون بوضوح مدة احتجازهم. ويحتجز ملتصو اللجوء لفترة أقصاها ١٢ شهراً ما دام طلب لجوئهم قيد الدرس. أما المهاجرون الذين لا يلتصون اللجوء السياسي أو الذين رُفضت طلباتهم فقد يُحتجزون لمدة ١٨ شهراً في مراكز احتجاز مغلقة. ويسلم التقرير بجهود الحكومة في سبيل تطبيق إجراء سريع لإطلاق سراح أسر المهاجرين المصحوبة بأطفال، والأحداث غير المصحوبين، والنساء الحوامل والأمهات المرضعات، والأشخاص المعوقين، ومن يعانون مشاكل بدنية أو عقلية خطيرة أو مزمنة، رغم أنه ما زال من الممكن أن يستغرق إيداعهم في مراكز مفتوحة فترة قد تصل إلى ثلاثة أشهر.

وبناء عليه، يوصي الفريق العامل بأن تقوم الحكومة بما يلي: تغيير قوانينها وسياساتها المتعلقة بالاحتجاز الإداري للمتمسكي اللجوء والمهاجرين في أوضاع غير قانونية، بحيث تبت المحاكم في مسألة الاحتجاز بفحص كل حالة على حدة وفقاً لمعايير واضحة ومستوفاة الشرح؛ وإلغاء احتجاز المهاجرين في حالة الفئات الضعيفة؛ واعتماد قرار ينص على أن تقوم المحاكم باستعراض دوري تلقائي لضرورة الاحتجاز وشرعيته في جميع الحالات وينص أيضاً على إتاحة سبيل انتصاف فعال للمحتجزين.

وبخصوص العدالة الجنائية، يوصي الفريق العامل بأن يُسمح للأشخاص الموقوفين بشبهة ارتكاب جريمة بأن يتصلوا بمحاميين خلال فترة الاحتجاز الأولى، وأقصاها ٤٨ ساعة، لدى الشرطة. أما بخصوص قضاء الأحداث، فيوصي الفريق العامل بأن تُرفع السن الدنيا للمسؤولية الجنائية في حالة الأحداث إلى ١٢ سنة؛ ويُلغى افتراض أن الأحداث المتروحة أعمارهم بين ٩ و ١٤ سنة يمكن أن يتصرفوا "عن تمييز وتعمد للأذى"؛ ويُتخذ قرار بتوسيع نطاق نظام قضاء الأحداث بحيث يشمل من تتراوح أعمارهم بين ١٦ و ١٨ سنة.

## Annex

### Report of the Working Group on Arbitrary Detention on its mission to Malta (19 to 23 January 2009)

#### Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction.....	1–4	4
II. Programme of the visit.....	5–8	4
III. Overview of institutional and legal framework.....	9–14	5
A. Political system.....	9–11	5
B. International human rights obligations.....	12	5
C. Constitutional guarantees.....	13–14	5
IV. Findings.....	15–72	6
A. Criminal procedure detention.....	15–30	6
B. Juvenile justice.....	31–32	8
C. Detention pursuant to immigration powers.....	33–66	9
D. Deprivation of liberty on grounds of mental health.....	67–68	16
E. Monitoring mechanisms.....	69–73	17
V. Conclusions.....	74–78	18
VI. Recommendations.....	79	19
Appendices		
I. Detention facilities visited.....		21
II. International human rights treaties to which Malta is a State party.....		22
III. Excerpts from the Constitution of Malta.....		23

## I. Introduction

1. The Working Group on Arbitrary Detention, established pursuant to Commission on Human Rights resolution 1991/42, whose mandate was clarified by Commission resolution 1997/50, and extended for a further three-year period by Human Rights Council resolution 6/4 of 28 September 2007, conducted a country mission to the Republic of Malta from 19 to 23 January 2009, at the invitation of its Government. The delegation was comprised of Ms. Manuela Carmena Castrillo (Spain), former Chairperson-Rapporteur of the Working Group, and Mr. El Hadji Malick Sow (Senegal), then Vice-Chair of the Working Group, who expressed their gratitude to the Government of Malta for the invitation and for the full cooperation extended to the Group in the conduct of its mission. The delegation was accompanied by the Secretary of the Working Group, another official from the Office of the High Commissioner for Human Rights and two United Nations interpreters.
2. The Government of Malta has extended a standing invitation to all United Nations special procedures mandates and promptly agreed to receive the Working Group on official mission when it requested an invitation.
3. During the entire visit and in all respects, the Working Group enjoyed the fullest cooperation of the Government and all authorities with which it dealt: they were willing to discuss openly all matters raised by the Working Group, were interested in its preliminary observations and strived to provide the delegation with all the information and to arrange meetings with all Government authorities requested. The delegation was able to visit all detention facilities and interview in confidence all detainees with which it asked to speak.
4. The Working Group would also like to thank the representatives of the civil society with which it met, and the representatives of international and supranational organizations, particularly the Office of the High Commissioner for Refugees, for their support of the mission.

## II. Programme of the visit

5. During its official visit, the Working Group visited the closed immigration detention centres at Safi and Lyster Barracks; the immigration quarters of the Ta'Kandja Police Complex; Malta International Airport Custody Centre; the Corradino Correctional Facility, which is the only prison on the island State; the holding cells of the General Headquarters of the Police at Floriana and Valletta police station (both visits were unannounced); the closed wards of Mount Carmel Hospital; and the cell at the guardroom in Luqa Barracks at the Headquarters of the Armed Forces. At these detention facilities, it interviewed detainees in private. The Working Group also visited the Substance Abuse Therapeutic Unit in Mtaħleb.
6. The Working Group met with senior Government authorities from the executive, legislative and judicial branch, including the Deputy Prime Minister and Minister for Foreign Affairs; the Chief Justice; the Senior Administrative Judge; the senior magistrates; the magistrate presiding over the Juvenile Court; the Attorney-General, the Refugee Commissioner; members of the Commission for the Administration of Justice; and senior officials of the Armed Forces of Malta. The Working Group also held meetings with representatives of various monitoring mechanisms such as the Ombudsman; the Board of Visitors of the Prisons; the Board of Visitors for Detained Persons; and the Permanent Commission against Corruption. It further met with representatives of United Nations agencies, international and supranational organizations, members of the civil society and the Chamber of Advocates.

7. The Working Group also attended a trial in a criminal court.
8. The mission concluded with a debriefing with the Government on the preliminary observations of the Working Group and a press conference.

### **III. Overview of institutional and legal framework**

#### **A. Political system**

9. Malta is a unitary State which is made up of an archipelago of six islands, only three of which are inhabited: Malta, Gozo and Comino. The executive branch consists of the President, the Prime Minister and the Cabinet. Legislation is passed by a unicameral Parliament, the House of Representatives, and interpreted by the judiciary. The Constitution is the supreme law of the land. Maltese law follows Roman law and European continental codification traditions, and has been largely influenced by the English common law, especially in the fields of constitutional, administrative and criminal law.

