



**UNHCR'S POSITION ON THE  
DETENTION OF ASYLUM-SEEKERS  
IN MALTA**

**18 September 2013**

*United Nations High Commissioner for Refugees*

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## EXECUTIVE SUMMARY

Malta's comprehensive detention policy, which affects asylum-seekers arriving irregularly in the country, has been addressed by UNHCR in various contexts in the past. Since the establishment of the national asylum system in 2001, UNHCR has consistently and publicly stated its position against the detention of asylum-seekers, regardless of their mode of entry. The continued public attention given to this issue, with an increasing number of requests for information directed towards UNHCR – from lawyers, civil society, the media and academia – has demonstrated the need for a more detailed public position by UNHCR on the use of administrative detention of asylum-seekers in Malta, in the context of international and regional law, domestic legislation and government policy.

To this end, this document provides an overview and analysis of the legal framework and government policy applying to the detention of asylum-seekers who arrive in Malta in an irregular manner. It is developed against the background of the 1951 *Convention relating to the Status of Refugees*<sup>1</sup> (the “1951 Convention”) and other international and European human rights instruments including the 1950 *European Convention for the Protection for Human Rights and Fundamental Freedoms*<sup>2</sup> (the “European Convention on Human Rights” or ECHR) and the EU asylum *acquis*. Specific reference is also made to UNHCR's *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012.<sup>3</sup> It calls into question the purpose and effectiveness of detention as a central policy in the Maltese asylum and migration context.

The paper assesses the prevailing legislative and policy framework on detention in Malta, as measured against international and regional law standards and relevant UNHCR guidance. It is not the aim of this paper, however, to elaborate in any detail about the specific conditions of detention or the services available within the detention facilities in Malta.

There is no empirical evidence that the prospect of being detained deters irregular migration or discourages persons from seeking asylum.<sup>4</sup> Threats to life or freedom in the country of origin (or transit) are likely to be a greater push factor than any possible disincentive created by a reception regime based on detention.<sup>5</sup> Given the steady number of arrivals into Malta, there is no evidence that the mandatory detention system in Malta has had a deterrent effect.<sup>6</sup> The negative and at times

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<sup>1</sup>UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>

<sup>2</sup>Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>

<sup>3</sup>UN High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html>

<sup>4</sup>A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and “Alternatives to Detention” of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011, page 1, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>; and UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, 24 April 2013, A/HRC/23/46, at para. 47, available at: <http://www.refworld.org/docid/51a743124.html>

<sup>5</sup>See C. Costello and E Kaytaz, *Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva*, UNHCR Legal and Protection Policy Research Series, PPLA/2013/02, June 2013, available at: <http://www.refworld.org/docid/51a6fec84.html>

<sup>6</sup>In fact, aside from a peak observed in 2008 (2800 arrivals) and a significant drop in 2010 (30 arrivals), the number of asylum-seekers arriving in Malta has remained close to an average of 1600 persons a year.

severe physical and psychological consequences of detention are well documented, yet appear to have had limited impact on national policy-making on the detention of asylum-seekers. UNHCR believes that there are also additional reasons, such as social and financial ones, why the practice of detaining asylum-seekers should be reviewed. Moreover, UNHCR encourages Malta to explore concrete and effective alternatives to detention, including reviewing its bail system to make it more effective and accessible.<sup>7</sup> UNHCR stands ready to provide technical and other advice on all of these matters.

In Malta, there are no specific legislative provisions regulating the administrative detention of asylum-seekers. Under Maltese immigration law, detention is the automatic consequence of a refusal to grant admission to national territory<sup>8</sup> or the issuance of a removal order in respect of a particular individual.<sup>9</sup> The Immigration Act does not provide for differential treatment to be accorded to asylum-seekers who fall under these circumstances. In addition, the Immigration Act does not make a direct reference to the *non-refoulement* provision found in the Refugees Act.<sup>10</sup> Under the Immigration Act, the position of asylum-seekers who enter irregularly is, thus identical to that of any other migrant. The authorities, the Immigration Appeals Board and the courts do not consider the *non-refoulement* provision in the Refugees Act to affect the application of the Immigration Act as regards the decision to detain asylum-seekers.

Although the law does not explicitly provide for exemptions from detention on grounds of vulnerability or special circumstances, procedures for release are regulated by policy and practice, and are implemented by the immigration authorities.<sup>11</sup> In practice, persons in special circumstances and needs, including children, are usually released from detention after they undergo a vulnerability or age assessment procedure by the Agency for the Welfare of Asylum Seekers (AWAS), which then recommends to the Principal Immigration Officer that the particular individual be released. It is UNHCR's view that such exemptions ought to be inserted into the law, rather than being left only to policy and practice.

Further, Maltese law does not contain guarantees to ensure compliance with Article 31 (on non-penalization of refugees who enter or stay illegally in the country of refuge) of the 1951 Convention. Asylum-seekers arriving in Malta without leave from the Principal Immigration Officer are termed as "prohibited migrants".<sup>12</sup> Despite consistent efforts by UNHCR and other entities over a number of years to influence positively Maltese legislation and practice, asylum-seekers who arrive in an irregular manner are still systematically and routinely detained, at times facing tough detention conditions in immigration detention facilities, some of which are lacking basic minimum standards in several respects.<sup>13</sup> UNHCR is concerned that asylum-seekers are subject to prolonged periods in detention without access to adequate avenues to challenge effectively their detention. There is also no general mechanism in place to consider alternative and less coercive measures than detention at the time of the

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<sup>7</sup>This is also in line with Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (hereinafter referred to as "EU Reception Conditions Directive 2013 (recast)").

<sup>8</sup>Article 10 of the Immigration Act, Chapter 217 of the Laws of Malta.

<sup>9</sup>Article 14(2) of the Immigration Act.

<sup>10</sup>Article 14(1), Refugees Act, Chapter 420 of the Laws of Malta.

<sup>11</sup>With the exception of bail, which is provided for in the Immigration Act and the Criminal Code (Chapter 9 of the Laws of Malta).

<sup>12</sup>Article 5 of the Immigration Act.

<sup>13</sup>See UNHCR Detention Guidelines, para. 48.

decision to detain, and the bail system, the only alternative available, is not effective nor generally accessible to asylum-seekers.

In view of the above, UNHCR is particularly concerned that the current practice in Malta is not in line with Article 31 of the 1951 Convention, and the fundamental right to liberty and security of person, as enshrined in international and European human rights instruments. On this basis, it is UNHCR's position that although founded on immigration regulations, the Maltese practice of detaining, for the purposes of removal, all asylum-seekers, who arrive on the territory in an irregular manner, is both unlawful as well as arbitrary in terms of well-established international law standards.<sup>14</sup>

UNHCR's dialogue with the Maltese authorities has included discussions about practical recommendations to alleviate the major concerns relating to conditions in the detention centres in Malta. In this context, UNHCR has put forward specific recommendations addressing a variety of issues to the authorities. Civil society organizations have also actively engaged with the authorities on this issue. While some improvements have been noted in recent years as regards infrastructure and detention conditions, many of UNHCR's recommendations have yet to be implemented.

In calling upon the Government of Malta to consider effective alternatives to detention, and starting from the premise that the rights to liberty, security of person and freedom of movement are fundamental human rights which apply to all persons, including asylum-seekers, UNHCR urges policy makers and legislators to further develop Malta's reception system based on international refugee and human rights law standards.

It is UNHCR's experience that the introduction of alternatives to detention is an effective means of balancing the rights of asylum-seekers with the efficient management of the asylum system. UNHCR stands ready to engage with the relevant authorities to contribute to improvements to the current system. This could include provision of support in exploring adjustments to the reception arrangements with the aim to further improve the overall management of Malta's asylum system.<sup>15</sup>

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<sup>14</sup>For more on this point, refer to Parts 3.1, 3.2 and 3.4.

<sup>15</sup>In recent years, Malta has made important progress in several areas: rescue at sea, reception infrastructure, further development of the national asylum system, and the pursuit of long term solutions, both for those who qualify for international protection and those who do not. UNHCR acknowledges that Malta is facing real challenges in terms of facilitating long term solutions, however it is not within the scope of this Paper to address these. UNHCR intends to shortly publish a separate document outlining practical proposals for adjustments and improvements to the national asylum system.

# 1. UNHCR's mandate and role

1. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees.<sup>16</sup> Paragraph 8(a) of its Statute confers responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees, whereas Article 35(1) of the 1951 *Convention relating to the Status of Refugees*<sup>17</sup> (“the 1951 Convention”) obliges State parties to cooperate with UNHCR in the exercise of its functions, including in particular to facilitate its duty of supervising the application of the provisions of the 1951 Convention.

2. UNHCR's supervisory responsibility is also reflected in European Union (EU) law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union,<sup>18</sup> as well as in Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees [...] on matters relating to asylum policy”.<sup>19</sup> Secondary EU legislation also emphasizes the role of UNHCR. UNHCR's supervisory responsibility is specifically articulated in Article 29 of the EU Asylum Procedures Directive 2013 (recast)<sup>20</sup> and Recital 22 of the EU Qualification Directive 2011 (recast).<sup>21</sup> In relation to the detention of asylum-seekers, UNHCR's role is explicitly recognized in the EU Reception Conditions Directive 2013 (recast).<sup>22</sup>

3. UNHCR has access to all detention centres in Malta, as do civil society organizations offering services and support to asylum-seekers and migrants in detention. UNHCR, in line with its supervisory role conducts regular visits to detention centres in pursuance of its protection-related and advocacy activities in Malta. During these visits UNHCR observes day-to-day operations within detention centres, interviews and counsels persons of concern, and also engages with Detention Service staff and management on various issues relating to the operation of detention centers and treatment of persons of concern. UNHCR also engages in continuous dialogue with the relevant authorities on specific issues relating to detention. Such authorities include the relevant ministries, senior management of

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<sup>16</sup>UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.unhcr.org/refworld/docid/3b00f0715c.html>

<sup>17</sup>UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, vol. 189, page 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>

<sup>18</sup>European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 2007 OJ C 115/47, available at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>

<sup>19</sup>European Union: Council of the European Union, *Treaty of Amsterdam Amending the Treaty on European Union, The treaties Establishing the European Communities and Related Acts*, 10 November 1997, available at: <http://www.refworld.org/docid/51c009ec4.html>

<sup>20</sup>European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, L 180/60, available at: <http://www.refworld.org/docid/51d29b224.html>. Article 29(1)(c) in particular obliges Member States to allow UNHCR

“to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure.”

<sup>21</sup>European Parliament, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 2011 L 337/9, available at: <http://www.refworld.org/docid/4f197df02.html>

<sup>22</sup>European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, L 180/96, Art. 10(3), available at: <http://www.refworld.org/docid/51d29db54.html>

Detention Service, the Board of Visitors for Detained Persons, and the Agency for the Welfare of Asylum Seekers (AWAS).

4. UNHCR's dialogue with the authorities has included the discussion of practical recommendations aimed at alleviating some of the major concerns relating to the conditions of detention centres in Malta. In 2012 UNHCR also had discussions with the Maltese authorities in the context of a review of the reception system in Malta. Recommendations on improvements to the reception system were submitted and they included specific reference to the UNHCR Detention Guidelines.<sup>23</sup> UNHCR intends to make further recommendations towards improvements to the reception system which take into account Malta's current infrastructure as well as international and European standards relating to the use of detention.

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<sup>23</sup>UNHCR Detention Guidelines 2012, op. cit.

## 2. Introduction

5. This paper seeks to outline and address specific aspects regarding legislation, policy and practice concerning the detention of asylum-seekers in Malta. It is grounded in the right to seek asylum<sup>24</sup> and the right to liberty and security of person<sup>25</sup> as fundamental human rights protected under international and European law.

6. It is UNHCR's position that although founded on immigration regulations, the Maltese practice of detaining, for the purposes of removal, all asylum-seekers, who arrive on the territory in an irregular manner, is arbitrary and unlawful in terms of well-established international law standards.<sup>26</sup> UNHCR is particularly concerned that this practice violates Article 31 of the 1951 Convention and the fundamental right to liberty and security of person, as enshrined in international and European human rights instruments.<sup>27</sup>

7. The negative and at times severe physical and psychological consequences of detention are well documented, yet appear to have had limited impact on national policy-making on the detention of asylum-seekers. A study by the Jesuit Refugee Service, for example, reveals that regardless of whether asylum-seekers present with symptoms of trauma at the start of their detention, they show such symptoms within a few months. The research concludes that everyone is vulnerable in detention.<sup>28</sup> UNHCR considers that there are both legal and practical grounds for Malta to explore and look at concrete and effective alternatives to detention, including less coercive and intrusive measures.<sup>29</sup> Moreover, UNHCR believes that there are additional reasons, such as social and financial ones, why the practice of mandatory detention of asylum-seekers should be reviewed.

