



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



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REPORT

by Thomas Hammarberg
Commissioner for Human Rights of the Council of Europe

Following his visit to Malta
from 23 to 25 March 2011

Summary

Commissioner Thomas Hammarberg and his delegation visited Malta from 23 to 25 March 2011. In the course of this visit the Commissioner held discussions with representatives of the Maltese authorities and institutions as well as with members of civil society. The present report focuses on the following human rights issues: reception of migrants including asylum seekers; access to international protection; and durable solutions for migrants in Malta.

The report stresses that appropriate solutions to these human rights challenges can only be found through concerted efforts by Malta itself and its European and international partners. The report underlines that the current uncertainty regarding the armed conflict in Libya and its possible impact on migration should not delay these efforts, but act as a catalyst for undertaking them and putting the values and standards of the Council of Europe into practice.

I. Reception of migrants including asylum seekers

Mandatory detention policy

The Maltese authorities apply a policy of mandatory administrative detention in respect of all arriving migrants, including asylum seekers. The Commissioner considers this policy irreconcilable with the requirements of the European Convention on Human Rights (ECHR) and the case-law of the Strasbourg Court, especially following the latter's July 2010 judgment in the case of *Louled Massoud*. In this case, the Court found that Malta had violated Article 5 of the ECHR (right to liberty and security) in relation to the detention of an asylum seeker, whose claim had been rejected, for almost 18 months. The Commissioner strongly encourages the Maltese authorities to bring their policy and practice relating to the detention of migrants into line with the ECHR and give full effect to the above judgment of the Court. As part of this process, speedy and effective remedies should be available to migrants to challenge their detention. In line with Resolution 1707 (2010) of the Council of Europe Parliamentary Assembly, the Maltese authorities should also provide for the presumption in favour of liberty under national law, and establish a framework for the implementation of alternatives to detention.

Living conditions in closed and open centres

The situation in open centres, where migrants released from detention are accommodated, varies substantially, with adequate arrangements reported in the smaller centres that cater for some vulnerable groups and far more difficult conditions in the bigger centres, such as those in Hal-Far (tent village and hangar complex) and in Marsa. The Commissioner finds conditions in the tent village at Hal-Far to be clearly inadequate even for short periods of time and recommends that it be closed. Following the new arrivals from Libya since the Commissioner's visit, conditions have reportedly worsened at the hangar complex too, where vulnerable groups such as families with children and pregnant women have been accommodated. The Commissioner calls on the Maltese authorities to ensure that material conditions in detention and open centres that hold migrants meet adequate standards of living at all times, in accordance with the standards of the ECHR and the Social Charter and in co-operation with UNHCR and international expert partners.

Vulnerable groups

Although they are released from detention earlier than the rest, members of vulnerable groups (including families with children, unaccompanied minors, pregnant women, elderly persons and persons with disabilities) are also subjected to mandatory detention upon arrival in Malta. The Commissioner finds this policy to be at variance with international standards, which prescribe that detention of these persons should be a measure of last resort and not be ordered as a rule. The Commissioner is also concerned that since the specialised facilities which are equipped to accommodate certain vulnerable groups (families with children, pregnant women, unaccompanied minors) have limited capacity, members of these groups, including those

returned from other EU countries under the 'Dublin Regulation', often end up in the bigger open centres that are totally inadequate for this purpose. Another cause for concern is that unaccompanied minors and people with disabilities or serious chronic physical or mental problems spend in certain cases long periods of time in detention as a result of the duration of the procedures for establishing their vulnerability. The Commissioner urges the Maltese authorities to ensure that persons belonging to vulnerable groups are in all cases placed in accommodation where they have access to adequate care.

II. Access to international protection

Rescue operations and interceptions at sea

The Commissioner welcomes the Maltese authorities' efforts aimed at rescuing irregular migrants on boats, which have saved thousands of lives over the past years. He encourages them to maintain this long-standing tradition of rescue, especially in the current context where forced migration from Libya is likely to increase. In this connection, the Commissioner recalls that when they exercise effective control, authority or power over third-country nationals rescued or intercepted at sea, states have obligations that go beyond search and rescue. These obligations include ensuring effective access to adequate asylum determination procedures and not returning individuals to countries where they would face a real risk of persecution or treatment contrary notably to Articles 2 (right to life) and 3 (prohibition of torture) of the ECHR. In accordance with UNHCR's recommendations, the Commissioner strongly encourages the Maltese authorities to continue to keep the country's borders open for people in need of international protection forced to flee from Libya.