10. The court system, as far as it is relevant for this report, was established by the former British colonial power and continued under the Republic. It consists of the inferior or magistrates' courts, one for the island of Malta and one for the islands of Gozo and Comino, and the superior courts. Judges and Magistrates are independent of the executive branch. The superior courts (the Constitutional Court; the Court of Appeal; the Court of Criminal Appeal; the Criminal Court and the Civil Court) are presided over by judges. The inferior courts are presided over by magistrates.

11. The Constitutional Court, presided over by three judges, was established by the 1964 Constitution. Its jurisdiction includes cases involving alleged violations of human rights, the interpretation of the Constitution and the validity of laws. Of the three sections in the Civil Court, the First Hall has first-instance jurisdiction for all applications for redress in respect of alleged violations of human rights and fundamental freedoms protected by both the Constitution of Malta and by the European Convention on Human Rights.

#### **B. International human rights obligations**

12. Malta is a party to the majority of international human rights treaties and, in particular, to the two principal international human rights covenants and four conventions, as well as to related optional protocols (see appendix II).

#### **C. Constitutional guarantees**

13. The Constitution affords several basic rights, such as the right to protection from arbitrary arrest or detention (art. 34), protection from inhuman treatment (art. 36) and a fair trial (art. 39). The full text of pertinent constitutional guarantees may be found in appendix III.

14. The guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights") were incorporated into domestic law by the European Convention Act in 1987.

## **IV. Findings**

### **A. Criminal procedure detention**

15. The Working Group notes with appreciation the well-established institutional and legal safeguards against arbitrary detention prevailing in Malta. It also welcomes the readiness of the Government of Malta to develop its laws and institutions wherever it is deemed necessary. Following an amendment of the criminal laws, the time spent by the accused in pretrial detention is now automatically deducted from the prison term.

16. The Working Group notes the concentration of powers of the Minister of Justice and Home Affairs, in whose portfolio falls, amongst other services, the Malta Police Force, the Correctional Services, the Detention Service, and the Commissioner for Refugees. Such accumulation of powers may lead to a perception of lack of transparency of and control within the system of administration of justice.

#### **1. Police**

17. As regards the criminal justice system, the Working Group is concerned that persons arrested on suspicion of having committed a criminal offence do not enjoy the right to access to lawyers for up to 48 hours while they are in police custody, during the crucial initial stage of the criminal investigation. The presence of a magistrate when evidence is being gathered by the police and the requirement for a search warrant and the magistrate's authorization every six hours to maintain custody of the suspect cannot be considered as an equivalent substitute for a defence lawyer acting solely in the interest of the suspect. Given the size of the country, the maximum period of 48 hours before the arrested suspect has to be brought before a magistrate might in itself be deemed unnecessarily long.

18. On a positive note, criminal procedure law stipulates that a suspect must be charged or released no later than 48 hours after an arrest has been carried out, although the Working Group has noted during its visit that this period is at times exceeded. The Government reported that no recent cases have been brought to the attention of the courts where this time limit has been exceeded. A magistrate is obliged to decide about detention on remand within 24 hours, failing which the magistrate would be criminally liable. Habeas corpus is available at any time to the accused in order to challenge the legality of detention, thus providing a strong safeguard against arbitrary detention.

19. Within the criminal justice context, the Working Group noted the relatively long periods of time which the accused spend in pretrial detention and the high rate of detainees on remand in comparison to the overall prison population. The Working Group is concerned about the fact that more than 50 per cent of the prisoners in Malta are pretrial detainees. Even if the number of pretrial detainees who are already serving a prison sentence is deducted from the overall figure of detainees on remand, reducing it to about 33 per cent, this is still a comparatively high rate. The Government stressed that it has to be kept in mind that such orders for custody on remand are decided by the courts as independent institutions. The Working Group is also concerned about allegations received that the rules of release on bail were not to be applied by courts equally to Maltese citizens and foreigners alike, and recalls the fundamental right of the accused to be presumed innocent until proven guilty and their right to be tried without undue delay, both of which are well-entrenched in international human rights law.

20. Police officers can be tried before the criminal courts. If complaints against the police are found to be justified, the courts may order the police commissioner to initiate the appropriate action.

## **2. Attorney-General**

21. According to article 91 of the Constitution, the Attorney-General is appointed by the President acting on the advice of the Prime Minister. The Attorney-General holds office until the age of 65 and may not be removed from office except by the President upon a resolution by the House of Representatives. The Attorney-General shall not be subject to orders or the control of any other authority in the exercise of his or her powers to institute, undertake or discontinue criminal proceedings. The Attorney-General performs the function of Public Prosecutor before the Criminal Court and the Court of Criminal Appeal. All requests for bail have to be communicated to him or her, and he or she advises the Government on proposed legislation.

## **3. Judiciary**

22. Although judges and magistrates are appointed by the President acting on the advice of the Prime Minister, a system of checks and balances ensure their independence. The eligibility criterion is 12 years' legal practice as an advocate to become a judge and seven years' to become a magistrate. Judges and magistrates shall vacate office when they attain the age of 65. They enjoy security of tenure: removal from office requires proven inability to perform their functions or proven misconduct, as well as the approval by a two-thirds majority in the House of Representatives.

23. In criminal matters, the Magistrates' Court has a twofold jurisdiction, namely as a court of criminal adjudication for the trial of offences which fall within its jurisdiction, and a court of inquiry in respect of offences which fall within the jurisdiction of a higher tribunal. In the second case, it conducts the preliminary inquiry into indictable offences and transmits the relative record to the Attorney-General. The Attorney-General may send for trial by this court any person charged with a crime punishable with imprisonment for a term exceeding six months but not exceeding ten years, if there is no objection on the part of that person. The court asks the accused whether they object to their cases being dealt with summarily and, if the accused does not object, the court becomes competent to try the accused and render judgment.

24. Appeals from judgments delivered by the magistrates' courts in their criminal jurisdiction are heard by one judge of the Court of Criminal Appeal. Appeals from the Criminal Court are heard by three judges of the Court of Criminal Appeal. The Criminal Court, sitting as one judge with a jury of nine persons, tries criminal offences exceeding the competence of the magistrates' courts. In certain exceptional cases, it may sit without a jury.

## **4. Legal aid**

25. Maltese laws grant legal aid to persons who are declared as not having the means to access the courts of justice. Persons seeking legal aid have to submit their case at the Office of the Advocate for Legal Aid. The Working Group was informed that the number of legal aid lawyers had decreased from 15 to 8.