8. In view of the hardship which it entails, and consistent with international refugee and human rights standards, the detention of asylum-seekers should normally be avoided and be a measure of last resort. The rights to liberty and security of person are fundamental human rights, reflected in the international prohibition on arbitrary detention, and supported by the right to freedom of movement.<sup>30</sup> These rights are expressed in all major international and regional human rights instruments, and are applicable to asylum-seekers.<sup>31</sup> As seeking

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<sup>24</sup>“Everyone has the right to seek and to enjoy in other countries asylum from persecution” - UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 14(1), available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>; UN General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII), available at: <http://www.unhcr.org/refworld/docid/3b00f05a2c.html>; Article 18 of the Charter of Fundamental Rights of the European Union: “The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.” - European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (OJ C 364/01), available at: <http://www.refworld.org/docid/3ae6b3b70.html>;

<sup>25</sup>Article 10 of the 1948 Universal Declaration of Human Rights, Article 9 and 12 of the 1966 International Covenant on Civil and Political Rights, Article 5 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>26</sup>See UNHCR Detention Guidelines 2012, op. cit. Guideline 4.

<sup>27</sup>Article 10 of the 1948 Universal Declaration of Human Rights, Article 9 and 12 of the 1966 International Covenant on Civil and Political Rights, Article 5 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>28</sup>Jesuit Refugee Service, *Europe: Becoming Vulnerable in Detention*, June 2011, available at: <http://www.unhcr.org/refworld/docid/4ec269f62.html>

<sup>29</sup>This is also in line with the EU Reception Conditions Directive 2013 (recast).

<sup>30</sup>UNHCR Detention Guidelines 2012, op. cit. para. 1.

<sup>31</sup>Ibid. para. 12.

asylum is not an unlawful act, any restrictions on liberty imposed on persons exercising this right need to be provided for in law, carefully circumscribed, assessed as to their necessity and proportionality in each individual case, and subject to prompt review.<sup>32</sup> These rights taken together – the right to seek asylum, the non-penalisation for irregular entry or stay and the rights to liberty and security of persons and freedom of movement – mean that the detention of asylum-seekers should be exceptional rather than routine, with liberty being the default position.<sup>33</sup>

9. Detention can only be applied for a legitimate purpose in the individual case. Without such a purpose, detention will be arbitrary, even if entry was illegal.<sup>34</sup> The purposes of detention ought to be clearly defined in legislation and/or regulations.<sup>35</sup> In the context of the detention of asylum-seekers, there are three purposes for which detention may be necessary in an individual case, and which are generally in line with international law, namely public order (that is, to carry out initial identity and security checks, to record basic elements of their asylum claim in an initial preliminary interview at entry, to prevent absconding, or for manifestly unfounded or clearly abusive claims in the context of accelerated procedures), public health or national security.<sup>36</sup>

10. When considering the implementation of a detention policy, less coercive and intrusive measures (alternatives to detention), including no detention or release with or without conditions, need to be available and given preference, in particular for vulnerable individuals or persons in special circumstances.<sup>37</sup> Any decisions to detain need to conform to minimum procedural safeguards.

11. There are various ways for governments to address irregular migration – other than through detention – that take due account of the concerns of governments as well as the particular circumstances of the individual concerned.<sup>38</sup> In fact, there is no empirical evidence that detention has any deterrent effect on irregular migration.<sup>39</sup> Regardless of any such effect, detention policies aimed at deterrence are generally unlawful under international human rights law, as they are not based on an individual assessment as to the necessity to detain. Research has also shown that asylum-seekers rarely abscond if they are in their destination country and awaiting an outcome of a status determination procedure.<sup>40</sup>

12. Despite UNHCR's consistent efforts over a number of years to influence positively Maltese legislation and practice,<sup>41</sup> asylum-seekers who arrive in an

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<sup>32</sup>Ibid. para. 2.

<sup>33</sup>Ibid. para. 14.

<sup>34</sup>*A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 3 April 1997, para. 9 available at: <http://www.refworld.org/docid/3ae6b71a0.html>

<sup>35</sup>WGAD, Report to the Tenth Session of the Human Rights Council, 16 February 2009, A/HRC/10/21, para. 67, available at: <http://www.unhcr.org/refworld/docid/502e0de72.html>. Some regional instruments explicitly limit the grounds of immigration detention: for example, Article 5(f) of the ECHR: “No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

<sup>36</sup>UNHCR Detention Guidelines 2012, op. cit. para. 21.

<sup>37</sup>These include victims of trauma or torture, children, women, victims or potential victims of trafficking, asylum-seekers with disabilities, older asylum-seekers, lesbian, gay, bisexual, transgender or intersex (LGBTI) asylum-seekers.

<sup>38</sup>UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in Action*, 3 February 2011, available at: <http://www.unhcr.org/refworld/docid/4d9430ea2.html>

<sup>39</sup>Edwards, op. cit. page 1.

<sup>40</sup>See Costello and Kaytaz, op. cit. p. 13.

<sup>41</sup>Through on-going dialogue with relevant ministries and policy makers, as well through a letter submitted to the Civil Court, First Hall in the case of *Tafarra Besabe Berhe vs Commissioner of Police as Principal Immigration Officer and*

irregular manner are systematically and routinely detained, and at times face harsh detention conditions in immigration detention facilities.

13. UNHCR is concerned that asylum-seekers face serious challenges in accessing adequate reception conditions when detained in Malta. These challenges relate to the material conditions of detention<sup>42</sup> and also the duration<sup>43</sup> of their detention, which in some respects are not in line with international and European legal standards.

14. Over a ten-year period (2002–2012) 16,617 individuals, of 46 different nationalities, the vast majority single men from Somalia and Eritrea, arrived in Malta by boat in an irregular manner, and almost all were immediately detained upon arrival.<sup>44</sup> The Office of the Refugee Commissioner received 15,832 asylum applications between January 2002 and December 2012.<sup>45</sup> Asylum-seekers are usually detained in Lyster Barracks in Hal Far, and in Safi Barracks.<sup>46</sup>

15. Part 3 of this paper addresses the systematic detention of undocumented asylum-seekers in Malta, including an analysis of the relevant legal framework against international standards. It deals first with the overall national legislative and policy framework, followed by a description of the practice in Malta, the treatment of asylum-seekers with vulnerabilities or special needs, and the avenues available for an individual to challenge that detention. Part 4 gives an overview of the relevant principles of international and European law governing the detention and the expulsion of asylum-seekers, refugees and persons recognized as being in need of international protection.

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*the Minister for Justice and Home Affairs*, Application No. 27/2007, Civil Court First Hall (Constitutional Jurisdiction), which is still pending final judgment.

<sup>42</sup>See Council of Europe: Committee for the Prevention of Torture, *Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 to 30 September 2011*, 4 July 2013, CPT/Inf (2013) 12, available at: <http://www.cpt.coe.int/documents/mlt/2013-12-inf-eng.htm>

<sup>43</sup>See *Aden Ahmed v. Malta*, Application No. 55352/12, Council of Europe: European Court of Human Rights, 23 July 2013, para. 142–146, available at: <http://www.refworld.org/docid/52025bb54.html>. This judgment is not yet final.

<sup>44</sup>In 2012, 1,890 individuals, of 18 different nationalities, arrived in Malta by boat from Libya. Of these, 1838 persons were asylum-seekers; around 19% of the total arrivals were women while around 9% of all arrivals claimed to be underage upon arrival. As of 18 September 2013, 1692 persons, of 19 different nationalities, arrived by boat (437 claiming to be underage), around 950 were in detention, including, at least, 800 asylum-seekers (UNHCR data).

<sup>45</sup>Sources: Ministry for Home Affairs, Immigration Police. Parliamentary Question No. 2551, available at: <http://www.pq.gov.mt/PQWeb.nsf/10491c99ee75af51c12568730034d5ee/c1256e7b003e1c2dc12574d700243a2d?OpenDocument>, and Parliamentary Question No. 13972, available at: <http://www.pq.gov.mt/PQWeb.nsf/10491c99ee75af51c12568730034d5ee/c1256e7b003e1c2dc12576c5003d2799?OpenDocument>; See also UNHCR Malta statistical page available at: <http://www.unhcr.org/mt/statistics>

<sup>46</sup>The use of Ta' Kandja Detention Centre was temporarily discontinued in 2010.

### 3. Detention of asylum-seekers in Malta

#### 3.1 Legislative and policy framework for the detention of asylum-seekers arriving in an irregular manner

16. Malta acceded to the 1951 Convention and the 1967 Protocol<sup>47</sup> in 1971 and it officially lifted the geographical reservation on the 13 December 2001.

17. In Malta, there are no specific legislative provisions regulating the administrative detention of asylum-seekers. In terms of Maltese immigration law, detention is the automatic consequence of a refusal to grant admission into national territory<sup>48</sup> or the issuance of a removal order in respect of a particular individual.<sup>49</sup> In this context, UNHCR notes that any detention or deprivation of liberty must be in accordance with and authorised by national law. Any deprivation of liberty that is not in conformity with national law would be unlawful, both as a matter of national as well as international law.<sup>50</sup> At the same time, although national legislation is the primary consideration for determining the lawfulness of detention, it is “*not always the decisive element in assessing the justification of deprivation of liberty.*”<sup>51</sup> In particular, a specific factor that needs to be considered is the underlying purpose of preventing persons deprived of their liberty arbitrarily.<sup>52</sup>

18. The Immigration Act<sup>53</sup> does not in itself provide any guidance for differential treatment to be accorded to asylum-seekers who are either refused admission, or who enter or are otherwise present in the territory in an irregular manner. In addition, the Immigration Act does not make a direct reference to the effects of the relevant *non-refoulement* provision found in the Refugees Act.<sup>54</sup> In the Immigration Act, the position of asylum-seekers who enter irregularly is considered to be identical to that of any migrant in breach of the regulations in the same Act. In this context, it is

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<sup>47</sup>UN General Assembly, *Protocol relating to the Status of Refugees*, 31 January 1967, United Nations Treaty Series, vol. 606, page 267, available at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>

<sup>48</sup>Article 10 of the Immigration Act:

“10(1) Where leave to land is refused to any person arriving in Malta on an aircraft, such person may be placed temporarily on land and detained in some place approved by the Minister and notified by notice in the Gazette\* until the departure of such aircraft is imminent.

(2) Where leave to land is refused to any person arriving in Malta by any other means, such person at his own request may, with the leave of the Principal Immigration Officer, be placed temporarily on shore and detained in some place approved by the Minister and notified by notice in the Gazette:

Provided that he shall be returned to the vessel by which he is to leave Malta immediately that he makes a request to that effect or that the Principal Immigration Officer so directs, whichever is the earlier.

(3) Any person, while he is detained under sub-article (1) or (2), shall be deemed to be in legal custody and not to have landed.”

<sup>49</sup>Article 14(2) of the Immigration Act:

“Upon such order being made, such person against whom such order is made, shall be detained in custody until he is removed from Malta...”

<sup>50</sup>UNHCR Detention Guidelines 2012, op. cit para. 15.

<sup>51</sup>*Lokpo and Touré v. Hungary*, (2011), App. No. 10816/10, Council of Europe: European Court of Human Rights, 20 September 2011, para. 21 (final decision), available at: <http://www.unhcr.org/refworld/docid/4e8ac6652.html>

<sup>52</sup>*Ibid.* The ECtHR stated: “It must in addition be satisfied that detention during the period under consideration was compatible with the purpose of the relevant provision, which is to prevent persons from being deprived of their liberty in an arbitrary fashion.” See UNHCR Detention Guidelines, op. cit. para. 15.

<sup>53</sup>Chapter 217 of the Laws of Malta.