Refugee determination procedures

The Commissioner welcomes the progress made in several aspects of the asylum system in recent years in Malta, as reflected in the shortening of the time needed to process asylum applications, improved provision of information on the asylum system to asylum seekers, and the increased rate of recognition of refugee status. He strongly encourages the Maltese authorities to ensure that these advances are maintained should the number of asylum applications rise again. However, progress is necessary in law and practice concerning a number of issues. In first instance proceedings before the Office of the Refugee Commissioner, these include the need to provide access to legal aid, and to improve access to case files for asylum seekers and their representatives and the motivation of decisions. Second instance proceedings must be made an effective tool for review, notably by improving legal assistance and access of asylum seekers and lawyers to the case files and through the holding of hearings at which asylum seekers may be present.

III. Durable solutions for migrants in Malta

Lack of opportunities for long-term livelihood in Malta

The Commissioner welcomes recent progress in securing relocation and resettlement of migrants from Malta to other countries, and stresses the need for international solidarity in this area to be strengthened. However, progress in this area should be matched by similar efforts on the part of the Maltese authorities to establish viable, long-term avenues for local integration, which should be supported by an adequate integration programme and eventually lead to family reunification and citizenship. To this end, the Commissioner finds that the system in place to support migrants, including beneficiaries of subsidiary protection, currently perpetuates their social exclusion and leaves them at serious risk of destitution. The Commissioner believes that in order to favour the gradual development of migrants' self-reliance and integration into society, the system which currently makes financial support for migrants dependent on residence in the open centres should be discontinued. Also, financial support and social assistance should be available to all beneficiaries of international protection.

Racism and xenophobia

The Commissioner is seriously concerned at reported manifestations of racism and xenophobia in Malta, which underpin many of the difficulties that migrants face across many areas of life, including employment, housing, access to services and places of entertainment, as well as protection against racial harassment and racist violence. Without strong efforts to counter these phenomena, no durable solution for migrants in Malta can be successful. It is particularly important that the Maltese authorities contribute to the public debate on immigration in a manner that fully reflects the importance of human rights and human dignity. It is also crucial that the media ensure that the material they publish does not contribute to creating an atmosphere of hostility, intolerance and rejection towards migrants present in Malta. As part of the efforts to provide durable solutions for beneficiaries of international protection in Malta, a robust public information strategy to favour their local integration should be developed, targeting civil society, education institutions and the labour market and including a strong focus on equality and non-discrimination. The legal and institutional framework against racism and xenophobia would benefit from a strengthening of the role of the National Commission for the Promotion of Equality and from the ratification by Malta of a number of Council of Europe instruments, including Protocol No 12 to the ECHR.

The Maltese authorities' comments on the Report are appended.

Introduction

1. The present Report is based on a visit to Malta by the Council of Europe Commissioner for Human Rights (the Commissioner) from 23 to 25 March 2011.¹ The aim of the visit was to review certain human rights issues in Malta, focusing in particular on the protection of the human rights of migrants, including asylum seekers.
2. In the course of the visit, the Commissioner held discussions with representatives of the national authorities, including the Permanent Secretary of the Ministry of Justice and Home Affairs, Mr Mario Debattista, the Director General of Operations of the same Ministry, Mr Mario Caruana, the Director of the Agency for the Welfare of Asylum Seekers, Mr Alexander Tortell, the Refugee Commissioner, Mr Mario Friggieri, the Chairman of the Refugee Appeals Board, Mr Henry Frendo, and the Commander of the Detention Service, Colonel Brian Gatt. He also met with the Ombudsman, Mr Joseph Said Pullicino and the Commissioner of the National Commission for the Promotion of Equality, Ms Maud Muscat. Commissioner Hammarberg also met and held discussions with a number of intergovernmental and non-governmental organisations active in the field of protecting the human rights of migrants, including asylum seekers, and visited the detention centre in Safi and the open centres in Marsa and Hal-Far.
3. The Commissioner wishes to thank the Maltese authorities, and in particular the Permanent Representation of Malta to the Council of Europe, for their assistance in organising the visit and facilitating its independent and smooth execution. He wishes to thank all of his interlocutors, from both the national authorities and institutions and civil society, for their willingness to share their knowledge and insights with him.
4. The Commissioner considers that the treatment afforded by member states to migrants constitutes a litmus test regarding the effective observance and respect of Council of Europe human rights standards. This is also true for Malta, where the situation of migrants, including

¹ During his visit, the Commissioner was accompanied by the Deputy to the Director of his Office, Mr Nikolaos Sitaropoulos, and his Adviser, Mr Giancarlo Cardinale.

asylum seekers, currently poses some of the most pressing human rights challenges the country has to face.