## 5. Imprisonment

26. Criminal sentences are executed by the Correctional Services. The Government reported that correctional facilities are considered more as a place of rehabilitation rather than of punishment. The Corradino Correctional Facility is the main prison. The prison population has more than doubled since 1995: During the Working Group's visit, the facility's penal population consisted of 435 prisoners: 204 convicts and 231 in pretrial detention, of whom approximately 100 were already serving a criminal sentence in connection with another criminal offence. One third of those were foreigners. Eight persons were serving sentences of life imprisonment, which are genuinely indeterminate sentences, unless, according to the Government, there is an amnesty converting such life imprisonment from an indeterminate to a determinate sentence. Most prisoners were serving determinate sentences. These prisoners are eligible to prison leave during the last two years of their sentence.

27. Young male inmates, female prisoners, inmates requiring medical attention and generally vulnerable persons are held in separate wings. The majority of the prisoners have their own cell with sanitary facilities. The facility is run by officers from the Correctional Services. Over recent years, the correctional facility has experienced an increase in the population of young and female offenders.

28. At the conclusion of its visit, when presenting its preliminary observations, the Working Group recommended that the Government of Malta consider establishing a system of release on parole, which is currently inexistent. The Working Group was informed by the Government that the introduction of a parole system was in the offing.

29. Criminal convicts in Malta receive a court sentence which reflects the maximum prison term to be served. This sentence is then computed and the earliest possible release date is determined. The actual release date depends on the inmate's conduct. Whenever the Disciplinary Board deems the conduct of a prisoner to be in violation of prison rules, a certain period of time is added to the computed sentence until the maximum prison term to be served is reached. Such decisions can only be challenged before a body outside the judicial system. During its visit, the Working Group found that the inmates at the facility were largely unaware of this procedure. Furthermore, contesting prisoners are not entitled to legal assistance, and have to rely on the assistance of an official of the Correctional Services pursuing their interests.

30. The Working Group welcomes the information received from the Government since the conclusion of its visit that this system is currently being reformed, and would appreciate receiving information about the progress made.

## B. Juvenile justice

31. With respect to minors in conflict with the law, the Working Group shares the concerns of the Committee on the Rights of the Child about the extremely low age of criminal responsibility for juveniles, set at nine years. It also shares the concern of the Committee about the assumption contained in Maltese legislation that a juvenile between the age of 9 and 14 years could act with "mischievous discretion" and the exclusion of children between 16 and 18 years of age from the juvenile justice system.<sup>1</sup>

32. Despite the fact that, in practice, minors are rarely taken into detention or sentenced to prison terms, the Working Group invites the Government of Malta to reconsider the

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<sup>1</sup> CRC/C/15/Add.129, paras. 49–50.

applicable laws, notwithstanding that it has already received indications from the Government that the current legislation on criminal responsibility of juveniles is considered appropriate.

### **C. Detention pursuant to immigration powers**

33. Turning to detention outside the criminal law context, the Working Group is seriously concerned by the administrative detention regime applied to migrants in an irregular situation.

34. Since 2002, because of its geographical location, Malta has witnessed a continuous increase in the irregular influx of migrants, arriving in the country mainly by boats from the North-African coast. According to statistics provided by the Refugee Commissioner, with whom the Working Group met during its mission, in 2008, arrivals by boat peaked during the summer months: at 575 in June, 794 in July, and 533 in August. The total of persons entering the country in an irregular manner during 2008 was 2,775 – 1,000 more than during 2007. Large numbers of irregular migrants now also appear to risk the perilous passage by boats during the winter months, with 262 arrivals solely on 1 February 2009.

35. The majority of these migrants are African, with the largest numbers coming from Eritrea, Somalia and Sudan. There are also a number of migrants from Western African countries such as Burkina Faso, the Gambia, Ghana, Mali, Nigeria and Senegal. Although the vast majority of these migrants apply for asylum, few applications are successful. In 2008, the Refugee Commission granted refugee status to 19 out of 2,715 applications; however, 1,394 applicants received a form of humanitarian protection called subsidiary protection, while 1,302 requests were rejected.

36. Pursuant to the Immigration Act, foreigners caught on Maltese territory without the right of entry, transit or residence, are subject to mandatory administrative detention until removal from Malta is carried out. Detention is the automatic consequence of the issuance of a removal order or a decision to refuse admission into national territory. As a result, at least initially, detention is imposed indiscriminately on all, including vulnerable groups of people. The Government maintains that asylum-seekers found to be in Malta without a valid visa are not detained. However, the Working Group understands, based on information received from civil society and gathered in interviews conducted with detained asylum-seekers, that a significant number of asylum-seekers are also subjected to detention. This is due to the fact that the vast majority of arrivals are acknowledged as asylum-seekers in Malta only at a later stage, when they are already detained. Most, if not all, arrivals register their desire to apply for asylum by filling in a preliminary questionnaire in the days following their arrival in Malta. The preliminary questionnaire is not, however, considered a formal application for asylum. The asylum application is filled in when the individual concerned is called for an interview with the Refugee Commissioner, usually months after arrival. However, once in custody, applying for asylum does not entail release from detention.

37. The Immigration Act does not define a limit to the period of detention; therefore, by law, the detention period is potentially indefinite. Until 2005, the immigration detention period ranged between 22 and 24 months on average. The Working Group was informed by the Government that, since 2005, however, it has been policy to release asylum-seekers after a maximum period of 12 months of detention if their asylum claim is still pending. This policy was introduced by the Government of Malta following the enactment of regulations pursuant to the Maltese Refugees Act, which, inter alia, implements European

Union directives. According to regulation No. 10 of the Maltese Reception of Asylum Seekers (Minimum Standards) Regulations,<sup>2</sup> echoing article 11 of the European Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, asylum-seekers who are still awaiting a decision of first instance by the asylum authorities after 12 months must be allowed access to the labour market (which is incompatible with the continuation of detention).

38. Since time spent outside of detention, e.g. in the case of an escape, is not counted, in practice this means that only asylum-seekers who have spent a full 12 months in detention in total benefit from the “12-months rule”. This policy was corroborated by information provided by an asylum-seeker from the Gambia, interviewed by the Working Group at Safi Barracks, who had spent a total of two years and eight months in detention, including one year of criminal detention at the Corradino Correctional Facility following a sentence on charges of escape from Safi Barracks.

39. In the case of rejected asylum-seekers and migrants in an irregular situation who do not apply for asylum in the country, detention is permitted by national law until removal is effected; however, according to current policy, the maximum period is 18 months.

