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ICJ Submission to the Universal Periodic Review of Malta

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The International Commission of Jurists (ICJ) welcomes this opportunity to present its submission to the Universal Periodic Review (UPR) of Malta. In this review, the Working Group on the UPR and the Council should address the violations or risks of violations of Malta's human rights obligations resulting from its immigration law, policy and practice. In particular, the ICJ draws attention to measures of administrative detention and expulsion of migrants in light of the right to liberty and security of the person and of the right to *non-refoulement* where there are substantial grounds for believing that there is a real risk of torture or cruel, inhuman or degrading treatment or other serious violations of human rights.

1. Introduction

Malta is facing a massive arrival of migrants on its shores, mainly due to its geographical position at the centre of the Mediterranean Sea and because it constitutes an entry door to the European Union. Reportedly, the average number of arrivals is equivalent to 45% of Malta's annual birth rate and, if compared with the national population, one immigrant arriving into Malta corresponds to 140 immigrants arriving in Italy or 205 in Germany.¹ The Maltese Government justifies its immigration policy, mainly based on administrative detention of the irregular newcomers, on these grounds.

While recognising Malta's authority to decide generally its immigration policy and the difficulties it faces in doing so, the ICJ recalls that such a policy must respect the international obligations of Malta, and in particular those arising from international human rights law.

Of particular concern are the policies and legislation of Malta on administrative detention and expulsion of "prohibited immigrants" and asylum-seekers, some aspects of which are or risk to be in breach of Malta's international human rights obligations. In Maltese law, the term "prohibited immigrants"² refers to migrants entering the territory irregularly. Since most asylum-seekers enter the country as "prohibited immigrants", they are often subject to the same measures, in particular administrative detention.

2. Administrative Detention of Migrants

As a general policy, "prohibited immigrants" and asylum-seekers are automatically subject to administrative detention on their arrival on Maltese territory. Under immigration

¹ 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.

² 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)) that did not receive leave by the authority. Moreover, migrants unable to provide for their support and that of their dependants, suffering from mental disorder or being mental defective, staying in Malta after quarantine, having committed certain criminal offences, contravening immigration provisions or regulations, whose conditions for staying have been breached or elapsed, being a prostitute or a dependant of a "prohibited immigrant" enter automatically within this category.

legislation, executive authorities have the power to order their deportation and removal and to arrest and detain them.³

2.1. Length and Automatic Nature of Administrative Detention

The ICJ is concerned at Malta's automatic resort to administrative detention of immigrants, and at the apparently excessive and disproportionate length of such detention. Maltese legislation does not provide for a maximum term of administrative detention for "prohibited immigrants" and asylum-seekers. Nevertheless, Government policy states that such detention should be no longer than eighteen months.⁴ According to reports of international bodies, the detention of "prohibited immigrants" is in practice for up to twelve months, while asylum procedures are pending,⁵ or eighteen months, if detainees have not applied for asylum or if their asylum claims have been finally rejected.⁶

The use of administrative detention for "prohibited immigrants" and asylum-seekers is automatic, apart from certain categories of "vulnerable people", *inter alia*, elderly people, children, people having been subjected to torture and ill-treatment.⁷

The ICJ recalls that administrative detention to prevent unauthorised 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.⁸ Moreover, administrative detention must not be indefinite, its length must be provided for in primary legislation,⁹ be proportional to the purposes of the individual case,¹⁰ and subject to periodic review of its grounds by independent and impartial courts.¹¹ In particular, "justification for the ["prohibited immigrant's"] detention [based on the country's] general experience that asylum seekers abscond if not retained in custody"¹² is not sufficient.

2.2. Shortcomings in Judicial Review of Administrative Detention

The Immigration Law allows the detainee to apply for judicial review of the removal, deportation or detention order to the Immigration Appeals Board, whose decision is final,

³ See, articles 14(1) and (2), 16 and 22, Immigration Act.

⁴ *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.

⁵ 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.

⁶ European Commission against Racism and Intolerance (hereinafter, ECRI), *Third Report on Malta*, CRI(2008)22, 14 December 2007, paragraph 33. PACE, *op.cit.*, fn 1, 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.

⁷ Immigration Act. See, *op.cit.*3.

⁸ 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.

⁹ ECtHR, *Amuur vs. 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.

¹⁰ *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.

¹¹ HRC, *A v Australia*, CCPR/C/59/D/560/1993, 30 April 1997, para. 9.4.

¹² HRC, *Danyal Shafiq v Australia*, CCPR/C/88/D/1234/2004, para. 7.3.

unless the same Board decides to grant an appeal on points of law to the ordinary Court of Appeal.¹³ The Board may grant release on grounds of unreasonableness of the order concerning duration of detention and lack of real prospect of deportation¹⁴ but in a considerable number of cases, including many cases where the identity of the detainee cannot be ascertained, it cannot release the person even when the detention is unreasonable.¹⁵ 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 three-year terms, renewable.¹⁶ 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.¹⁷

In addition to review by the Immigration Appeals Board, the Constitution (article 46) and the European Convention Act (article 4) provide for a remedy of *amparo* before the courts for violation of Constitutional and European Convention rights. There is no legislative provision for a regular periodic review of the justification and proportionality of the detention.