5. Due to its geographical location, Malta has experienced a considerable influx of migrants (mostly Sub-Saharan Africans) arriving in the country irregularly on unseaworthy boats while attempting to navigate across the Mediterranean from Northern Africa, mainly Libya, to Europe. From 1998 until the end of March 2011, approximately 13 500 people arrived in Malta in this manner. A sharp decrease in arrivals has been registered since mid-2009, presumably linked with the simultaneous commencement of operations carried out jointly by Italy and Libya in the central Mediterranean, aimed at intercepting migrants fleeing Libya on boats and returning them there. Thus, only 27 people arrived in Malta in 2010. However, at the end of March 2011, immediately after the Commissioner's visit, boats carrying people fleeing the armed conflict in Libya started to arrive again, with a total of approximately 1 100 persons making it to Maltese shores over two weeks. At the end of 2010, the total non-EU population of Malta was estimated at 11 300 persons, that is, 2.7% of the total population.² The Commissioner understands that this figure includes around 4 400 persons originating from sub-Saharan Africa.
6. It is clear that due to its small size, the density of its population and the limited absorption capacity of its labour market, Malta can offer adequate conditions of reception and opportunities for long-term livelihoods to only a fraction of these migrants. The need for international, and notably European, solidarity in ensuring that the human rights of the many asylum seekers to whom Malta has rightly granted international protection are respected, is evident. Apart from few exceptions, however, this need has unfortunately remained with limited response. In the Commissioner's view, solidarity includes the opening of avenues enabling migrants to move to other countries, notably through relocation programmes within the European Union, and resettlement further afield, but also financial and other assistance to improve the material conditions, asylum determination procedures and integration opportunities for those who will stay, temporarily or on a long-term basis, in Malta. The Commissioner wishes to emphasise that failing meaningful international solidarity and co-operation, there is a risk that migrants landing in – or attempting to reach - Malta will continue to be prevented from fully enjoying their human rights, and might in some cases suffer serious human rights violations.
7. At the same time, the Commissioner wishes to stress that Malta must abide by its human rights obligations *vis-à-vis* all migrants, including asylum seekers, who find themselves within Malta's jurisdiction, a responsibility which in the Commissioner's view has not been met fully, in spite of some improvements, notably made possible by declining numbers in arrivals over the last couple of years preceding the March 2011 arrivals.
8. In most of the areas relating to the protection of the human rights of migrants which need improvement in Malta and are examined in this report, appropriate solutions can only be found through concurrent efforts by Malta and its European and international partners. The Commissioner underlines that these efforts must be carried out in a concerted manner that focuses on the prompt and effective protection of the human rights of migrants, including asylum seekers.
9. At the time of the Commissioner's visit to Malta, uncertainty about the armed conflict in Libya and the possible impact that this would have on migration resulted in a very cautious approach on the part of the Maltese authorities to discussing any improvements to their current asylum, reception or integration systems. In the Commissioner's view, however, instead of deterring the Maltese authorities from undertaking the necessary reforms, these events should be a compelling reason for acting on them and for European solidarity to support such efforts by Malta. While recognising the human rights challenges posed by these

² Eurostat Newsrelease 50/2011, Demography Report 2010.

events, the Commissioner hopes that Malta and the other Council of Europe member states will focus more on the imperative obligations they represent in order to give real effect to the Council of Europe values of human rights, democracy and the rule of law.

10. In the present Report, the Commissioner focuses on the following major issues: Reception of migrants including asylum seekers (Section I); Access to international protection (Section II); and Durable solutions for migrants in Malta (Section III).