40. The actual length of the detention period is, in practice, largely dependent on whether the individual qualifies for fast-track release for belonging to a vulnerable group and whether an application for asylum is made and its outcome. It also depends on the length of the relevant procedures, such as the “vulnerability assessment” and related procedures, e.g., obtaining medical clearance, and the length of the asylum proceedings. The length of detention of immigrants also depends on the ability of immigration authorities to establish the identity and citizenship of the individual liable for removal and obtain travel documents, as well as the cooperation extended by the migrants themselves in these respects. The ability and willingness of the consular representatives of the country of origin, if any, also affects the length of detention. Only very limited numbers of undocumented migrants have been removed from Maltese territory before the expiry of the 18-month rule. Hence, the vast majority of migrants who do not qualify for asylum have spent a full 18 months in detention before being released. Indeed, the Government applies the 18-month rule in all cases, so many people are released into the community with an immigration certificate issued by the Principal Immigration Officer in which the period of legal stay is identified and laid out.

41. Vulnerable migrants in an irregular situation, such as families with children, unaccompanied minors, pregnant women, breastfeeding mothers, persons with disabilities, elderly persons, or people with serious and/or chronic physical or mental health problems, are also subjected to mandatory detention when arriving to Malta. They are released from detention under a fast-track procedure once the competent Government agency, the Organisation for the Integration and Welfare of Asylum Seekers, has assessed their situation and determined that they are indeed vulnerable. According to the Government, “manifestly vulnerable cases” are referred to the Organisation by the Principal Immigration Officer, whose authorization for release upon recommendation by the Organisation is usually obtained within days.

42. In cases concerning other than “manifestly vulnerable” individuals, the procedures usually take time to complete and authorities are faced with certain obstacles, prolonging the period of detention.<sup>3</sup> Problems, for example, relate to the determination of the age of an

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<sup>2</sup> Legal notice 320 of 2005.

<sup>3</sup> See also United Nations High Commissioner for Refugees, “The detention of refugees and asylum-seekers by reason of their unauthorized entry or presence”, July 2007, pp. 5–6, available at <http://www.unhcr.org/refworld/docid/4950f39f2.html>.

individual who claims to be a minor, particularly when this contention is disputed by the authorities. The Working Group was informed that such procedures may take more than an unacceptable three months for individuals who may be unaccompanied minors. Once it has been determined that a person belongs to a vulnerable group eligible for early release, medical clearance and accommodation in one of the open centres must be obtained, which further adds to the length of detention. The Government has, however, informed the Working Group that progress has been made in this regard in the past years and medical clearance now takes only a few days.

43. The law makes no provision for an automatic review of the necessity or legality of detention in each single case, be it by a judicial or administrative authority. Since 1 February 2005, detained migrants may challenge their detention before the Immigration Appeals Board (art. 25A of the Immigration Act). The Immigration Appeals Board does not, however, form part of the judiciary and requires only that its Chairperson be a qualified lawyer. The Board is an administrative body, which is competent only to “grant release from custody ... where in its opinion the continued detention of such person is, taking into account all the circumstances of the case, *unreasonable* as regards duration or because there is no reasonable prospect of deportation within a reasonable time” (emphasis added).<sup>4</sup> This means that the Board applies a test of reasonableness of detention only, rather than examining its lawfulness.

44. The Board may refuse a release order if, at the time of a final decision, rejected asylum-seekers do not cooperate with the immigration authorities concerning their removal. The Board must refuse release in a number of cases specified, i.e., if the applicant’s identity has not yet been established; if elements of the asylum claim have yet to be determined and cannot be determined without detention; or if release would pose a threat to public security or order (Immigration Act, art. 25A, paras. 10 and 11). The latter criterion could arguably also affect those who suffer from contagious diseases, such as scabies or tuberculosis, which occur in the immigration detention centres of Malta. Decisions of the Immigration Appeals Board on detention are final (Immigration Act, art. 25A, para. 9).

45. According to civil society representatives involved in legal proceedings on behalf of migrants in administrative detention, the procedure before the Immigration Appeals Board is ineffective. This claim was corroborated by the Ombudsman when confronted by the Working Group. The Board has no registry or office, and there are no clear, publicly available instructions explaining where to file an application or what procedures should be followed. Even legal professionals face difficulties when trying to obtain access to this remedy. It is therefore practically impossible for a detained asylum-seeker to make use thereof. The Board meets once a week for one afternoon only to process all cases for which it has jurisdiction, i.e., not just requests for release.

46. Legal aid for migrants in an irregular situation exists in theory only. Public lawyers are available from a pool designated solely for the asylum procedure. For detention related challenges, there are a very limited number of civil society lawyers available. Legal aid for filing a case in court is virtually inaccessible to the detainees. Persons seeking legal aid have to present their case at the Office of the Advocate for Legal Aid, situated in the Law Courts, which is impossible for detainees. The few cases challenging immigration detention that have been brought before the courts to date were handled by civil society organizations without the benefit of a waiver of court fees.

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<sup>4</sup> Immigration Act, art. 25A, para. 10.

47. Migrants in an irregular situation do not effectively enjoy the right to habeas corpus in terms of section 409A of the Criminal Code.<sup>5</sup> In 2005, the Superior Criminal Court overturned a decision of the Court of Magistrates, which had granted habeas corpus, arguing that the detention was lawful under the Immigration Act and that the criminal courts are not competent to test whether the detention is unlawful under any other laws, including the Constitution or the guarantees of the European Convention on Human Rights.

48. The only domestic judicial remedy available is before the civil courts in their constitutional — and “conventional” — jurisdiction and ultimately before the Constitutional Court. Under these jurisdictions, the constitutional right to challenge the legality of detention and article 5, paragraph 4, of the European Convention on Human Rights are applied. Civil society representatives have indicated to the Working Group that this procedure is ineffective. It takes approximately two years for a final decision to be handed down, which exceeds the maximum immigration detention period in terms of Government policy, as described above. The Government referred the Working Group to other cases in which judgement was delivered by the court of first instance within four or five months and the appeal heard and decided within the following five months.

49. In an initial complaint procedure before the Constitutional Court, the Civil Court (First Hall) in its constitutional jurisdiction ruled that the applicant was required to appeal to the Immigration Appeals Board before approaching the courts. The Constitutional Court did not render any decision on the merits, since the applicant had already left the country and had not authorized his legal representatives to proceed with his case. Constitutional complaints are struck off the court roll after half a year of abandonment.

50. The Working Group is unaware of a single case in which a legal challenge to immigration detention was successful. The European Court of Human Rights ruled in two cases brought against Malta that the constitutional complaint procedure is not to be considered a speedy remedy within the meaning of article 5, paragraph 4, of the European Convention on Human Rights.<sup>6</sup> The Government informed the Working Group that the Criminal Code was amended following these judgements. The Working Group would appreciate receiving from the Government a copy of the pertinent provisions as before and after their amendment and how the amendments have remedied the situation with which the European Court of Human Rights has taken issue.

51. Immigration detainees are held at three different detention centres under the authority of the Armed Forces and one under the authority of the police. The operation of these centres is supervised by the Detention Service which is under the portfolio of the Ministry for Justice and Home Affairs. The Working Group held interviews with detainees at Lyster Barracks, Safi Barracks, the immigration quarters of the Ta'Kandja Police Complex and Malta International Airport Custody Centre. At the time of the Working Group's visit, according to the Government, 1,940 migrants were detained at these centres.