<sup>54</sup>Article 14(1), Chapter 420 of the Laws of Malta:

“14(1) A person shall not be expelled from Malta or returned in any manner whatsoever to the frontiers of territories where the life or freedom of that person would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

relevant to note that every person has the right to seek and enjoy asylum.<sup>55</sup> Seeking asylum is not, therefore, an unlawful act.<sup>56</sup> Furthermore, the 1951 Convention provides that asylum-seekers shall not be penalised for their illegal entry or stay, provided they present themselves to the authorities without delay and show good cause for their illegal entry or presence.<sup>57</sup> This is so because, in exercising the right to seek asylum, asylum-seekers are often forced to arrive at, or enter, a territory without prior authorisation.<sup>58</sup> In this context States should ensure, through the implementation of their law and practice, that no person who is entitled to benefit from Article 31 is subject to penalties due to irregular entry. Likewise, penalties imposed on refugees and asylum-seekers who are legally in the territory would be in breach of international law. The position of asylum-seekers thus differs fundamentally from that of ordinary migrants in that they may not be in a position to comply with the legal formalities for entry.<sup>59</sup>

19. According to Article 10(3) of the Immigration Act persons who, whether arriving by aircraft or by any other means, are refused access to national territory and detained “*shall be deemed to be in legal custody and not to have landed.*”

20. Article 5 of the Immigration Act states that any person who enters Malta without leave from the Principal Immigration Officer is considered to be a prohibited migrant and may be refused entry.<sup>60</sup> The Immigration Act goes on to state, in Article 14, that the Principal Immigration Officer may issue a removal order against a prohibited migrant,<sup>61</sup> and the person against whom the order is issued shall be detained until he or she is removed from Malta.<sup>62</sup> The decision to refuse admission to the territory or to grant a visa or permission to enter is discretionary.

21. Article 16<sup>63</sup> of the Immigration Act provides for powers of arrest. Any police officer has the power to arrest without a warrant an individual who is in Malta without the required leave from the immigration authorities or who is reasonably suspected of being in Malta without the authorization of the Principal Immigration Officer. Any person arrested on the basis of Article 16 is deemed to be in legal custody.

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<sup>55</sup>See UNHCR Detention Guidelines, op. cit. para. 11.

<sup>56</sup>Article 14, *Universal Declaration of Human Rights*, 1948 (UDHR); Article 22 (7) ACHR; Article 12(3), ACHPR; Article 27, *American Declaration of the Rights and Duties of Man*, 1948 (ADRDM); Article 18, *Charter of Fundamental Rights of the European Union*, 2000, (CFREU).

<sup>57</sup>Article 31, 1951 Convention.

<sup>58</sup>UNHCR Detention Guidelines 2012, op. cit. para. 11.

<sup>59</sup>*Ibid.*

<sup>60</sup>Article 5(1): “*Any person, other than one having the right of entry, or of entry and residence, or of movement or transit under the preceding Parts, may be refused entry, and if he lands or is in Malta without leave from the Principal Immigration Officer, he shall be a prohibited immigrant.*”

<sup>61</sup>Article 5(2) of the Immigration Act lists the instances where a person is also considered to be a prohibited migrant notwithstanding that he has landed or is in Malta with the leave of the Principal Immigration Officer or that he was granted a residence permit. Among the several instances mentioned, the Act states that if such person is “*unable to show that he has the means of supporting himself and his dependants (if any) or if he or any of his dependants is likely to become a charge on the public funds...*”, then he or she is considered to be a prohibited migrant. This reason is commonly cited in removal orders and return decisions issued to asylum-seekers who arrive by boat in an irregular manner.

<sup>62</sup>Article 14: “(1) *If any person is considered by the Principal Immigration Officer to be liable to removal as a prohibited immigrant under any of the provisions of article 5, the said Officer may issue a removal order against such person who shall have a right to appeal against such order in accordance with the provisions of article 25A...*  
(2) *Upon such order being made, such person against whom such order is made, shall be detained in custody until he is removed from Malta...*”

<sup>63</sup>“16. *Any person who acts in contravention of article 5(1), or is reasonably suspected of having so acted, may be taken into custody without warrant by the Principal Immigration Officer or by any Police officer and while he is so kept in custody he shall be deemed to be in legal custody.*”

22. It is relevant to note that Article 14(5) of the same Act states “*nothing in this article shall preclude or prejudice the application of Maltese law on the right to asylum and the rights of refugees and of Malta’s international obligations in this regard.*” However, the Immigration Act (or any other law) does not include specific provisions regulating the exercise of discretion in decisions to issue removal orders against asylum-seekers or persons with *prima facie* or clear and manifest international protection needs (e.g. persons coming from countries where there is widespread conflict and/or severe human rights violations).

23. UNHCR notes that in practice, the immigration authorities in Malta systematically issue removal orders to all persons arriving irregularly<sup>64</sup> by boat from Libya, which constitute the majority of asylum-seekers who arrive on the island. The removal orders issued typically refer to the lack of means to sustain themselves<sup>65</sup> or to their irregular entry.<sup>66</sup> Persons against whom a removal order is issued are not informed of the considerations leading to the Removal Order, or given an opportunity to present information, documentation and/or other evidence in support of a request for a period of voluntary departure.<sup>67</sup>

24. UNHCR notes that persons who arrive in an irregular manner but who are not immediately detected by the immigration authorities may avoid being detained if they first register their interest in applying for refugee status with the Office of the Refugee Commissioner. These asylum-seekers are given an “asylum-seeker’s document” proving that they have, in fact, lodged an asylum application and are subsequently directed to the immigration authorities for the issuance of identity documents in the form of an immigration certificate<sup>68</sup> or an interim authorisation to stay. In such situations asylum-seekers are normally not detained by the Immigration Police but allowed freedom of movement during the asylum-procedure. In this context, UNHCR is concerned that this approach, which is in itself a good practice and should be adopted in a more consistent manner, raises issues of discrimination and arbitrariness in the implementation of the legal norms established in the Immigration Act as regards other asylum-seekers who are rescued by the Maltese authorities and subsequently brought to Malta.

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<sup>64</sup>The majority are brought to Malta by the Armed Forces of Malta after they are rescued at sea.

<sup>65</sup>In practice, even though persons arriving irregularly by boat could have such means, the immigration authorities do not conduct an individual assessment but issue the removal order and return decision in an automatic manner. All possessions are confiscated by the Immigration Police (including money) and a receipt is given to the person. The confiscated items may be collected from the immigration authorities after release from detention.

<sup>66</sup>...In terms of Article 5(2) of the Immigration Act. Since the enactment of the Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, S.L. 217.12 (Legal Notice 81 of 2011) (Returns Regulations) transposing Directive 2008/115/EC of the European Parliament and of the Council of 16th December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (EU Returns Directive), a Return Decision is given which informs the individual of the right to apply for a period of voluntary departure while, at the same time, a Removal Order is given stating that such an application was rejected.

<sup>67</sup>In terms of Regulation 4(2) of the Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Subsidiary Legislation 217.12, Legal Notice 81 of 2011, the Principal Immigration Officer shall inform the third-country national in the return decision that he may submit an application to be granted an appropriate period for voluntary departure. In practice persons arriving in an irregular manner are given a return decision stating that their stay has been terminated and that they have a right to apply for an appropriate period of voluntary departure. However, the decision to terminate their stay is notified without them even having made such a request for voluntary departure in the first place. In terms of Regulation 3(3) of the same Regulations, “*where a third-country national staying illegally in Malta is the subject of a pending procedure for renewing his residence permit or other authorisation offering a right to stay, the Principal Immigration Officer shall consider refraining from issuing a return decision, until the pending procedure is finished...*” Regulation 3(4) further states that “*Nothing in this regulation shall be construed as preventing the Principal Immigration Officer from ending a legal stay and issuing a return decision and, or a decision on a removal and, or entry ban in a single administrative decision.*”

<sup>68</sup>The same kind of identification document is given to persons whose claim for international protection has been rejected, after they have been released from detention.

25. Article 14 of the Refugees Act sets out the principle of *non-refoulement*. The practical effect of this provision is the *de facto* suspension of removal proceedings. The immigration authorities halt all removal proceedings once an individual expresses his/her wish to apply for asylum in Malta by filling in the Preliminary Questionnaire and submitting it to the Office of the Refugee Commissioner. Upon receipt of the Preliminary Questionnaire, the Office of the Refugee Commissioner notifies the immigration authorities that a request to submit an asylum application has been filed. However, the individual remains in detention.<sup>69</sup> UNHCR contends that it is at this point that the detention of an asylum-seeker becomes unlawful since the legal ground (removal) is no longer applicable. Asylum-seekers in on-going asylum proceedings are not available for removal until a final decision on their claim has been made. Detention for the purposes of removal should only occur after the asylum claim has been finally determined and rejected.<sup>70</sup>

26. Regulation 6 of the Returns Regulations<sup>71</sup> also provides for the 'postponement' of removal where:

(a) *"it violates the principle of non-refoulement; or*  
(b) *an appeal has been filed with the [Immigration Appeals] Board in accordance with the provisions of article 25A(7) of the Act and a decision thereon is pending:*  
*Provided that the Principal Immigration Officer may postpone removal for an appropriate period taking into account the specific circumstances of the case, in particular the third-country national's physical state or mental capacity, or technical reasons."*

27. The law cited above specifies the circumstances when removal should be postponed. In addition, it gives a rather wide margin of discretion to the Principal Immigration Officer with regard to removal proceedings. However, even in circumstances where the removal is postponed, asylum-seekers are still detained by the immigration authorities. In terms of law and policy, no exception is made in Article 5 (Immigration Act) to ensure conformity with Article 31 of the 1951 Convention, Article 5(1)(f) of the 1950 *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR)<sup>72</sup>, or Article 18(1) of the 2005 EU Asylum Procedures Directive<sup>73</sup> which states that "*Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.*" The new EU Asylum Procedures Directive 2013 (recast) further elaborates on this principle and states "*Member States shall not hold a person in detention for the sole reason that he*

<sup>69</sup>It should also be noted that for some cases, removal of persons whose claim for international protection has been rejected is not effected because of the practical difficulties of returning persons to particular countries of origin. Such persons are normally released after 18 months, as per the government policy dated 2005.

<sup>70</sup>See *Lokpo and Touré v. Hungary*, (2011), App. No. 10816/10, Council of Europe: Europe Court of Human Rights, available at: <http://www.unhcr.org/refworld/docid/4e8ac6652.html>; *R.U. v. Greece*, App. No. 2237/08, Council of Europe: European Court of Human Rights, 7 June 2011, para. 94, available at: <http://www.unhcr.org/refworld/docid/4f2aafc42.html>. See, also, *S.D. v. Greece*, App. No. 53541/07, Council of Europe: European Court of Human Rights, 11 June 2009, para. 62, available at: <http://www.unhcr.org/refworld/docid/4a37735f2.html>. The ECtHR has held that detention for the purposes of expulsion can only occur after an asylum claim has been finally determined. See, also, *Hendrin Ali Said and Aras Ali Said v. Hungary*, App. No. 13457/11, Council of Europe: European Court of Human Rights, 23 October 2012, available at: <http://www.refworld.org/docid/51263aa32.html>; and *Al Tayyar Abdelhakim v. Hungary*, App. No. 13058/11, Council of Europe: European Court of Human Rights, available at: <http://www.refworld.org/docid/512639e32.html>

<sup>71</sup>Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, S.L. 217.12 (Legal Notice 81 of 2011).

<sup>72</sup>Malta signed the European Convention on Human Rights (ECHR) on 12 December 1966 and ratified it on 23 January 1967.

<sup>73</sup>European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, OJ L 326, 13 December 2005, pp. 13-34 available at: <http://www.refworld.org/docid/4394203c4.html>

or she is an applicant. The grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with Directive 2013/33/EU” [EU Reception Conditions Directive 2013 (recast)].

### 3.2 The practice in Malta regarding the detention of asylum-seekers who arrive in an irregular manner

28. Maltese law sets no maximum limits on the duration of detention of asylum-seekers. In practice, asylum-seekers are released from detention only once they have obtained a form of protection granted by the Office of the Refugee Commissioner.<sup>74</sup>

29. Prior to December 2003, when the first releases took place, Malta employed a policy, in accordance with the provisions of the Immigration Act, of blanket and indefinite detention of persons found entering or staying in Malta in an irregular manner, including asylum-seekers. In January 2005, through the adoption of a policy document jointly published by the Ministry for Justice and Home Affairs and the Ministry for the Family and Social Solidarity (the “2005 policy document”), Malta formally started implementing the policy of detaining persons who are refused admission into the territory or found to be prohibited migrants in terms of the Immigration Act for a maximum period of 18 months. This document provides that *“irregular immigrants will remain in closed reception centres until their identity is established and their application for asylum processed. No immigrant shall, however, be kept in detention for longer than eighteen months.”*<sup>75</sup>

30. However, the 2005 policy document contains no reference to the time limit applied to the detention of asylum-seekers as it only mentions a time limit for “irregular migrants”. The one-year time limit for the detention of asylum-seekers is inferred from Regulation 10(2)<sup>76</sup> of the Reception of Asylum Seekers (Minimum Standards) Regulations<sup>77</sup> (“Reception Regulations”) [transposing Article 11(2) of the EU Reception Conditions Directive 2003].<sup>78</sup> The Regulations stipulate that asylum-seekers should be given access to the labour market after one year. Given that it is not possible to work while in detention, this provision has been interpreted to mean that asylum-seekers should be released after one year if their asylum application is still pending. According to the new EU Reception Conditions Directive 2013 (recast), Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged.<sup>79</sup> UNHCR considers that it is not appropriate to use laws and policies

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<sup>74</sup>UNHCR notes that in August 2013 some asylum-seekers were released from detention after they filled in their Preliminary Questionnaire. These individuals were granted an “Emergency Provisional Humanitarian Protection” certificate stating “this certificate is to declare that you have lodged an asylum application with the Office of the Refugee Commissioner. You are therefore to be considered as an asylum seeker.”