I. Reception of migrants including asylum seekers

Mandatory detention policy

11. The Maltese authorities apply a policy of mandatory administrative detention in respect of all arriving migrants, including asylum seekers. At least initially, detention is therefore imposed indiscriminately on all, including vulnerable groups of people (such as families with children, unaccompanied minors, pregnant women, lactating mothers, persons with disabilities, elderly persons, or people with serious and/or chronic physical or mental health problems), although they are eventually released earlier than the rest. The Immigration Act does not establish a maximum duration for administrative detention; therefore, by law, detention is potentially of an unlimited duration. Since 2005 however, the Maltese authorities have been implementing a policy whereby migrants are detained for a maximum duration of 12 months (if they have applied for asylum but have not yet received a final decision on their claims) or 18 months (if they have not applied for asylum or if their asylum claims have been finally rejected). During a meeting with the Commissioner in Valletta, the Maltese authorities stated that the policy of mandatory detention is considered necessary for a number of reasons, including to ensure public order, facilitate the orderly carrying out of the relative procedures and repatriation, and also to act as a deterrent to those who would abuse the system.
12. However, the Commissioner finds this policy hardly reconcilable with the requirements imposed by the European Convention on Human Rights (ECHR) and the case-law of the Strasbourg Court, especially following the latter's July 2010 judgment against Malta in the case of *Louled Massoud*, relating to the detention of an Algerian asylum seeker, whose claim had been rejected, for almost 18 months.³ In this case, the Court noted that there were grave doubts as to whether the grounds for the applicant's detention (i.e. action with a view to deportation) remained valid for the whole period of his detention, due to the probable lack of a realistic prospect of his expulsion and the possible failure of the domestic authorities to conduct the proceedings with due diligence. In addition, the Maltese legal system did not provide for a procedure capable of avoiding the risk of arbitrary detention in such circumstances. As a consequence, the Court found that Malta had violated article 5, paragraph 1 of the ECHR (right to liberty and security).⁴ The Commissioner notices in particular that in making this finding, the Court also noted that it was "hard to conceive that in a small island like Malta, where escape by sea without endangering one's life is unlikely and fleeing by air is subject to strict control, the authorities could not have had at their disposal measures other than the applicant's protracted detention to secure an eventual removal in the absence of any immediate prospect of his expulsion".⁵ The Court also found a violation of Article 5, paragraph 4 of the ECHR, concluding that none of the remedies currently available in Malta to immigration detainees (i.e. those provided by Article 409A of the Criminal Code, Article 25A of the Immigration Act and the Constitution of Malta) constituted an effective and speedy remedy for challenging the lawfulness of the applicant's detention.

³ *Louled Massoud v Malta*, App. No. 24340/08, judgment of 27 July 2010.

⁴ *Louled Massoud*, paras. 69 and 71.

⁵ *Louled Massoud*, para. 68.

13. Noting that the general principles enunciated by the Court appear to be relevant to the situation of all those who are detained in Malta pursuant to the relevant provisions of the Immigration Act, the Commissioner considers that these findings have very important implications for the legal and policy framework governing the detention of migrants, including asylum seekers, in Malta.

Conclusions and recommendations

14. The Commissioner urges 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. In view of the paramount importance of the human right to liberty and security, the Commissioner calls on the Maltese authorities to execute rapidly, fully and effectively the judgment of the Strasbourg Court rendered in the case of *Louled Massoud*.
15. The Commissioner recalls in particular that states may have recourse to the detention of asylum seekers only exceptionally.⁶ Detention of immigrants is lawful only if carried out in accordance with Article 5 of the ECHR, which allows for the 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. Detention with a view to deportation or extradition remains lawful only for so long as proceedings to that end are underway and being pursued with due diligence.⁷
16. Any detention of migrants, including asylum seekers, must be in accordance with a procedure prescribed by law and can be ordered only if, after a review of all alternatives to deprivation of liberty, it is concluded that in the specific case there is no effective alternative.
17. The Commissioner recalls the Council of Europe Parliamentary Assembly Resolution 1707(2010) on *detention of asylum seekers and irregular migrants in Europe* and calls on Malta to give effect to the useful recommendations contained therein.⁸ The Maltese authorities are urged in particular to consider alternatives to detention for migrants and provide for a presumption in favour of liberty under national law, which should also contain a clear framework for the implementation of alternatives to detention.⁹
18. Effective remedies in line with the ECHR to challenge the detention and removal of migrants must be available. The Commissioner notes that the Strasbourg Court findings in *Louled Massoud* clearly indicate that Malta currently does not comply with this requirement and is under an obligation to remedy this situation.