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<sup>5</sup> Article 409A of the Criminal Code, inter alia, provides:

“(1) Any person who alleges he is being unlawfully detained under the authority of the Police or of any other public authority not in connection with any offence with which he is charged or accused before a court may at any time apply to the Court of Magistrates, which shall have the same powers which that court has as a court of criminal inquiry, demanding his release from custody. Any such application shall be appointed for hearing with urgency ...

“(3) If, having heard the evidence produced and the submissions made by the applicant and respondents, the court finds that the continued detention of the applicant is not founded on any provision of this Code or of any other law which authorises the arrest and detention of the applicant it shall allow the application. Otherwise the court shall refuse the application.”

<sup>6</sup> European Court of Human Rights, *Kadem vs. Malta*, application No. 55263/00, judgement of 9 January 2003; *Sabeur Ben Ali vs. Malta*, application No. 35892/97, judgement of 29 June 2000.

Another establishment that used to be a closed centre under the auspices of the police, the Immigration Reception Centre at Hal Far, is now operated as an open centre, albeit still listed as a detention centre in Maltese legislation. Representatives of the Office of the United Nations High Commissioner for Refugees, the Board of Visitors for Detained Persons and non-governmental organizations have unrestricted access to the facilities at any time.

52. Civil society representatives have, however, no access to isolation cells which are used to punish the breaking of disciplinary rules or for quarantine purposes. According to the Government, such “detention within detention” is governed by a 2006 pamphlet entitled, *Detention Centre Rules and Standing Instructions*, in particular paragraph 43 on “Removal from association”. The Government, in its comments to the draft of this report following its adoption, provided the Working Group with the wording of this provision:

**“43. Removal from association**

- (1) Where it appears necessary in the interests of security or safety that a detained person should not associate with other detained persons, either generally or for particular purposes the Officer in Charge may after consultation with the Commander Detention Service arrange for the detained person’s removal from association accordingly.
- (2) A detained person shall not be removed under this rule for a period of more than 24 hours without the authority of the Commander Detention Service.
- (3) An authority under paragraph (2) shall be for a period not exceeding 6 days.
- (4) Notice of removal from association under this rule shall be given without delay to the Medical Officer.
- (5) If in any case the Medical Officer so advises on medical grounds, the Officer in Charge may arrange at his discretion for such a detained person as aforesaid to resume association with other detained persons.
- (6) Particulars of every case of removal from association shall be recorded by the Officer in Charge in a manner to be directed by the Commander Detention Service.

During the period of removal from association an immigrant is required to be visited by a medical officer on a daily basis.”

The Working Group appreciates having been informed about these rules and procedures and would like to receive further information from the Government, inter alia, with respect to: the legal status of the *Detention Centre Rules and Standing Instructions*; whether the detainee removed from association with other detainees is entitled to access to a lawyer and courts to challenge the order on removal from association; how these rules and instructions are applied in practice, particularly with a view to the discretionary powers of the competent officials; and statistics about the frequency of removal from association being ordered.

53. Despite the efforts made by the authorities, the conditions of detention at the closed centres of Safi and Lyster Barracks are appalling, adversely affecting the health, including the mental health, of some of the detainees.

54. These detention centres are overcrowded. At Lyster Barracks, families are not separated from men, women (including pregnant and nursing mothers) and children (including unaccompanied minors). The Government, in its comments to the draft of this report, noted that the policy followed by the Detention Service to separate single males from families and single females was already implemented during the visit of the Working Group. The Working Group, however, during its visit to Lyster Barracks interviewed inmates concerned who alleged that this was not always the case.

55. Many detainees were living in tents. At the time of the visit, in the winter month of January 2009, 59 inmates did not even find a place to sleep in these tents. The Government, in its comments to the draft of this report, reported that only single males were accommodated in tents and that they contained enough beds for every single male migrant. The Working Group however received first-hand accounts from the inmates that a number of them slept in the buildings where the showers and toilet facilities were, or outside. At Lyster Barracks, the Working Group also met an 8-year-old boy who should not be detained at all, as well as a Somali man, suffering from HIV and chicken pox, who was held in one of the isolation cells to protect other inmates from infection when he should have been transferred to a hospital.

56. Upon the conclusion of the visit, the Working Group took these cases up with the Government and was informed that no migrant in detention is denied the necessary medical — including hospital — treatment. The Government further reported that the 8-year-old boy had been released less than two weeks after his arrival to Malta on the last day of the visit of the Working Group, following the medical clearance procedure routinely applied in all cases under the fast-track release procedure described above. The Government further informed the Working Group that irregular migrants in detention are afforded the same medical treatment as Maltese citizens and maintained that the Somali man had been separated from the other inmates with a view to avoiding the spread of chicken pox to the other migrants, but not by being placed in the isolation cell. The Working Group received a different account when interviewing the man, and considers that he should have been transferred to a hospital. The Working Group was also informed about measures taken by the Government of Malta after the visit of the Working Group to improve the conditions of detention at the various immigration detention facilities, including the removal of the tents section at Lyster Barracks. It looks forward to receiving a comprehensive report from the Government in a spirit of a continuous dialogue applied by the Working Group vis-à-vis all States it visits on official mission.

57. The conditions of detention at the closed immigration detention centres, as observed by the Working Group during its visit in January 2009, adversely affect the ability of the detainees to properly understand their rights and follow the legal proceedings related to them. These legal procedures include the challenging of the lawfulness of detention under the applicable laws of Malta (although this is not effective in practice) and the Working Group is mandated by the Human Rights Council to report on conditions of detention to the extent that they prevent detainees from exercising the right to make such challenges. These conditions of detention of migrants in an irregular situation stand in stark contrast to the cells at the Corradino Correctional Facility, the Police Headquarters at Floriana or the recently refurbished cells at Valletta police station, where foreign prisoners and detainees are also being held.

58. The detention regime to which migrants in an irregular situation are subjected falls far short of international human rights law, which requires that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful” (art. 9, para. 4, of the International Covenant on Civil and Political Rights, to which Malta is a State party). Detention of vulnerable groups of persons cannot be deemed the last resort, as required by applicable international human rights law and European Union legislation.<sup>7</sup>

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<sup>7</sup> Article 17 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *Official Journal of the European Union*, L 348, 24 December 2008, pp. 98–107.

59. Although disagreeing with administrative detention of migrants in an irregular situation, the Working Group believes that, if there has to be detention, its length should be clearly defined in law. Despite the laudable efforts of the Commissioner for Refugees to expedite the processing of asylum applications with limited resources, the procedure still takes too long given the attendant deprivation of liberty in difficult conditions. The Working Group interviewed asylum-seekers who were still waiting for an interview on their application, let alone a decision, after six months. For those asylum-seekers, it further adds to unnecessary prolongation of detention. The length of the asylum application procedure varies, as the complexity of each case can differ.