<sup>75</sup>It is not sufficiently clear whether persons who arrive in an irregular manner by boat still fall within the remits of the policy document since, on one hand, the Returns Regulations clearly exclude persons who arrive by boat (many of whom are asylum-seekers) from the purview of the Special Procedural Safeguards, while on the other hand, the IAB (in *Ibrahim Suzo vs. PIO*, 2012) has decided that these safeguards do in fact apply to persons who arrive by boat.

<sup>76</sup>“If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant or his legal representative, the Ministry responsible for issuing employment licenses shall decide the conditions for granting access to the labour market for the applicant.”

<sup>77</sup>Subsidiary Legislation 420.06, Legal Notice 320 of 2005.

<sup>78</sup>European Union: Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States*, 6 February 2003, OJ L 31; 6 February 2003, pp18-25, available at: <http://www.refworld.org/docid/3ddcfda14.html>

<sup>79</sup>Article 15(1).

regulating access to the labour market as a means to regulate detention practices. The grounds for detention are provided for in European and international law, and are set out in UNHCR's Detention Guidelines, and these rules provide ample clarity on the circumstances in which asylum-seekers may or may not be detained.<sup>80</sup>

31. The lack of a time limit established by law and the policy set in the 2005 policy document have led to a practice whereby asylum-seekers are detained for a maximum of one year (or less if they have obtained a form of protection before then), and persons whose claim for protection is rejected are detained for a maximum of 18 months. The processing of an asylum application by the Office of the Refugee Commissioner does not have a specific period established by law stating the time frame within which an application is decided. However, the Office of the Refugee Commissioner aims to conclude most cases within an average of six months.<sup>81</sup> UNHCR considers that there should be no link between the processing time for a status determination procedure and the grounds for one's detention. These need to be separate assessments, otherwise there is a risk of prolonging the detention of an individual for no reason other than delays in the asylum procedure. This would not be in alignment with international legal standards. Further, it is UNHCR's view that decisions on detention should not be within the responsibility of the Office of the Refugee Commissioner.<sup>82</sup>

32. To guard against arbitrariness, any detention needs to be necessary in the individual case, reasonable in all the circumstances and proportionate to a legitimate purpose. Furthermore, failure to consider less coercive or intrusive means (alternatives to detention) could also render detention arbitrary.<sup>83</sup> As a fundamental right, decisions to detain are to be based on a detailed and individualised assessment of the necessity to detain in line with a legitimate purpose. Appropriate screening or assessment tools can guide decision-makers in this regard, and should take into account the special circumstances and needs of particular categories of asylum-seekers.<sup>84</sup>

33. Mandatory or automatic detention is arbitrary, as it is not based on an examination of the necessity of the detention in the individual case.<sup>85</sup>

### **3.3 The special circumstances and needs of particular asylum-seekers in detention<sup>86</sup>**

34. Maltese law does not provide for explicit exemptions from detention on grounds of their vulnerability or special circumstances. That said, particular attention is to be given to specific categories of irregular migrants in the 2005 policy document.

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<sup>80</sup>See UNHCR Detention Guidelines, Guideline 4, para. 18 to 42.

<sup>81</sup>*Performance Audit Dealing with Asylum Applications*, National Audit Office Malta, July 2011, page 9, para. 12, available at: <http://www.nao.gov.mt/news.aspx?nid=48>, accessed on 23 July 2013.

<sup>82</sup>See also footnote 74.

<sup>83</sup>UNHCR Detention Guidelines, 2012, para. 18.

<sup>84</sup>Ibid. para. 19.

<sup>85</sup>Ibid. para. 20.

<sup>86</sup>In terms of the UNHCR Detention Guidelines, Guideline 9, these include victims of trauma or torture, children, women, victims or potential victims of trafficking, asylum-seekers with disabilities, older asylum-seekers, lesbian, gay, bisexual, transgender or intersex (LGBTI) asylum-seekers.

35. According to the policy document,<sup>87</sup> *“Irregular Immigrants, Refugees and Integration”* published in 2005, *“particular attention is to be given to those irregular immigrants who are considered to be more vulnerable, namely unaccompanied minors, persons with disability, families and pregnant women.”*

36. Regulation 14(1) of the Reception Regulations also provides that, *“in the implementation of the provisions relating to material reception conditions and health care, account shall be taken of the specific situation of vulnerable persons which shall include minors, unaccompanied minors and pregnant women, found to have special needs after an individual evaluation of their situation.”* This Regulations further state that with regard to the material reception conditions for vulnerable asylum-seekers, where these refer to children, the best interests of the child shall constitute a primary consideration.<sup>88</sup>

37. Regulation 15 of the same Regulations provides that *“an unaccompanied minor aged sixteen years or over may be placed in accommodation centres for adult asylum seekers.”*<sup>89</sup> Taken in the context of a system which implements a policy of mandatory and automatic detention in all cases, and considering that detention centres are not suited for the needs of children, Regulation 15 raises serious protection concerns. It is relevant to note that the new EU Reception Conditions Directive 2013 (recast), very clearly states *inter alia* that *“minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors.”*<sup>90</sup> It further states that *“unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible.”*<sup>91</sup>

38. Guideline 9 of the UNHCR Detention Guidelines offers guidance on the principles applying to the special circumstances and needs of particular asylum-seekers, including children.<sup>92</sup> General principles relating to detention apply *a fortiori* to children, who should in principle not be detained at all. The United Nations *Convention on the Rights of the Child* provides specific international legal obligations in relation to children and sets out a number of guiding principles regarding the protection of children.<sup>93</sup>

39. Overall, an ethic of care – and not enforcement - needs to govern interactions with asylum-seeking children, including children in families, with the best interests of the child a primary consideration.<sup>94</sup> The extreme vulnerability of a child takes precedence over the status of an “illegal alien”.<sup>95</sup> It is UNHCR’s view that Regulation

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<sup>87</sup>National Legislative Bodies, *Malta: Irregular Immigrants, Refugees and Integration Policy Document, 2005*, available at: <http://www.refworld.org/docid/51b197484.html>

<sup>88</sup>Regulation 14(2) of the Reception Regulations.

<sup>89</sup>“Accommodation centre” means any place used for collective housing of asylum-seekers (Regulation 2).

<sup>90</sup>Article 11(2).

<sup>91</sup>Article 11(3).

<sup>92</sup>Guideline 9 also offers guidance on the detention of victims of trauma and torture, women, victims or potential victims of trafficking, asylum-seekers with disabilities, older asylum-seekers, and lesbian, gay, bisexual, transgender or intersex (LGBTI) asylum-seekers.

<sup>93</sup>UNHCR Detention Guidelines, 2012, para. 51.

<sup>94</sup>*Ibid.* para. 52.

<sup>95</sup>*Muskhadzhiyeva and others v. Belgium*, App. No. 41442/07, Council of Europe: European Court of Human Rights, 19 January 2010, available at: <http://www.unhcr.org/refworld/docid/4bd55f202.html>, in which it was held *inter alia* that detaining children in transit facilities designed for adults not only amounted to inhuman or degrading treatment in contravention of Article 3 of the ECHR, it also rendered their detention unlawful.

15 does not presently reflect the standards in international law and it will have to be revised in order to conform to the EU Reception Conditions Directive 2013.<sup>96</sup>

40. In practice, vulnerable persons such as unaccompanied and separated children, pregnant women, families with children and persons with severe medical and psychological conditions are usually released after they undergo a vulnerability or age assessment procedure by AWAS.<sup>97</sup> That said, release from detention is not automatic, and vulnerable persons arriving in an irregular manner are still immediately detained upon arrival and only released from detention once AWAS recommends early release to the Principal Immigration Officer.<sup>98</sup> There are no prescribed time limits for early release on grounds of vulnerability and the procedure can take a number of days, weeks, and in some cases even months, since AWAS has limited capacity and at times struggles with the number of arrivals by boat, particularly during the summer months.<sup>99</sup> There is currently no procedure of automatic judicial oversight over the age and vulnerability assessment procedures.<sup>100</sup> AWAS is also the agency responsible for the management and administration of open reception centres housing unaccompanied children and families. UNHCR considers that AWAS is not sufficiently resourced to effectively carry out both the age and vulnerability assessment procedures and the placement of persons in the open reception centres.

### 3.4 Legal remedies to challenge detention

41. Maltese law provides for a number of legal avenues to challenge one's detention: a remedy under the Criminal Code, various remedies under the Immigration Act, a remedy under the EU Returns Directive, and a remedy through constitutional proceedings. These, however, are not considered to be effective in practice.

42. In fact, there have been a number of decisions finding that Malta imposes prolonged periods of administrative detention for asylum-seekers without providing adequate avenues to effectively challenge their detention,<sup>101</sup> and without considering alternative and less coercive measures than detention, including liberty and freedom of movement. In the context of less coercive measures and freedom of movement, it is relevant to note the opinion of the European Court of Human Rights in *Louled Massoud v. Malta*, wherein it stated that *"the Court finds it hard to conceive that in a small island like Malta, where escape by sea without endangering one's life is unlikely and fleeing by air is subject to strict control, the authorities could not have*

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<sup>96</sup>In the 2013 Manifesto for Children, the Maltese Commissioner for Children stated that the effect of the detention policy is not an acceptable one in terms of rights and the best interests of children (at para. 3.2.6, available in Maltese at: [http://www.tfal.org.mt/MediaCenter/PDFs/1\\_Manifesto%20for%20Children%202013%20-%203.1.pdf](http://www.tfal.org.mt/MediaCenter/PDFs/1_Manifesto%20for%20Children%202013%20-%203.1.pdf))

<sup>97</sup>AWAS was established by Subsidiary Legislation 217.11, Legal Notice 205 of 2009.

<sup>98</sup>UNHCR has noted that on a few occasions children were not automatically detained but were placed in open centres after ministerial care orders were issued immediately after arrival, thus avoiding detention.

<sup>99</sup>Up to 18 September 2013, 481 persons were referred to AWAS as minors in detention. According to UNHCR's observations from July to August 2013 the average time period for age assessment procedures was 15 days, a shorter time period than UNHCR has observed in past years. However, due to capacity constraints many children are still detained for several weeks after they have been formally recognized as minors by AWAS.

<sup>100</sup>See UNHCR Detention Guidelines, para. 47(v).

<sup>101</sup>See preliminary ruling by the Civil Court First Hall (Constitutional Jurisdiction) in *Tafarra Besabe Berhe vs Commissioner of Police as Principal Immigration Officer and the Minister for Justice and Home Affairs*, Application No. 27/2007; *Louled Massoud v. Malta*, App. No. 24340/08, 27 July 2010, *Suso Musa v. Malta*, App. No. 42337/12, 23 July 2013 (not final); *Aden Ahmed v. Malta*, App. No. 55352/12, 23 July 2013 (not final), European Court of Human Rights.

had at their disposal measures other than the applicant's protracted detention to secure an eventual removal in the absence of any immediate prospect of his expulsion."<sup>102</sup>

43. The European Court of Human Rights has held, in *Suso Musa v. Malta*,<sup>103</sup> that it "considers it worthwhile to reiterate that it has already found in *Louled Massoud*... that the Maltese legal system did not provide for a procedure capable of avoiding the risk of arbitrary detention pending deportation."<sup>104</sup>

#### 3.4.1 *Remedy under the Criminal Code*

44. Under Article 409A of the Criminal Code,<sup>105</sup> a detained person may seek recourse before the Court of Magistrates and request it to examine the lawfulness of detention and order release from custody. However, in the case of *Karim Barboush v. Commissioner of Police*<sup>106</sup> the Court held that "it is not within the competence of the Court of Magistrates or the Criminal Court to examine whether, beyond the fact that there is a clear law authorising continued detention, there are other circumstances which could render it illegal, such as an incompatibility with the rights granted by the Constitution or the Convention [ECHR]."<sup>107</sup> The Court also held that the fact Mr Barboush, who was detained on the basis of Article 14(2) of the Immigration Act, was also an asylum-seeker does not render his detention illegal. The Court ordered the re-arrest of Mr Barboush.