The ICJ recalls that administrative detention must be subject to judicial review both as regards the procedure that led to it and the merit of the detention itself in light of domestic and international law.¹⁸ The judicial review on the lawfulness of detention must be provided to the person subjected to administrative detention “without delay”¹⁹ or “speedily”.²⁰

The ICJ calls on the Working Group to recommend to the Human Rights Council that Malta:

- **Provide by way of legislation for alternatives to administrative detention, the application of which must be decided discretionally on a case-by-case basis;**
- **Provide in legislation that administrative detention shall be resorted to only where it is necessary in the particular circumstances, that in no case should it be automatic, but instead be decided on a case-by-case basis, and that it should be subject to a clear maximum duration;**
- **Provide for regular periodic judicial review of the necessity and proportionality of administrative detention;**
- **Provide for free legal assistance to those subject to administrative detention and/or alternative measures, regardless of their status of asylum-seeker and of the appeal or review proceedings;**

¹³ See, Article 25A(1), (5), (8) and (9), Immigration Act. See also, ECRI, *op.cit.*, fn 7, paragraph 40. See, Civil Court (Constitutional jurisdiction) 20 June 2007, Application no. 20/07 JRM, *Tafarra Besabe Behre vs. Police Commissioner as Principal Immigration Officer and Minister of Justice and Home Affairs*. The Civil Court (First Hall) has stated that the Immigration Appeals Board does not constitute an effective remedy and, in the silence of the Immigration Law, called for its jurisdiction to decide on violations of Constitutional and European Convention rights by decision of this panel and the Executive authorities requiring administrative detention. Nevertheless, the Maltese legal system does not retain the rule of *stare decisis* and this case is still on-going and potentially subject to appeal.

¹⁴ See, Article 25A(10), Immigration Act.

¹⁵ 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”.

¹⁶ See, Article 25A (1)(a) and (4), Immigration Act.

¹⁷ See, Article 25A(12), *ibidem*.

¹⁸ 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.

¹⁹ Article 9(4), International Covenant on Civil and Political Rights (ICCPR).

²⁰ Article 5(4), European Convention on Human Rights (ECHR).

- Give competence and jurisdiction to courts - or in alternative to other effective, independent and impartial bodies authorised by law to exercise judicial power - to review on the merits, promptly and without delay, the grounds and the procedure of administrative detention, to ensure observance of domestic and international law;
- Become party to the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.

3. Expulsion and the Principle of *Non-Refoulement*

Malta provides for the grant of refugee status, in accordance with the 1951 Geneva Convention qualifications requirements, and, if this is denied, for “subsidiary protection status” for people at risk of the death penalty, torture, inhuman or and degrading treatment or punishment, or threats to the person caused by indiscriminate violence in international and internal armed conflicts.²¹

Nevertheless, some categories of people are automatically excluded from this subsidiary protection: those who committed, instigated or participated in crimes against peace, war crimes or crimes against humanity, a serious crime, acts contrary to the purposes and principles of the United Nations, or that constitute a danger to the community or to the security of Malta. In addition, such protection can be excluded by executive authorities on grounds of having committed one or more crimes which would be punished with imprisonment if they were committed in Malta and if the applicant left his country of origin solely in order to avoid sanctions resulting from these crimes, or of national security and public order.²²

The ICJ recalls that States must respect the obligation of *non-refoulement* as provided in international human rights law, as well as in international refugee law. Under international human rights law, the obligation of *non-refoulement* applies where there are substantial grounds for believing that an individual faces a real risk, following removal, of torture and cruel, inhuman or degrading treatment or punishment or other violations of the most fundamental human rights, including arbitrary detention and flagrant denial of the right to a fair trial.²³ The right to *non-refoulement* cannot be overridden by considerations of national security or on grounds of the offences committed by the concerned person.²⁴ People subject to removal and deportation orders have the right to contest such measures, in the light of this principle, before an independent and effective judicial mechanism.²⁵

The ICJ calls on the Working Group to seek clarification from the Government of Malta on the following points:

- **How the principle of *non-refoulement* to face a risk of torture or other gross violation of human rights is respected in Maltese law and practice;**
- **What procedures exist for independent and effective judicial review of deportation or removal orders in light of this right; and**
- **Whether the right is limited where considerations of national security or public order apply, or where criminal offences have been committed.**

The Working Group should recommend that the Human Rights Council call on the Government to take appropriate measures that may be necessary to establish and ensure respect for the obligation of *non-refoulement* in Maltese law.

²¹ See, Articles 2, 8(1), 17(1), Refugee Act 2000.

²² See, Articles 14, 17(1) and (2), Refugee Act 2000.

²³ Human Rights Committee, *Kindler v. Canada*, UN Doc. CCPR/C/48/D/470/1991 (1993), § 13.2; HRC, *General Comment No. 31*, cit., § 12. ECHR Article 6: ECtHR, *Soering v. UK*, Judgment of 7 July 1989, § 113, *Drozdz and Janousek v. France and Spain*, Judgment of 26 June 1992, § 110; Article 5 and Article 6: *MAR v. UK*, Judgment of 19 September 1997; *Tomic v. UK*, Admissibility decision of 14 October 2003, §3. On the wider application of *non-refoulement*, see *R v. Special Adjudicator, ex parte Ullah*, [2004] UKHL 26, per Lord Bingham, § 21.

²⁴ See, *inter alia*, *Soering v. UK*, Judgment of 7 July 1989; *Chahal v. UK*, Judgment of 25 October 1996

²⁵ Human Rights Committee, *Mohammed Alzery vs. Sweden*, CCPR/C/88/D/1416/2005, 10 November 2006, para. 11(8). HRC, *Zhakhongir Maksudov and others vs. Kyrgyzstan*, CCPR/C/93/D/1461 and others, 31 July 2008, para. 12.7 (also on article 6); and, CPT/Inf (2005) 15, para. 30.