60. It appears there is no legal link between the specifics of each individual case to be considered and the length of detention. Detention is automatic and mandatory for all foreigners caught on Maltese territory without the right of entry, transit or residence until removal. Since asylum-seekers have a right to stay and enter the territory of a country where asylum is sought, no action with a view to their removal may be taken until their applications have been assessed and determined. However, since all asylum-seekers in Malta are also subjected to detention, they are detained with a view to processing their asylum application, rather than carrying out their removal from the territory. It appears that this detention policy, accepted by Maltese courts as justifiable under article 5, paragraph 1(f), of the European Convention on Human Rights,<sup>8</sup> represents, or is conducive to, an attempt to deter people from seeking asylum in Malta.

61. Even the imposition of mandatory administrative detention is questionable since, according to Maltese immigration law, recourse is made to detention to carry out removal from its territory. However, according to Government authorities, of the almost 12,000 individuals who have arrived in Malta since March 2002, only some 2,000 nationals from certain countries have been repatriated. Thus, mandatory detention seems to be used as a deterrent and a sanction for irregularly entering the country. As the possible maximum length of detention is exhausted in most cases, migrants in an irregular situation who have not committed any criminal offence virtually have to earn release by serving prolonged periods of detention.

62. The maximum length of detention is not defined by law. It is only Government's regulations and policy that sets a maximum period of one year of detention for asylum-seekers whose application is still pending. Rejected asylum-seekers and all migrants in an irregular situation are generally released only after 18 months of detention pending return to their home countries or to third countries.

63. Detention is not ordered by a court of law; nor is it effectively reviewed by a court of law, but rather by the administrative Immigration Appeals Board, which functions outside the judiciary. The legal remedies theoretically available to challenge the necessity and legality of detention before courts of law cannot be considered as effective in practice because of a lack of access to legal aid, inter alia.

64. The Working Group notes that the mandatory detention regime applied to foreigners has led to sharp criticism by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;<sup>9</sup> the Commissioner for Human Rights of the Council of Europe;<sup>10</sup> the Committee on Civil Liberties, Justice and Home Affairs of the

<sup>8</sup> *Tafarre Besabe Berhe vs. Commissioner of Police*, unreported.

<sup>9</sup> See the "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 15 to 21 June 2005", 10 September 2007, available at <http://www.cpt.coe.int/documents/mlt/2007-37-inf-eng.pdf>.

<sup>10</sup> See "Follow up report on Malta, (2003–2005) – Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights", 29 March 2006.

European Parliament;<sup>11</sup> and the Office of the High Commissioner for Refugees.<sup>12</sup> The Government has indicated that Malta gives full consideration to all recommendations made by the Council of Europe, the European Parliament, the Office of the High Commissioner for Refugees, human rights treaty bodies, special procedures and civil society organizations and implements those which are considered appropriate within the country's context, and particularly in view of the country's practical circumstances.

65. The Government of Malta has defended its detention policy on migrants arriving irregularly in the country, stating that it is without alternative given the magnitude of the problem faced by Malta as a small archipelagic member State of the European Union. Malta, with over 1,300 persons per km<sup>2</sup>, is ranked as fifth in the world in terms of population density. Its limited financial and other resources and the lack of support from the European Union and the international community as a whole do not allow the Government to authorize entry into its territory of the some 12,000 migrants who arrived irregularly during the last six years. Other countries are not cooperating effectively through resettlement programmes.

66. The Working Group expressly notes the progress that the Government has made in endeavouring to bring the immigration detention regime into conformity with international human rights standards; for example, through the decriminalization in 2002 of illegal entry into the country and the adoption of measures aimed at reducing the time required for the processing of asylum applications. Malta can tackle the large increase of arrivals experienced since 2002 only with the help of the international community. This, however, does not detract from the international human rights obligations Malta has undertaken.

#### **D. Deprivation of liberty on grounds of mental health**

67. According to the 1976 Mental Health Act, patients are compulsorily admitted outside the criminal law context to the closed wards at Mount Carmel Hospital in terms of the following procedure: compulsory admission is permitted for an observation period up to 28 days upon recommendation of two registered doctors, one of whom must be approved by the Minister responsible for Public Health as having special experience in the diagnosis or treatment of mental disorder. The recommendation must be supported by an application by the nearest relative or mental welfare officer. In case of emergency, a recommendation by any one registered doctor, supported by an application as above, is sufficient to detain the patient for an observation period of 72 hours to allow time to secure a second medical assessment. If patients require treatment for a mental disorder of a nature which warrants detention in hospital in their own health or safety interests or with a view to the protection of other persons, but refuses observation beyond 28 days, they may be detained in hospital, with possibility of leave, for up to one year. The order of compulsory admission is renewable upon a renewed recommendation by two registered doctors, one of whom must be approved by the Minister responsible for Public Health as having special experience in the diagnosis or treatment of mental disorder. The recommendation must be

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<sup>11</sup> See European Parliament, "Report by the LIBE Committee delegation on its visit to the administrative detention centres in Malta, 30 March 2006", available at [http://www.jrsmalta.org/LIBE\\_Malta\\_Report\\_2006.pdf](http://www.jrsmalta.org/LIBE_Malta_Report_2006.pdf).

<sup>12</sup> See United Nations High Commissioner for Refugees, "The detention of refugees and asylum-seekers by reason of their unauthorized entry or presence", July 2007, pp. 5–6, available at <http://www.unhcr.org/refworld/docid/4950f39f2.html>.

supported by an application by the nearest relative or mental welfare officer. During the first 28 days of observation, the patient does not enjoy the right to challenge compulsory admission. Only upon issuance of a one-year treatment order, can an application, with or without the assistance of a lawyer, be made to the Mental Health Review Board for release.

68. The Working Group notes the absence of a right to appeal in the event of a compulsory admission during a prolonged period of 28 days. It was informed about a current reform of the Mental Health Act which envisages the strengthening of patients' rights when they are compulsorily admitted to a psychiatric institution. The Working Group requests that the Government of Malta regularly provide it with information about the progress of this reform.

## **E. Monitoring mechanisms**

69. Positive aspects in this regard are the numerous independent monitoring mechanisms with competence on detention facilities, such as the Ombudsman; the Board of Visitors of the Prisons; and the Board of Visitors for Detained Persons. The latter regularly visit the Corradino Correctional Facility and all other detention facilities, and have been designated as national preventive mechanisms under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Board of Visitors of the Prisons and the Board of Visitors for Detained Persons focus on conditions of detention, detainees' rights and follow-up on allegations of ill-treatment, on which their – independent and remunerated – members report to the Ministry for Justice and Home Affairs. Their mandates do not cover the aspect of legality of detention. Their reports addressed to the Minister for Justice and Home Affairs are not automatically published: publication is at the discretion of the Minister.