#### 3.4.2 *Remedies under the Immigration Act*

45. According to Article 25A of the Immigration Act, the Immigration Appeals Board (hereinafter the "IAB") has the "jurisdiction to hear and determine appeals or applications in virtue of the provisions of [the Immigration] Act or regulations made thereunder or in virtue of any other law..."<sup>108</sup> These are discussed below.<sup>109</sup>

##### (i) *Appeals against removal orders*

46. Article 14(1) of the Immigration Act grants the right of appeal against the issuance of a removal order. Any appeal has to be filed in the Registry of the Board within three working days from the decision subject to appeal.<sup>110</sup> UNHCR notes that in practice, it is difficult for detained asylum-seekers to access legal assistance immediately after arrival and consequently to file an appeal within three days from when they are served with the removal order, that is, from the day of their arrival in

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<sup>102</sup> *Louled Massoud v. Malta*, App. No. 24340/08, Council of Europe: European Court of Human Rights, 27 July 2010, at para. 68, available at: <http://www.refworld.org/docid/4c6ba1232.html>

<sup>103</sup> *Suso Musa v. Malta*, App. No. 42337/12, Council of Europe: European Court of Human Rights, 23 July 2013 (not final), available at: <http://www.refworld.org/docid/52025a8f4.html>

<sup>104</sup> At para. 105.

<sup>105</sup> Chapter 9 of the Laws of Malta.

<sup>106</sup> Criminal Court, Case No. 2/2004, Chief Justice Vincent De Gaetano, 5 November 2004.

<sup>107</sup> As cited in *Louled Massoud v. Malta*, Application No. 24340/08, European Court of Human Rights, 27 July 2010, para. 21.

<sup>108</sup> Article 25A(1)(c).

<sup>109</sup> In terms of the Board of Visitors for Detained Persons Regulations, Subsidiary Legislation 217.08, Legal Notice 251 of 2012, the Board (known as the "Detention Visitors Board") acts as the body of persons responsible for a National Preventive Mechanism for the prevention of torture, as provided for in the Optional Protocol to the United Nations Convention against Torture. It has several functions relating to *inter alia* monitoring of detention conditions, treatment of detainees, inquiring and reporting on any matter which it deems proper, and advising the Minister. However, its mandate is limited to making recommendations and it does not have decision-making powers in terms of policy.

<sup>110</sup> Article 25A(7).

Malta.<sup>111</sup> There is currently no system in place to ensure that legal aid lawyers visit detention centres to offer legal services for the purposes of providing access to legal proceedings to challenge detention.

*(ii) Applications requesting release on the grounds of unreasonableness*

47. According to Article 25A(9) the IAB also has the “*jurisdiction to hear and determine applications made by persons in custody in virtue only of a deportation or removal order to be released from custody pending the determination of any application under the Refugees Act or otherwise pending their deportation...*” The law further states in sub-article 10 that the IAB shall only grant release “*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: Provided that where a person, whose application for protection under the Refugees Act has been refused by a final decision, does not co-operate with the Principal Immigration Officer with respect to his repatriation to his country of origin or to any other country which has accepted to receive him, the Board may refuse to order that person’s release.*”

48. It is relevant to note that according to Article 25A(10) the IAB only has the competence and jurisdiction to decide on the *reasonableness* of the duration of detention, but not on the legality.

49. In addition, Article 25A(11) states that “*the Board shall not grant release in the following cases:*

- a) when the identity of the applicant including his nationality has yet to be verified, in particular where the applicant has destroyed his travel or identification documents or used fraudulent documents in order to mislead the authorities;*<sup>112</sup>
- b) when elements on which any claim by applicant under the Refugees Act is based, have to be determined, where the determination thereof cannot be achieved in the absence of detention;*
- c) where the release of the applicant could pose a threat to public security or public order.”*

50. Specifically on the limitation raised in Article 25A(11)(b), UNHCR notes that a number of asylum-seekers are released from detention after they undergo vulnerability assessment procedures by AWAS. Applications for international protection normally continue to be processed. In this context, the absence of detention does not affect the determination of the asylum application. On this point, UNHCR notes that it is permissible to detain an asylum-seeker for a limited initial period for the purpose of recording, within the context of a preliminary interview, the elements of their claim to international protection.<sup>113</sup> However, such detention can only be justified where that information could not be obtained in the absence of detention. This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought but would not ordinarily extend to a determination of the

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<sup>111</sup>This kind of legal assistance is offered by one civil society organization on a consistent basis. However, the relevant NGO does not have the capacity to provide legal assistance to all detained asylum-seekers and sometimes visits take place after three days from arrival because of logistical and other reasons.

<sup>112</sup>This is particularly relevant in the case of undocumented asylum-seekers or persons who are otherwise in need of international protection.

<sup>113</sup>UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum-Seekers*, No. 44 (XXXVII) –1986, para. (b), available at: <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>

full merits of the claim. This exception to the general principle – that detention of asylum-seekers is a measure of last resort – cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.<sup>114</sup>

51. In *Suso Musa v. Malta*,<sup>115</sup> the European Court of Human Rights observed, “that release under the said provisions may be granted only if it is shown that the detention was unreasonable on account of its duration or if there is no prospect of deportation. It follows that such a remedy is not applicable to a person in the initial stages of detention, pending a decision on an asylum application, and in consequence cannot be considered as a remedy for persons in that situation.”<sup>116</sup>

### (iii) Applications requesting release on bail

52. Article 25A(6) provides that the IAB may grant provisional release to any person arrested or detained, under such terms and conditions as it may deem fit, and the provisions relating to bail in the Criminal Code<sup>117</sup> are applicable in this context. According to the Criminal Code, considerations of the Court include whether the accused will appear before the relevant authority, whether he or she will abscond or leave Malta, and whether the accused will observe any conditions imposed by the Court.<sup>118</sup> UNHCR notes that the IAB sets a number of conditions which the vast majority of asylum-seekers who arrive by boat are unable to fulfil: bail is usually set at around €1000, a sum which they usually cannot afford;<sup>119</sup> the IAB requires a guarantor who would provide subsistence and accommodation and it also prohibits the person released on bail from working.<sup>120</sup>

53. In the context of bail, UNHCR notes that for bail procedures to be genuinely available to all asylum-seekers, bail hearings would preferably need to be automatic. Alternatively, asylum-seekers must be informed of the availability of bail procedures in a form and language they understand, and these procedures need to be accessible and effective. Access to legal counsel is an important component in making bail accessible. The bond amount set must be reasonable given the particular situation of asylum-seekers, and should not be so high as to render bail systems merely theoretical; and the provision of a guarantor should be available as a substitute for the payment of a bond.<sup>121</sup>

54. The remedies provided by Article 25A of the Immigration Act have been declared to be ineffective by the Civil Court, First Hall (Constitutional Jurisdiction), in the case of *Tafarra Besabe Berhe vs. Commissioner of Police as Principal Immigration Officer and Minister for Justice and Home Affairs*.<sup>122</sup> In this preliminary ruling the Court held that the remedy in Article 25A does not ensure a complete fair and certain remedy in cases where a person has been detained even for a short while. The ineffectiveness of this remedy has also been confirmed, for various

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<sup>114</sup> UNHCR Detention Guidelines, 2012, op. cit. Guideline 4.1, para. 28.

<sup>115</sup> Judgment not yet final at the time of writing.

<sup>116</sup> At para. 56.

<sup>117</sup> Title IV of Part II of Book Second of the Criminal Code, Chapter 9 of the Laws of Malta.

<sup>118</sup> Article 575(1) of the Criminal Code, Chapter 9 of the Laws of Malta.

<sup>119</sup> Upon arrival, the immigration authorities confiscate any money which they might have with them for the entire duration of their detention, and it is not available to those who apply for bail.

<sup>120</sup> UNHCR is only aware of a few cases where asylum-seekers have been released on bail.

<sup>121</sup> UNHCR Detention Guidelines, 2012, op. cit. Annex A, para. (vi).

<sup>122</sup> *Tafarra Besabe Berhe vs. Commissioner of Police as Principal Immigration Officer and Minister for Justice and Home Affairs, First Hall (Constitutional Jurisdiction)*, 20 June 2007, Application No. 27/2007. This was a preliminary ruling on admissibility. Case is still pending final judgment.

reasons, in the case of *Louled Massoud v. Malta*,<sup>123</sup> where the Court held that such a remedy is “devoid of any legal or practical effect.”<sup>124</sup>

### 3.4.3 *Remedy under the Returns Regulations*

55. Another remedy may be found under the heading of “Special Procedural Safeguards” in Part IV, Regulation 11(10) of the Returns Regulations,<sup>125</sup> which states:

*“The third-country national subject to the provisions of subregulation (8) [detention for the purpose of removal] shall be entitled to institute proceedings before the Board to contest the lawfulness of detention and such proceedings shall be subject to a speedy judicial review.”*

56. The Returns Regulations also specify limits for the duration of detention for the purposes of removal. Regulation 11 of the Returns Regulations states:

*“(14) Detention shall be maintained until the conditions laid down in sub-regulation (8) [detention for the purpose of removal] are fulfilled and it is necessary for removal to be carried out:*

*Provided, however, the period of detention may not exceed six months.*

*(15) The period of six months referred to in the preceding proviso may be extendable by a further twelve months where:*

*(a) there is a lack of cooperation by the third country national; or*

*(b) there are delays in obtaining the necessary documents from the third country in question; or*

*(c) the Principal Immigration Officer may deem necessary.”*

57. In this context, it is particularly relevant to note that Regulation 11(1) refers to the non-application of special procedural safeguards:

*“The provisions of part IV shall not apply to third country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by sea or air of the external border of Malta and who have not subsequently obtained an authorisation or a right to stay in Malta.”*

58. Due to Malta’s geographical position and the mixed migratory trends affecting the country in the past years, the phrase “irregular crossing by sea” has a particular significance in the context of asylum-seekers who arrive in Malta. Regulation 11(1) thus clearly excludes the majority of asylum-seekers who arrive on the island from seeking a remedy (on the basis of the Returns Regulations) before the IAB since they typically arrive in an irregular manner by sea.

59. Nevertheless, in a decision on the case of *Ibrahim Suso v. Principal Immigration Officer*,<sup>126</sup> the IAB concluded that the provisions in Part IV are, in fact, applicable to asylum-seekers stating that *“the appellant entered Malta illegally by crossing the external frontier of Malta, and subsequently obtained the right to remain*

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<sup>123</sup> Application No. 24340/08, European Court of Human Rights, 27 July 2010.

<sup>124</sup> At para. 44. See also *Suso Musa v. Malta*, at para. 57-59.

<sup>125</sup> Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations. Subsidiary Legislation 217.12, Legal Notice 81 of 2011.

<sup>126</sup> See *Ibrahim Suso v. Principal Immigration Officer*, 5 July 2012, Immigration Appeals Board.

in Malta by applying for refugee status.”<sup>127</sup> UNHCR has not however seen any impact on the current practice of the IAB as a result of this decision.

60. Judicial review of administrative detention of asylum-seekers is ineffective in Malta in many instances, as the relevant body, the IAB, fails to address the lawfulness of detention in individual cases, or to provide individualised reasoning based upon the specific facts and circumstances of the applicant.<sup>128</sup>

61. Administrative decisions imposing detention on prohibited migrants may be challenged before the IAB. However, UNHCR notes that it takes very long for the IAB to decide cases challenging detention,<sup>129</sup> and decisions given are not based on any considerations relative to refugee law nor based on an individualized review.<sup>130</sup>

#### 3.4.4 Constitutional proceedings

62. Another remedy lies with constitutional law. It is possible to file an application before the Civil Court (First Hall) in its Constitutional Jurisdiction, and where necessary, appeal to the Constitutional Court. However, in the case of *Sabeur Ben Ali v. Malta*<sup>131</sup> and *Kadem v. Malta*,<sup>132</sup> the European Court of Human Rights held that “this procedure was rather cumbersome and therefore lodging a constitutional application would not have ensured a speedy review of the lawfulness of the applicants’ detention”.<sup>133</sup> This position was reiterated by the European Court of Human Rights in *Louled Massoud v. Malta*,<sup>134</sup> *Suso Musa v. Malta*<sup>135</sup> and *Aden Ahmed v. Malta*.<sup>136</sup>

63. Maltese law also provides for the possibility of a speedy resolution of a matter involving constitutional and conventional matters under Part I of the Court Practice and Procedure and Good Order Rules<sup>137</sup> where an applicant may request that the case be treated, heard and concluded with urgency. UNHCR notes that the case of *Tafarra Besabe Berhe vs. Commissioner of Police as Principal Immigration Officer and Minister for Justice and Home Affairs*,<sup>138</sup> wherein the Court took cognizance of UNHCR’s position on the detention of asylum-seekers in Malta submitted by the applicant, the applicant specifically requested that the case be heard with urgency. However, this case is still pending final judgement since October 2008.