Living conditions in closed and open centres

19. At the end of their detention, migrants, including refugees, beneficiaries of subsidiary protection, asylum seekers and persons whose asylum claims have been rejected, are accommodated in open centres around Malta. Conditions prevailing in these centres vary greatly, with adequate arrangements reported in the smaller centres that cater for some vulnerable groups, such as families with children or unaccompanied minors, and far more difficult conditions in the bigger centres. As mentioned above, when the Commissioner's visit took place the number of irregular arrivals had been very low for over 18 months and the 2011 arrivals from Libya had not yet started. As a result, the vast majority of migrants had

⁶ See also *Guidelines on human rights protection in the context of accelerated asylum procedures* (adopted by the Council of Europe Committee of Ministers on 1 July 2009).

⁷ See e.g. *Saadi v United Kingdom*, App. No. 13229/03, judgment of 29 January 2008 (GC), para. 72.

⁸ PACE Resolution 1707 (2010) *Detention of asylum seekers and irregular migrants in Europe*, adopted on 28 January 2010.

⁹ PACE Resolution 1707 (2010), 9.3.

moved out of the detention centres and were living in open centres, with the respective populations numbering at 49 and 2 231 respectively. The Commissioner visited the detention centre in Safi, and three open centres - the Hal-Far tent village, the Hangar Open Centre in Hal-Far and Marsa.

20. At the time of the visit the material conditions in the Safi detention centre, where all 49 of the migrant detainees were kept, appeared to be considerably better than those in open centres. Although a number of issues remained to be addressed, including those regarding the detainees' access to a diversified diet and water other than from the tap, the premises visited, including the dormitories, toilets and showers had been recently refurbished. The only female detainee of the centre was accommodated in a separate facility. The Commissioner wishes to note however, that in accordance with the mandatory detention policy referred to above, most of the persons (approximately 1 100) who have arrived from Libya since his visit have been placed in detention centres. This is naturally bound to have a significant impact on the adequacy of the conditions in these centres.
21. Material conditions in the open centres visited by the Commissioner were clearly sub-standard, with the Hal-Far tent village offering totally inadequate conditions of accommodation even for short periods of time. The village, which at the time of the visit hosted approximately 600 migrants, mainly from Africa, consists of tents, some of which had been damaged due to bad weather conditions, and containers, as well as offices, a classroom, sanitary facilities, a mosque, and a restaurant. Each tent is shared between approximately 20-25 men who sleep in bunk beds. The tents were clearly overcrowded and offered no privacy. Residents have complained to the Commissioner about bad sanitary conditions, including having to share the same space with persons who are sick, and about the very cold temperatures in the facilities in the winter and hot temperatures during the summer. The presence of rats was also reported by migrants. The tent village has a building with toilets, showers and basins for laundry. However, hot water is reportedly not always available. A female migrant stated that she avoided using the toilets at night as she felt unsafe covering the considerable distance between them and the container where she was accommodated. Reportedly the tent village was served by one social worker and one nurse. For medical services migrants were referred to centres outside of the tent village.
22. At walking distance from the tent village another complex, the Hangar Open Centre in Hal-Far, which includes a few dozen containers and a dilapidated hangar, accommodated approximately 500 migrants, mainly from Africa. At the time of the visit, the Commissioner noted that certain women and families with children were accommodated in containers separately from the male migrants. In the centre there was a recent building that included toilets and showers. The hangar was closed and not in use. However, the Commissioner was informed that following the new arrivals from Libya since his visit, the hangar has been re-opened and that tents have been placed inside of it to accommodate migrants. Material conditions in the hangar are reported to be seriously sub-standard, with lack of adequate bedding, dirty floors, toilets (which are shared by men, women and children), and kitchen, insufficient lighting, and the presence of rats. These conditions are all the more worrying as the Commissioner understands that a number of family units with young children are accommodated there, as mentioned below.¹⁰
23. Conditions were somewhat better at the open centre in Marsa with approximately 600 male residents mostly from Somalia and Sudan. Unlike the tent village and hangar complex in Hal-Far, which are run directly by the Agency for the Welfare of Asylum Seekers (AWAS) the running of the centre in Marsa is subcontracted by the authorities to a non-governmental organisation (the Foundation for Shelter and Support to Migrants). The Commissioner notes that extensive refurbishment work, which would allow for better conditions and a more functional distribution of space, were underway during his visit. At the time of the visit

¹⁰ See Vulnerable groups.

however, serious overcrowding was still very obvious. Toilets visited by the Commissioner, although they had been cleaned, appeared to be run down, while the whole area of the open centre in Marsa, situated near a port, was covered by a smell which appeared to be caused by stagnating water in a neighbouring canal.