70. The Working Group invites the Government to strengthen the status, powers and functions of the Board of Visitors of the Prisons and the Board of Visitors for Detained Persons, which do not enjoy executive powers and are not entitled to make their reports public. This would provide for more effective monitoring bodies for all places of detention.

71. The Ombudsman is appointed by Parliament. The mandate of the Ombudsman comprises receiving individual complaints against Government agencies (except for the military) related to administrative actions and decisions; investigating the complaints as a last resort once all other remedies have been exhausted; making recommendations to the concerned Government agency; and reporting to the House of Representatives at least annually. The Ombudsman is also competent to investigate complaints related to detention facilities.

72. When the Working Group met with the Ombudsman, a discussion about the regime of administrative detention applied to migrants in an irregular situation and asylum-seekers evolved. The Ombudsman justified the present situation given that “ordinary rules”, such as detention ordered by a judge or else release after 48 hours, could not be applied in this context, because of the sheer numbers of foreigners arriving irregularly on Malta. He concluded that the mandatory immigration detention regime was not in violation of international law.

73. His predecessor issued a critical report, focusing mainly on conditions of detention and allegations of ill-treatment in immigration detention centres. The Working Group was informed that conditions have improved since the publication of the report. This gives rise

to concern, since they were found to still be appalling during the visit of the Working Group in January 2009.

## V. Conclusions

74. The Working Group expresses its appreciation to the Government of Malta for the invitation and for its full cooperation throughout its mission to the country. It notes a number of positive aspects with respect to the institutions and laws safeguarding against the occurrence of cases of arbitrary deprivation of liberty. For example, the time spent by the accused in pretrial detention is now automatically deducted from the prison term following legislative amendments.

75. With regard to criminal justice, the Working Group observes the relatively long periods which the accused spend in pretrial detention and the high rate of detainees on remand in comparison to the overall prison population (around 53 per cent of the overall prison population and approximately 33 per cent when deducting the number of prisoners on remand who are already serving a prison term). It also notes with concern that the rules of release on bail are not equally applied by courts to Maltese citizens and foreigners. The Working Group also observes the non-existence of a system of release on parole, the introduction of which is in the offing according to the Government.

76. Although the Working Group is fully aware of the constraints faced by Malta, as a country with by far the highest population density in Europe and with limited resources, and that, since 2002, it has been experiencing a large increase of unauthorized arrivals of migrants and asylum-seekers, it considers that the mandatory legal detention regime applied to them is not in line with international human rights law. Migrants in an irregular situation arriving in the country are subjected to mandatory detention without genuine recourse to a court of law. The conditions of detention at the closed immigration detention centres adversely affect the ability of the detainees to challenge the lawfulness of their detention. Undocumented persons or migrants in an irregular situation arriving to Malta have not committed any criminal offence according to Maltese legislation.

77. The Working Group observes that the length of detention of migrants in an irregular situation and of asylum-seekers has not clearly been defined under law. Asylum-seekers are held in detention for a maximum of 12 months if their asylum claim is still pending. Those migrants who do not apply for political asylum or whose applications have been rejected may end up in custody for 18 months at closed detention centres.

78. The Working Group acknowledges the Government's efforts to apply a fast-track procedure for the release of families of migrants with children, unaccompanied minors, pregnant women and breastfeeding mothers and people with disabilities, serious or chronic physical or mental problems. However, it observes that it may take up to three months to free them into open centres. It also notes the decriminalization in 2002 of illegal entry into the country and the adoption of measures aimed at reducing the time required for the processing of asylum applications.

## VI. Recommendations

79. On the basis of its findings, the Working Group makes the following recommendations to the Government:

- Concerning criminal justice:
  - (a) Allow access to lawyers to persons arrested on suspicion of having committed a criminal offence during the first period of up to 48 hours while in police custody;
- Concerning juvenile justice:
  - (b) Increase the minimum age of criminal responsibility for juveniles to 12 years in accordance with paragraph 32 of general comment No. 10 (2007) of the Committee on the Rights of the Child;<sup>13</sup>
  - (c) Eliminate the assumption that a juvenile aged between 9 and 14 years could act with “mischievous discretion”;
  - (d) Provide that the juvenile justice system extends to minors between the age of 16 and 18 years;
- Concerning detention under immigration powers:
  - (e) Change its laws and policies related to administrative detention of migrants in an irregular situation and asylum-seekers, so that detention is decided upon by a court of law, on a case-by-case basis and pursuant to clearly and exhaustively defined criteria in legislation, under which detention may be resorted to, rather than being the automatic legal consequence of a decision to refuse admission of entry or a removal order;
  - (f) Rule out immigration detention of vulnerable groups of migrants, including unaccompanied minors, families with minor children, pregnant women, breastfeeding mothers, elderly persons, persons with disabilities, people with serious and/or chronic physical or mental health problems;
  - (g) Provide in all cases for automatic periodic review by a court of law on the necessity and legality of detention;
  - (h) Provide for an effective remedy for detainees to challenge the necessity and legality of detention at any time of the detention period and ex post facto and define the circumstances;
  - (i) Where there remains a regime of mandatory administrative detention for migrants in an irregular situation, legally define its maximum period rather than basing it on Government regulations or policy;
  - (j) Provide for a system of legal aid for immigration detainees;
  - (k) Appeal to the international community to assist the Government in bringing its immigration detention regime into conformity with applicable international human rights law and standards. The Working Group observes that Malta is carrying a disproportionate burden and does not have the necessary financial and other resources at its disposal. This does not detract Malta from its international human rights obligations undertaken voluntarily as a sovereign nation;

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<sup>13</sup> CRC/C/GC/10 of 27 April 2007.

- **Concerning monitoring mechanisms:**

(l) **Strengthen the status, powers and functions of the Board of Visitors of the Prisons and the Board of Visitors for Detained Persons to provide for more effective monitoring of detention facilities, as designated national preventive mechanisms under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. This would include the extension of their respective mandates to the aspect of legality of detention which is not ordered by a court, including administrative detention and “detention within detention” as a form of disciplinary measure, as well as the publication of all their reports addressed to the Minister of Justice and Home Affairs; and**

(m) **Strengthen the status, powers and functions of the Office of the Ombudsman in accordance with the Paris Principles.**

## Appendix I

### **Detention facilities visited**

General Headquarters of the Police

Valletta police station

Corradino Correctional Facility

Luqa Barracks, guardroom cell

Safi Barracks

Lyster Barracks

Ta Kandja Police Complex, immigration quarters

Malta International Airport Custody Centre

Mount Carmel Hospital, closed wards

## Appendix II

### **International human rights treaties to which Malta is a State party**

International Convention on the Elimination of All Forms of Racial Discrimination

International Covenant on Economic, Social and Cultural Rights

International Covenant on Civil and Political Rights

First Optional Protocol to the International Covenant on Civil and Political Rights

Second Optional Protocol to the International Covenant on Civil and Political Rights,  
Aiming at the Abolition of the Death Penalty

Convention on the Elimination of All Forms of Discrimination against Women

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination  
against Women

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or  
Punishment

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or  
Degrading Treatment or Punishment

Convention on the Rights of the Child

Optional Protocol to the Convention on the Rights of the Child on the involvement of  
children in armed conflict

## Appendix III

### Excerpts from the Constitution of Malta

**Article 32.** Whereas every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:

(a) Life, liberty, security of the person, the enjoyment of property and the protection of the law; ... the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

**Article 33.** (1) No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence under the law of Malta of which he has been convicted.