64. In another case filed in 2008, *Essa Maneh v. Commissioner of Police as Principal Immigration Officer and Minister for Justice and Home Affairs*,<sup>139</sup> the case was finally decided on the 29 April 2013. UNHCR notes that in this case, the

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<sup>127</sup> UNHCR Malta translation: “...l-appellant dañal Malta illegalment b’mod illi qasam il-fruntiera esterna ta’ Malta, u sussegwentement kiseb dritt joqghod Malta billi applika biex jingħata status ta’ rifuġjat ...”, *Ibrahim Suzo v. Principal Immigration Officer*, 5 July 2012, Immigration Appeals Board

<sup>128</sup> See *Ibrahim Suzo v. Principal Immigration Officer*, 5 July 2012, Immigration Appeals Board.

<sup>129</sup> See *Aden Ahmed v. Malta*, para. 119, 120, 121.

<sup>130</sup> See *Suso Musa v. Malta*. Applicant filed an application before the IAB on 28 June 2011 and the IAB decided the case on 5 July 2012.

<sup>131</sup> Application No. 35892/97, European Court of Human Rights, 29 June 2000, para. 40.

<sup>132</sup> Application No. 55263/00, European Court of Human Rights, 9 January 2003, para 53.

<sup>133</sup> *Louled Massoud v. Malta*, Application No. 24340/08, European Court of Human Rights, 27 July 2010, para. 20.

<sup>134</sup> At para. 45.

<sup>135</sup> At para. 52.

<sup>136</sup> At para. 62.

<sup>137</sup> *Court Practice and Procedure and Good Order Rules, Subsidiary Legislation 12.09, Legal Notice 279 of 2008, as amended by Legal Notice 333 of 2008.*

<sup>138</sup> *Tafarra Besabe Berhe vs. Commissioner of Police as Principal Immigration Officer and Minister for Justice and Home Affairs, First Hall (Constitutional Jurisdiction)*, 20 June 2007, Application No. 27/2007.

<sup>139</sup> *Essa Maneh v. Commissioner of Police as Principal Immigration Officer and Minister for Justice and Home Affairs*, 53/2008/1, Malta: Constitutional Court (Qorti Kostituzzjonali), 29 April 2013, available at: <http://www.refworld.org/docid/519f71d74.html>

Constitutional Court (as a court of appeal and last instance) upheld the judgment of the first court, which stated, *inter alia*, that “*in this case it does not result that the detention in question is intended to ‘humiliate and debase’ the applicant. Detention can be considered, in the particular circumstances of our country, as a necessary measure required for the stability of the country so as to, as much as possible, avoid a deluge of ‘irregular’ people running around Malta, and this without having established the prima facie interest and disposition of the person.*”<sup>140</sup>

65. The Court also held that:<sup>141</sup>

“42. *It is also noted that this large influx of prohibited migrants may be a threat to public order in the country, as well as national security, because of their number and also because of the time necessarily required to verify their identity.*”<sup>142</sup>

“43. *That when one considers the factors indicated above, particularly the failure on the part of the applicant to apply for provisional release [bail in terms of Immigration Act], also considering the just balance which has to be achieved between the interests of society in general and the need to protect the right enshrined in Article 5, it cannot be said that his detention exceeds that which is reasonable in the circumstances.*”<sup>143</sup>

66. UNHCR notes that the Constitutional Court’s assessment in *Essa Maneh* of the domestic legal framework, policy and practice relating to the detention of asylum-seekers in Malta does not reflect well-established principles of international and European human rights law.<sup>144</sup>

67. In summary, the legal remedies available under Maltese law do not provide sufficient guarantees to prevent arbitrary detention of asylum-seekers because they are ineffective in terms of their accessibility, scope and speed.

68. In this context it is pertinent to note that Article 18(2) of the 2005 EU Asylum Procedures Directive<sup>145</sup> states that “*where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.*” The new EU Reception Conditions Directive 2013 (recast)<sup>146</sup> provides, in Article 9(3) that “*where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted ex officio and/or at the request of the applicant. When conducted ex officio, such review shall be decided on as speedily as possible from the beginning of*

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<sup>140</sup> UNHCR translation of: “*Ma jirriżultax f’dan il-każ li d-detenzjoni in kwistjoni hija intiza “to humiliate and debase” ir-rikorrenti. Id-detenzjoni tista’ titqies, fic-cirkostanzi partikolari ta’ pajjiżna, b’ħala mizura meħtieġa għall-istabbiltà ta’ pajjiż biex kemm jista’ jkun, jiġi evitat duluvju ta’ nies “irregolari” jiġġerrew ma’ Malta, u dan mingħajr ma l-interess u d-disposizzjoni ta’ kull persuna tiġi almenu prima facie, stabbilita.*”

<sup>141</sup> See footnote 136.

<sup>142</sup> UNHCR translation of: “*42. Jiġi osservat ukoll li dan l-influss kbir ta’ immigranti pprojbti jista’ jkun ta’ theddida għal buon ordni fil-pajjiż, kif ukoll għas-sigurtà nazzjonali, kemm minħabba n-numru tagħhom kif ukoll iż-żmien li necessarjament jeħtieġ sabiex jiġu verifikati l-identità tagħhom.*”

<sup>143</sup> UNHCR translation of: “*43. Illi meta wieħed iqis il-fatturi fuq indikati, partikolarment in-nuqqas da parti tal-applikant li japplika għar-rilaxx provvizorju, ikkunsidrati wkoll il-bilanċ ġust li għandu jsir bejn l-interessi tas-socjeta` in generali u l’ħtieġa li jiġi protett id-dritt sancit bl-Artikolu 5, ma jistax jingħad li d-detenzjoni tiegħu kienet teçcedi dak li hu raġjonevoli fic-cirkostanzi.*”

<sup>144</sup> See UNHCR Detention Guidelines 2012, op. cit. Guideline 4, para. 18 to 42.

<sup>145</sup> European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, OJ L 326, 13 December 2005, pp. 13-34 available at: <http://www.refworld.org/docid/4394203c4.html>

<sup>146</sup> European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, L 180/96, Art. 10(3), available at: <http://www.refworld.org/docid/51d29db54.html>

*detention... To this end, Member States shall define in national law the period within which the judicial review ex officio and/or the judicial review at the request of the applicant shall be conducted.”*

### 3.5 Positions of other stakeholders

69. Following its visit to Malta in 2009, the UN Working Group on Arbitrary Detention recommended, among others, that the Government of Malta “[c]hange 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.”<sup>147</sup>

70. In March 2011 the Commissioner for Human Rights of the Council of Europe visited Malta. In his report to the Maltese Government he urged “*the Maltese authorities to reconsider their law and practice relating to the detention of migrants, including asylum seekers, and to bring them fully and effectively into line with the requirements of the European Convention on Human Rights as interpreted by the Court.*”<sup>148</sup>

71. The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) has visited Malta on several occasions. The most recent visit was held in September 2011 and in its report to the Maltese Government the CPT made a number of recommendations addressing the material conditions in detention centres.<sup>149</sup>

72. Throughout the years, civil society organizations have been active in advocating for changes to the current reception system and have also engaged in dialogue with the authorities on several issues relating to detention. Local civil society organizations have also assisted individuals who were detained in seeking various remedies, including through the European Court of Human Rights. International civil society organizations have also contributed to the debate on detention and made recommendations to the Maltese authorities.<sup>150</sup>

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<sup>147</sup> See page 19 of the Report of the Working Group on Arbitrary Detention (Addendum) on its mission to Malta, A/HRC/13/30/Add.2, dated 18 January 2010, which may be downloaded at:

<http://www.ohchr.org/EN/Issues/Detention/Pages/Annual.aspx>

<sup>148</sup> Council of Europe: Commissioner for Human Rights, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Malta from 23 to 25 March 2011*, 9 June 2011, CommDH(2011)17, at para. 14, available at: <http://www.refworld.org/docid/4ecba92d2.html>

<sup>149</sup> See CPT Report, 2013, op. cit. available at: <http://www.cpt.coe.int/documents/mlt/2013-12-inf-eng.htm>

<sup>150</sup> See International Commission of Jurists (ICJ), *Not Here to Stay*, May 2012, available at: <http://www.refworld.org/docid/4fe4096a2.html>; Human Rights Watch, *Boat Ride to Detention: Adult and Child Migrants in Malta*, 18 July 2012, ISBN: 1-56432-918-6, available at: <http://www.refworld.org/docid/500915092.html>

## 4. Relevant principles of international and European law

### 4.1 The right to freedom of movement and the right to liberty and security of person

73. The right to freedom of movement, including the right to leave any country, including one's own, is established in all the major international human rights instruments,<sup>151</sup> and is an essential component of legal systems upholding the rule of law, including those of Malta and the other Member States of the European Union. Similarly, the fundamental right to liberty and security of person is expressed in all the major international and regional human rights instruments.<sup>152</sup> These rights apply to all persons, regardless of their immigration or other status.<sup>153</sup> The right to liberty and security of the person is a substantive guarantee against unlawful as well as arbitrary detention. For any detention or deprivation of liberty to be lawful, it must be applied in accordance with a procedure prescribed by law. The foreseeability and predictability of the law and the legal consequences of particular actions also inform the assessment of whether the detention will be considered lawful.<sup>154</sup> There must be legal certainty,<sup>155</sup> meaning that the law must be sufficiently accessible and precise, in order to allow an individual to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>156</sup>

74. With respect to the requirement that any deprivation of liberty or detention not be arbitrary, restrictions on the right to liberty and security of the person should only be resorted to when they are determined to be necessary,<sup>157</sup> reasonable in all the

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<sup>151</sup> See, e.g. Article 13, UN General Assembly, Universal Declaration of Human Rights 1948, 10 December 1948, 217 A (III) (hereinafter "UDHR"); Article 12, UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations Treaty Series, vol. 999, page 171 (hereinafter "ICCPR"); Article 5, UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations Treaty Series, vol. 660, page 195 (hereinafter "ICERD"); Articles 1-4, Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS 46; Article 12, Organization of African Unity, *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (hereinafter "ACHPR"); Article 13, Organization of African Unity, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990); Articles 20-24, League of Arab States, *Arab Charter on Human Rights*, 15 September 1994.

<sup>152</sup> See, e.g., Articles 3 and 9, UDHR; Article 9, ICCPR; Article 5(1), ECHR; Article 6, European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01) (hereinafter "Charter of Fundamental Rights of the EU"); Articles 1 and 25, Organization of American States, *American Declaration of the Rights and Duties of Man*, 2 May 1948, O.A.S. Res. XXX, 1948; Article 7(2), Organization of American States, *American Convention on Human Rights*, 22 November 1969; Article 6, ACHPR.

<sup>153</sup> UN Human Rights Committee ("UN HRC"), General Comment No. 18: Non-discrimination, 10 November 1989, para. 1, available at **Error! Hyperlink reference not valid.**; UN HRC, General Comment No. 15: The position of aliens under the Covenant, 11 April 1986, para. 1, available at: <http://www.unhcr.org/refworld/docid/45139acfc.html>

<sup>154</sup> *Saadi v. the United Kingdom*, ECtHR, App. No. 13229/03, 29 January 2008, at para. 67, available at: <http://www.unhcr.org/refworld/docid/47a074302.html>

<sup>155</sup> *Bozano v. France*, ECtHR, App. No. 9990/82, 18 December 1986, at para. 54; *H.L. v. the United Kingdom*, ECtHR, App. No. 45508/99, 5 October 2004, at para. 114. See also *Shum Kwok-she v. Hong Kong SAR* [2002] 5 HKCFAR 318 and 'A' v. *Director of Immigration* [2008] HKCU 1109, 18 July 2008 (HK Court of Appeal).

<sup>156</sup> *Kawka v. Poland*, ECtHR, App. No. 25847/94, 9 January 2001, at para. 48-49; *Dougoz v. Greece*, ECtHR, App. No. 40907/98, 6 March 2001, at para. 55.

<sup>157</sup> The necessity requirement was expressed by the UN Human Rights Committee in its General Comment No.8 and a number of its decisions, and is reflected in Article 31(2). It should also be noted that the EU Reception Conditions Directive 2013 (recast) limits detention of asylum-seekers by introducing in Article 8(2), a necessity test ("When it proves necessary and on the basis of an individual assessment of each case" and "if other less coercive measures

circumstances and proportionate to a legitimate objective. Analysis of potential arbitrariness must consider whether there were less restrictive or coercive measures that could have been applied to the individual concerned. The availability, effectiveness and appropriateness of alternatives to detention must be considered before recourse to detention.<sup>158</sup>

## 4.2 The detention of asylum-seekers, refugees and persons in need of international protection should not be used as a penalty for illegal entry or as a deterrent to seeking asylum under international refugee law

75. The fundamental right to liberty and security of person, and the correlated right to freedom of movement, are also reflected in international refugee law.<sup>159</sup> Article 26 of the 1951 Convention provides for a general right of free movement for those refugees “lawfully in” the territory of the host State, subject only to necessary restrictions which may be imposed.<sup>160</sup> This provision also applies to asylum-seekers.<sup>161</sup> Persons who are found to be in need of international protection, for example in accordance with Regulation 14<sup>162</sup> of the Maltese Procedural Standards in Examining Applications for Refugee Status Regulations<sup>163</sup> are entitled to remain in Malta and are granted residence permits to lawfully reside in Malta, and should therefore be considered to be “lawfully staying” there within the meaning of the 1951 Convention.<sup>164</sup>

76. In addition to Article 26, the 1951 Convention contains a non-penalization clause, which provides that even entry without authorization does not give the State an automatic right to detain under international refugee law. Article 31(1) of the 1951 Convention stipulates that refugees “coming directly” shall not be penalized for their “illegal entry or presence” if they present themselves to the authorities without delay

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cannot be applied effectively”). See European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, L 180/96, available at: <http://www.refworld.org/docid/51d29db54.html>

<sup>158</sup> *C v. Australia*, HRC, Comm. No. 900/1999, available at: <http://www.unhcr.org/refworld/docid/3f588ef00.html>, where the HRC observed that: “the State party has failed to demonstrate that those reasons justify the author’s continued detention in the light of the passage of time and intervening circumstances. In particular, the State party has not demonstrated that, in the light of the author’s particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party’s immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author’s deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee’s view, arbitrary and constituted a violation of article 9, paragraph 1”; and *Sahin v. Canada, (Minister of Citizenship and Immigration)* [1995] 1 FC 214 available at: <http://reports.fja.gc.ca/eng/1995/1995fca0233.html>

<sup>159</sup> See, e.g. UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, 4 September 2001, EC/GC/01/17, available at: <http://www.unhcr.org/refworld/docid/3bfa81864.html>

<sup>160</sup> See Edwards, op. cit. Reinhard Marx, “Article 26 (Freedom of Movement)”, in Andreas Zimmerman (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011), at page 1147.

<sup>161</sup> See, UNHCR, *Reception of Asylum-Seekers, including Standards of Treatment, in the Context of Individual Asylum Systems*, EC/GC/01/17, 4 September 2001, at para. 3. See also, *R. v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520, 29 July, 1999, at 527.

<sup>162</sup> “14. (1)(a) Notwithstanding the provisions of any other law to the contrary, and notwithstanding any deportation or removal order, a person declared to be a refugee shall be entitled –  
(i) without prejudice to the provisions of articles 9 and 10 of the [Refugees] Act, to remain in Malta with freedom of movement, and to be granted, as soon as possible, personal documents, including a residence permit for a period of three years, which shall be renewable...”

<sup>163</sup> Subsidiary Legislation 420.07, Legal Notice 243 of 2008.

<sup>164</sup> “Lawful stay” within the meaning of the 1951 Convention embraces both permanent and temporary residence.

and show good cause for their illegal entry or stay.<sup>165</sup> The prohibition against penalization for illegal entry included in Article 31 applies to asylum-seekers.<sup>166</sup> A policy of prosecuting or otherwise penalizing, including through the use of detention, illegal entrants, those present illegally, or those who use false documentation, without regard to the circumstances of flight in individual cases, and the refusal to consider the merits of an applicant's asylum claim, amount to a breach of a State's obligations under international law.<sup>167</sup> Further, Article 31(2) of the 1951 Convention provides that States shall not apply restrictions to the movement of refugees or asylum-seekers except when it is considered necessary. Such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.

77. The right to asylum is recognized as a basic human right.<sup>168</sup> In exercising this right, asylum-seekers are often forced to arrive at, or enter, state territory without prior authorization. The position of asylum-seekers often thus differs fundamentally from that of ordinary migrants in that they may not be in a position to comply with the legal formalities for entry, not least because they may be unable to obtain the necessary documentation in advance of their flight, e.g., because of their fear of persecution or the urgency of their departure.<sup>169</sup> This element, as well as the fact that

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<sup>165</sup>The expression "coming directly" in Article 31(1) covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept "coming directly" and each case must be judged on its merits. Similarly, given the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum-seeker to another, there is no time limit which can be mechanically applied or associated with the expression "without delay". "Illegal entry" would, *inter alia*, include arriving or securing entry through the use of false or falsified documents, the use of other methods of deception or clandestine entry, including entry into State territory with the assistance of smugglers or traffickers. "Illegal presence" would cover, for example, remaining after the elapse of a short, permitted period of stay. See, UNHCR, *Global Consultations on International Protection: Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees – Revised*, 8-9 November 2001 (hereinafter "Global Consultations Summary Conclusions"), available at: <http://www.unhcr.org/3bf4ef474.html>

<sup>166</sup>In *R. v. Uxbridge Magistrates Court, ex parte Adimi*, see footnote 158, a case involving an asylum-seeker who had used false documents to enter the United Kingdom prior to lodging his application for asylum, the High Court of the UK concluded: "That Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt." Upheld in *R. v. Asfaw* [2008] UKHL31, at para. 26.

<sup>167</sup>Global Consultations Summary Conclusions, see footnote 156, at paras. 5-7; Guy Goodwin-Gill, "Article 31 of the 1951 Convention relating to the Status of Refugees: non-penalization, detention, and protection", in Erika Feller, Volker Turk and Frances Nicholson (eds.), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003), at page 219 (paras. 11-12).

<sup>168</sup>Article 18 of the Charter of Fundamental Rights of the EU enshrines the right to asylum. The scope of this right is broad and incorporates not only the substantive provisions of the 1951 Convention but also the procedural and substantive standards contained in the Union's asylum *acquis*. The protection it confers plainly goes beyond protection from *refoulement* and includes a right to apply for and be granted refugee or subsidiary protection status. There will thus be a breach of Article 18 not only where there is a real risk of *refoulement* but also in the event of (i) limited access to asylum procedures and to a fair and efficient examination of claims or to an effective remedy; (ii) treatment not in accordance with adequate reception and detention conditions and (iii) denial of asylum in the form of refugee status or subsidiary protection status, with attendant rights, when the criteria are met. See UNHCR, *N.S. v. Secretary of State for the Home Department in United Kingdom; M.E. and Others v. Refugee Application Commissioner and the Minister for Justice, Equality and Law Reform in Ireland - Written Observations of the United Nations High Commissioner for Refugees*, 1 February 2011, C-411/10 and C-493/10, available at: <http://www.unhcr.org/refworld/docid/4d493e822.html>. The right to seek and enjoy asylum is also recognized in Article 14 of the UDHR. Read together, the right to asylum and the right to liberty and security of the person give rise to a presumption against detention for asylum-seekers.

<sup>169</sup>UNHCR Detention Guidelines 2012, op. cit. Guideline 1. See also, UN Working Group on Arbitrary Detention, Report to the Seventh Session of the Human Rights Council, A/HRC/7/4/, 10 January 2008, at para. 53: "[C]riminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention", available at: <http://www.unhcr.org/refworld/docid/502e0eb02.html>

many asylum-seekers have experienced traumatic events,<sup>170</sup> needs to be taken into account in determining the justifiability of any restrictions on freedom of movement or liberty based on irregular entry or presence.<sup>171</sup> The prohibition against detaining asylum-seekers solely on the grounds that they have applied for asylum is also reflected in EU law, most notably in Article 18 of the Asylum Procedures Directive<sup>172</sup> and Article 26 of the Asylum Procedures Directive 2013 (recast).<sup>173</sup>

### 4.3 The prohibition of the expulsion of asylum-seekers, refugees and persons recognized as being in need of international protection

78. UNHCR notes that under Articles 31 to 33 of the 1951 Convention, an asylum-seeker cannot be deported or otherwise removed until his/her application for refugee status has been definitively determined. This principle was worded in clear terms by the European Court of Human Rights in the case of *R.U. v. Greece*:

*"[I]t emerges from international and national law, notably Articles 31-33 of the Geneva Convention Relating to the Status of Refugees [...] that the expulsion of a person who has submitted an application for asylum is not permitted until a final determination on the asylum application."*<sup>174</sup>

79. This prohibition against the deportation or expulsion of an individual who has sought asylum, and whose claim has not yet been definitively determined, stems from States' *non-refoulement* obligations. The obligation of states not to expel or return (*refouler*) a person to territories where his/her life or freedom would be threatened is a cardinal protection principle, most prominently expressed in Article 33(1) of the 1951 Convention. The prohibition of *refoulement* applies to all refugees, including those who have not been formally recognized as such, to persons recognized as being in need of international protection, and to asylum-seekers

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<sup>170</sup>As recognized by the European Court of Human Rights in its Grand Chamber judgment of *M.S.S. v. Belgium and Greece*, ECtHR (Grand Chamber), App. No 30696/09, 21 January 2011, at para. 232-233, available at: <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>

<sup>171</sup>UNHCR Detention Guidelines 2012, op. cit. Guideline 1.

<sup>172</sup>European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, OJ L 326, 13 December 2005, pp. 13-34 available at:

<http://www.refworld.org/docid/4394203c4.html>. Article 18 provides: "Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum." Further, Article 31(2) also provides that: "Contracting States shall not apply to the movements of such refugees (including asylum-seekers) restrictions other than those which are necessary, and that any restrictions shall only be applied until such time as their status is regularized, or they obtain admission into another country."

<sup>173</sup>European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, L 180/60, available at: <http://www.refworld.org/docid/51d29b224.html>. Article 26 provides: "1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant. The grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with Directive 2013/33/EU.

2. Where an applicant is held in detention, Member States shall ensure that there is a possibility of speedy judicial review in accordance with Directive 2013/33/EU."