(2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this article if he dies as the result of the use of force to such extent as is reasonably justifiable in the circumstances of the case:

- (a) For the defence of any person from violence or for the defence of property;
- (b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) For the purpose of suppressing a riot, insurrection or mutiny; or
- (d) In order to prevent the commission by that person of a criminal offence, or if he dies as the result of a lawful act of war.

**Article 34.** (1) No person shall be deprived of his personal liberty save as may be authorised by law in the following cases, that is to say:

- (a) In consequence of his unfitness to plead to a criminal charge;
- (b) In execution of the sentence or order of a court, whether in Malta or elsewhere, in respect of a criminal offence of which he has been convicted;
- (c) In execution of the order of a court punishing him for contempt of that court or of another court or tribunal or in execution of the order of the House of Representatives punishing him for contempt of itself or of its members or for breach of privilege;
- (d) In execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;
- (e) For the purpose of bringing him before a court in execution of the order of a court or before the House of Representatives in execution of the order of that House;
- (f) Upon reasonable suspicion of his having committed, or being about to commit, a criminal offence;

(g) In the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;

(h) For the purpose of preventing the spread of an infectious or contagious disease;

(i) In the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community; or

(j) 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.

(2) Any 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.

(3) Any person who is arrested or detained:

(a) For the purpose of bringing him before a court in execution of the order of a court; or

(b) Upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought not later than forty-eight hours before a court; and if any person arrested or detained in such a case as is mentioned in paragraph (b) of this sub-article is not tried within a reasonable time, then, without prejudice to any further proceedings which may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefore from that person.

(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question authorises the taking during such a period of public emergency as is referred to in paragraph (a) or (c) of sub-article (2) of article 47 of this Constitution of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period of public emergency.

(6) If any person who is lawfully detained by virtue only of such a law as is referred to in the last foregoing sub-article so requests at any time during the period of that detention not earlier than six months after he last made such a request during that period, his case shall be reviewed by an independent and impartial tribunal established by law and composed of a person or persons each of whom holds or has held judicial office or is qualified to be appointed to such office in Malta.

(7) On any review by a tribunal in pursuance of the last foregoing sub-article of the case of any detained person, the tribunal may make recommendations concerning the necessity or expediency of continuing his detention to the authority by whom it was ordered, but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations.

**Article 36.** (1) No person shall be subjected to inhuman or degrading punishment or treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Malta immediately before the appointed day.

(3) (a) No law shall provide for the imposition of collective punishments;

(b) Nothing in this sub-article shall preclude the imposition of collective punishments upon the members of a disciplined force in accordance with the law regulating the discipline of that force.

**Article 39.** (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Any court or other adjudicating authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

(3) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.

(4) Nothing in sub-article (3) of this article shall prevent any court or any authority such as is mentioned in that sub-article from excluding from the proceedings persons other than the parties thereto and their legal representatives:

(a) In proceedings before a court of voluntary jurisdiction and other proceedings which, in the practice of the Courts in Malta are, or are of the same nature as those which are, disposed of in chambers;

(b) In proceedings under any law relating to income tax; or

(c) To such extent as the court or other authority:

(i) May consider necessary or expedient in circumstances where publicity would prejudice the interests of justice; or

(ii) May be empowered or required by law to do so in the interests of defence, public safety, public order, public morality or decency, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings.

(5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty: Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this sub-article to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts.

(6) Every person who is charged with a criminal offence:

(a) Shall be informed in writing, in a language which he understands and in detail, of the nature of the offence charged;

(b) Shall be given adequate time and facilities for the preparation of his defence;

(c) Shall be permitted to defend himself in person or by a legal representative and a person who cannot afford to pay for such legal representation as is reasonably required by the circumstances of his case shall be entitled to have such representation at the public expense;

(d) Shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses subject to the payment of their reasonable expenses, and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

(e) Shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge, and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

(7) When a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.

(8) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.

(9) No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal or review proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence: Provided that nothing in any law shall be held to be inconsistent with or in contravention of this sub-article by reason only that it authorises any court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of that force, so however that any court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under that disciplinary law.

(10) No person who is tried for a criminal offence shall be compelled to give evidence at his trial.

(11) In this article "legal representative" means a person entitled to practise in Malta as an advocate or, except in relation to proceedings before a court where a legal procurator has no right of audience, a legal procurator.

**Article 46.** (1) Subject to the provisions of sub-articles (6) and (7) of this article, any person who alleges that any of the provisions of articles 33 to 45 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleges, may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress.

(2) The Civil Court, First Hall, shall have original jurisdiction to hear and determine any application made by any person in pursuance of sub-article (1) of this article,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said articles 33 to 45 (inclusive) to the protection of which the person concerned is entitled: Provided that the Court may, if it considers it desirable so to do, decline to exercise its powers under this sub-article in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

(3) If in any proceedings in any court other than the Civil Court, First Hall, or the Constitutional Court any question arises as to the contravention of any of the provisions of the said articles 33 to 45 (inclusive), that court shall refer the question to the Civil Court, First Hall, unless in its opinion the raising of the question is merely frivolous or vexatious; and that court shall give its decision on any question referred to it under this sub-article and, subject to the provisions of sub-article (4) of this article, the court in which the question arose shall dispose of the question in accordance with that decision.

(4) Any party to proceedings brought in the Civil Court, First Hall, in pursuance of this article shall have a right of appeal to the Constitutional Court.

(5) No appeal shall lie from any determination under this article that any application or the raising of any question is merely frivolous or vexatious.

(6) Provision may be made by or under an Act of Parliament for conferring upon the Civil Court, First Hall, such powers in addition to those conferred by this article as are necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by this article.

(7) Rules of Court making provision with respect to the practice and procedure of the Courts of Malta for the purposes of this article may be made by the person or authority for the time being having power to make rules of court with respect to the practice and procedure of those Courts, and shall be designed to secure that the procedure shall be by application and that the hearing shall be as expeditious as possible.

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