<sup>174</sup>*R.U. v. Greece*, ECtHR, App. No. 2237/08, 7 June 2011, at para. 94, available at:

<http://www.unhcr.org/refworld/docid/4f2aafc42.html>. [UNHCR translation of "[I]l ressort du droit international et national, à savoir les articles 31-33 de la Convention de Genève relative au statut des réfugiés [...] que l'expulsion d'une personne ayant soumis une demande d'asile n'est pas permise jusqu'au traitement définitive de ladite demande." The Court made a similar finding in *S.D. v. Greece*, ECtHR, App. No. 53541/07, 11 June 2009, at para. 62, available at: <http://www.unhcr.org/refworld/docid/4a37735f2.html>, without making specific reference to the provisions of the 1951 Convention. See also the Maltese Court's judgement in *Abdul Hakim Hassan Abdulle vs. Minister of Justice and Home Affairs and the Commissioner of Police as Principal Immigration Officer*, Civil Court First Hall (Constitutional Jurisdiction), 29 November 2011, Application No. 56/2007.

whose status has not yet been determined.<sup>175</sup> The *non-refoulement* principle has been recognized as a principle of customary international law,<sup>176</sup> and is also contained in Article 19(2) of the EU Charter. Furthermore, a *non-refoulement* obligation may also arise as a result of the risk of a breach of certain rights contained in the ECHR.<sup>177</sup>

80. The protections against *refoulement* and expulsion of refugees lawfully in the territory of a host State (contained in Articles 33 and 32<sup>178</sup> of the 1951 Convention respectively) and the prohibition of penalization of refugees and asylum-seekers for illegal entry and presence (contained in Article 31 of the 1951 Convention) are central tenets of the 1951 Convention and the right to asylum. In addition, the right to asylum requires States to (i) advise individuals of their right to apply for refugee status and other forms of international protection and (ii) provide for fair and effective status determination procedures.<sup>179</sup> States must regulate and apply their immigration policies with due regard to their obligations under the 1951 Convention.<sup>180</sup> This means that States cannot return such persons to their country of origin or another territory until such time as it has been definitively determined that they do not have international protection needs.<sup>181</sup> The principle of *non-refoulement* is also found in Article 21 the EU Qualification Directive 2011 (recast),<sup>182</sup> which Directive also states that “the Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees.”<sup>183</sup>

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<sup>175</sup> See ExCom Conclusion No. 6 (XXVIII), 1977, at para. (c), ExCom Conclusion No. 79 (XLVII), 1996, at para. (j), ExCom Conclusion No. 81 (XLVII), 1997, at para. (i), available at <http://www.unhcr.org/pages/49e6e6dd6.html>. See also, *Note on International Protection (submitted by the High Commissioner)*, A/AC.96/815, ExCom Reports, 31 August 1993, at para. 11, available at <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>

<sup>176</sup> *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol adopted at the Ministerial Meeting of States Parties of 12–13 December 2001*, HCR/MMSP/2001/09, 16 January 2002, at preambular para. 4, available at: <http://www.refworld.org/docid/3d60f5557.html>. Earlier, the Executive Committee of UNHCR observed that “the principle of *non-refoulement* ... was progressively acquiring the character of a *peremptory rule* of international law.” See Executive Committee Conclusion No. 25 (XXXIII), para. (b). See also UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html>

<sup>177</sup> On Article 3, see in particular: *M.S.S. v. Belgium and Greece*, see footnote 167, and *Hirsi Jamaa and Others v. Italy*, ECtHR, App. No. 27765/09, 23 February 2012, available at:

<http://www.unhcr.org/refworld/docid/4f4507942.html>. On Article 6, see in particular *Othman (Abu Qatada) v. the United Kingdom*, ECtHR, App. No. 8139/09, 17 January 2012, available at: <http://www.unhcr.org/refworld/docid/4f169dc62.html>

<sup>178</sup> Compliance with due process is expressly required by Article 32(2) of the 1951 Convention in respect of expulsion of refugees. To the extent that *refoulement* would pose a potentially greater threat to a refugee or asylum-seeker than expulsion, it is UNHCR’s position that, at the very least, the due process safeguards applicable to expulsion must be read into the application of the exceptions to *refoulement*. There are no exceptions to the *non-refoulement* obligation under the ECHR or in the jurisprudence of the European Court of Human Rights, and as such, the protection afforded by the ECHR is wider than that provided by Articles 32 and 33 of the 1951 Convention. *Saadi v. Italy*, ECtHR, App. No. 37201/06, 28 February 2008.

<sup>179</sup> ExCom Conclusion No. 85 (XLIX), 1988, at para. (dd).

<sup>180</sup> *Hirsi Jamaa and Others v. Italy*, see footnote 174, at para. 179.

<sup>181</sup> See, for example ExCom Conclusion No. 22 (XXII), 1981, Section 2 (*Admission and Non-Refoulement*); ExCom Conclusion No. 81 (XLVIII), 1997, at para. (h) (no rejection at frontiers without the application of these procedures); ExCom Conclusion No. 82 (XLVIII), 1997, at para. (d) (admission of asylum applicants to state territory); ExCom Conclusion No. 85 (XLIX), 1998, at para. (q); ExCom Conclusion No. 99 (LV), 2004, at para. (l); ExCom Conclusion No. 108 (LIX), 2008. Under EU law, there are clear legal obligations on the part of the responsible State (pursuant to the provisions of the Dublin III Regulation and the Asylum Procedures Directive 2013 recast) to complete the examination of the application for asylum and to allow asylum-seekers to remain on their territory pending the examination of their application. See, in particular, Article 3 of the Dublin III Regulation; Article 9 of the Asylum Procedures Directive 2013 recast; Article 6 of the Reception Conditions Directive 2013 recast.

<sup>182</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), see footnote 21.

<sup>183</sup> Preambular para. 4 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), see footnote 21.

#### **4.4 The prohibition of detention of asylum-seekers, refugees and persons recognized as being in need of international protection for the purpose of expulsion**

81. In light of the principles highlighted above in Parts 4.1, 4.2 and 4.3, it can be concluded that there exists a prohibition in international human rights and refugee law, under which asylum-seekers and persons recognized as being in need of international protection cannot lawfully be detained for the purpose of expulsion or removal.<sup>184</sup>

#### **4.5 The right to liberty and security under Article 5(1) ECHR in light of the relevant international human rights and refugee law standards**

82. The guarantee of the right to liberty and security in Article 5 ECHR applies to “everyone” within a State’s jurisdiction, irrespective of nationality or immigration status. Article 5 also explicitly states that “no one” shall be deprived of the right to liberty save in prescribed cases. Sub-paragraphs (a) to (f) of Article 5(1) contain an exhaustive list of grounds upon which persons may be deprived of their liberty.<sup>185</sup> Article 5(1)(f) only permits the State to restrict the liberty of third-country nationals in an immigration context, either (i) to prevent an individual from effecting an unauthorized entry or (ii) with a view to deportation or extradition.

83. Compliance with the international obligations of States should form an integral part of their compliance with their obligations under the ECHR. The European Court of Human Rights has already taken into consideration a State’s international obligations, including under international refugee law, when assessing its compliance with the ECHR in a number of cases. As noted above, in *R.U. v. Greece*, the Court considered Greece’s obligations under Articles 31 to 33 of the 1951 Convention in assessing whether there had been a violation of Article 5(1)(f) ECHR.<sup>186</sup> In *Hirsi Jamaa and Others v. Italy*, the Court took into account a State’s *non-refoulement* obligations under international law in the context of its finding that there had been a violation of Article 3 ECHR.<sup>187</sup> In *Kuric and Others v. Slovenia* the Court took into account the international standards on preventing statelessness to conclude that there had been a violation of Art. 8 ECHR,<sup>188</sup> while in *Rahimi v. Greece*, the Court took into account, *inter alia*, the Convention on the Rights of the Child to conclude to a violation of Art. 5 ECHR.<sup>189</sup>

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<sup>184</sup> *R.U. v. Greece*, see footnote 70, at para. 94; *S.D. v. Greece*, see footnote 70, at para. 62.

<sup>185</sup> See, e.g., *Saadi v. the United Kingdom*, see footnote 151, para. 43; *Witold Litwa v. Poland*, ECtHR, App. No. 26629/95, at para. 49.

<sup>186</sup> *R.U. v. Greece*, see footnote 70.

<sup>187</sup> *Hirsi Jamaa and Others v. Italy*, see footnote 174, at para. 134.

<sup>188</sup> *Kuric and Others v. Slovenia*, ECtHR, App. No. 26828/06, 13 July 2010, at para. 376, available at: <http://www.unhcr.org/refworld/docid/4c3f01312.html>

<sup>189</sup> *Rahimi v. Greece*, ECtHR, App. No. 8687/08, 5 April 2011, at para. 108 to 110, available at: <http://www.unhcr.org/refworld/docid/4d9c3e482.html>

84. As with the right to liberty and security of the person in international human rights law, as summarized in Section 4.1 above, any deprivation of liberty must (i) be lawful and (ii) not be arbitrary under Article 5(1)(f) of the ECHR.

85. The European Court of Human Rights has held that where the lawfulness of detention is in issue, including the question of whether a “procedure prescribed by law” has been followed, the ECHR refers essentially to national law, although the State party also needs to ensure that any deprivation of liberty is in keeping with the purpose of Article 5, which is to protect the individual from arbitrariness.<sup>190</sup> As mentioned in Section 4.1 above, the Court has also held that there must be a degree of legal certainty.<sup>191</sup>

86. In relation to detention for the purposes of expulsion, the Court has held that any deprivation of liberty under the second limb of Article 5(1)(f) will be justified only so long as deportation or extradition proceedings are in progress. As stated in *Chahal v. the United Kingdom*, and in subsequent cases such as *Louled Massoud v. Malta*, *Suso Musa v. Malta* and *Aden Ahmed v. Malta*, if deportation proceedings are “not prosecuted with due diligence, the detention will no longer be permissible under Article 5(1)(f).”<sup>192</sup>

87. UNHCR notes that in Malta, the detention of asylum-seekers is generally based upon Article 5, 14 and 16 of the Immigration Act, related to illegal entry and removal. As noted in Section 3.1 above, Maltese law permits detention with a view to removal.<sup>193</sup> Under Maltese law, persons to whom the *non-refoulement* principle has been found to be applicable cannot be returned or expelled.<sup>194</sup> Moreover, under Maltese law, asylum-seekers cannot be removed from Malta before their application is finally determined and such applicants shall be allowed to enter or remain in Malta pending a final decision of their application.<sup>195</sup>

88. Further to Sections 4.2 to 4.4 above, UNHCR notes that detention, for the purposes of expulsion or removal of (i) an asylum-seeker whose application for international protection has not been definitively rejected and/or (ii) a person recognized as being in need of international protection, is at variance with international human rights and refugee law. Furthermore, in keeping with the European Court of Human Rights’ jurisprudence cited above, Malta’s failure to comply with relevant obligations under international refugee law should form an integral part of any assessment of its compliance with Article 5(1)(f) of the ECHR.

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<sup>190</sup> *Amuur v. France*, ECtHR, App. No. 19776/92, 25 June 1996, at para. 50, available at:

<http://www.unhcr.org/refworld/docid/3ae6b76710.html>; *Lokpo and Touré v. Hungary*, at para. 17; *Hendrin Ali Said and Aras Ali Said v. Hungary*, ECtHR, App. No. 13457/11, *Al-Tayyar Abdelhakim v. Hungary*, ECtHR, App. No. 13058/11.

<sup>191</sup> *Bozano v. France*, see footnote 34, at para. 54; *H.L. v. the United Kingdom*, at para. 114; *Dougoz v. Greece*, see footnote 35; *Kawka v. Poland*, at paras. 48-49.

<sup>192</sup> See *Chahal v. the United Kingdom*, ECtHR, App. No. 22414/93, 15 November 1996, at para. 113, available at: <http://www.unhcr.org/refworld/docid/3ae6b69920.html>; *Louled Massoud v. Malta*, Application no. 24340/08, Council of Europe: European Court of Human Rights, 27 July 2010, at para. 60; *Suso Musa v. Malta*, App. No. 42337/12, 23 July 2013 (not final); *Aden Ahmed v. Malta*, App. No. 55352/12, 23 July 2013 (not final).

<sup>193</sup> Article 14(1) and (2) of the Immigration Act, Chapter 217 of the Laws of Malta.

<sup>194</sup> Article 14(1) of the Refugees Act, Chapter 420 of the Laws of Malta.

<sup>195</sup> Regulation 12(1) of the Procedural Standards in Examining Applications for Refugee Status, Subsidiary Legislation 420.07, Legal Notice 243 of 2008.

## 5. Conclusion

89. While it is acknowledged that some improvements have been made in the infrastructure and conditions of detention in Malta, UNHCR considers that the current reception system, based on the systematic administrative detention of asylum-seekers is not in conformity with international law standards. The fact that Malta continues to receive relatively high numbers of asylum-seekers does not absolve the fundamental state responsibilities in this regard.

90. Under international human rights and refugee law, as well as Maltese refugee law, asylum-seekers cannot be deported or expelled, until such time as there has been a final decision on their claims, determining that they are not in need of international protection. The majority of asylum-seekers in Malta are subject to prolonged periods in detention without access to adequate avenues to challenge effectively the decision to detain. There is also no general mechanism in place to consider less coercive and alternative measures in individual cases at the time of the decision to detain. The bail system, the only statutory alternative available, is neither effective nor generally accessible to asylum-seekers arriving in an irregular manner. In these circumstances, it is UNHCR's position that the mandatory and automatic detention of all asylum-seekers who arrive in an irregular manner, for the purposes of removal, is unlawful and arbitrary.

91. It is UNHCR's experience that the introduction of alternatives to detention is an effective means of balancing the rights of asylum-seekers with the efficient management of the reception system. UNHCR stands ready to contribute to any form of review of the current system and provide support in exploring potential adjustments which can lead to a better response towards the arrival of asylum-seekers, in line with international and European law standards.

92. To this end, UNHCR will present a separate document outlining a comprehensive proposal for changes to the national asylum system that could address many of the issues and concerns raised in this position paper. UNHCR appreciates in this context that the organization has full access to all detention centres in Malta, thus facilitating the execution of its mandate functions and supervisory role, including through effective cooperation with relevant national authorities.