Conclusions and recommendations

24. The Commissioner calls on the Maltese authorities to ensure that material conditions in detention and open centres that accommodate migrants meet adequate standards of living at all times and draws the attention of the Maltese authorities to Resolution 1637 (2008) of the Parliamentary Assembly of the Council of Europe on *Europe's boat people: mixed migration flows by sea into southern Europe*.¹¹
25. The Commissioner notes that this Resolution calls on member states to close unsuitable reception and detention centres and ensure that all such centres provide: appropriate food and sufficient quantities of drinking water; adequate bedding; separate accommodation and separate sanitation for men, women and unaccompanied minors; and adequate sanitation facilities which are kept clean and in serviceable operation.¹²
26. There is a risk that the situation in detention centres in Malta may deteriorate as a result of the combined effect of increasing arrivals from Libya and the mandatory detention policy which the authorities apply to all arriving migrants; it should therefore be monitored and shortcomings addressed by the authorities. The conditions in open centres must be addressed as a matter of urgency.
27. The Commissioner strongly recommends that the Maltese authorities close the tent village in Hal Far and ensure that residents are relocated to facilities that meet adequate standards of housing and living, in accordance notably with the standards of the European Convention on Human Rights and of the European Social Charter. Co-operation with UNHCR and international expert partners should be sought as necessary, to ensure that this is done. The Commissioner supports the establishment of smaller centres, possibly run by non-governmental organisations with experience in the field, in different parts of the island.

Vulnerable groups

28. Members of vulnerable groups (families with children, unaccompanied minors, pregnant women, lactating mothers, persons with disabilities, elderly persons, or people with serious and/or chronic physical or mental health problems) are also subjected to mandatory detention when arriving in Malta. However, there are procedures for their early release, one central aspect of which is the actual assessment of their vulnerability by AWAS.
29. Procedures for the release of pregnant women and families with children are reported to be prompt. However, when the vulnerability of the persons in question is more difficult to determine (typically, their being minors, or having a disability or serious chronic physical or mental health problems), procedures take longer and detention is accordingly prolonged. In fact, even once the vulnerability is established, detention continues until the additional procedures that need to take place before release are completed. These include medical screenings, immigration clearance (or, in the case of minors, the issuing of a care order) and assignment to an open centre. The presence, in some cases prolonged for as long as several months, of unaccompanied minors and persons with mental disabilities in detention centres that are not equipped to deal with their situations is of particular concern to the Commissioner.

¹¹ Resolution 1637 (2008) *Europe's boat people: mixed migration flows by sea into southern Europe*, 28 November 2008, in particular 9.7-9.9.

¹² Resolution 1637 (2008), 9.7 and 9.8

30. After release, adequate care is reportedly provided only to persons who can be accommodated in the smaller facilities, run by AWAS or non-governmental organisations. These centres house families with children or unaccompanied minors, although the centres that accommodate the latter are reported to not always be sufficiently resourced to provide properly individualised care and follow-up. However, the Commissioner notes that places in these smaller centres are limited and do not meet the levels of need. The situation appears to have worsened after the closure of the centre in Dar Qawsalla in December 2010.
31. As a result, families and pregnant women end up being accommodated in bigger centres, including the Hangar Open Centre in Hal-Far, as witnessed by the Commissioner, where as mentioned above conditions are inadequate even for persons who do not present a specific vulnerability. The Commissioner also notes that migrants belonging to vulnerable groups who are returned to Malta from other EU states under the 'Dublin Regulation' often end up in Hal-Far, as the centres which would be equipped to take care of them are generally full. The Commissioner has been informed that at the beginning of 2011 a family with several children and a seven-month pregnant mother returned from Finland to Malta were accommodated in the Hangar Open Centre in Hal-Far for a few weeks in totally inadequate conditions before being moved to a smaller centre. The Commissioner also notes that other categories of vulnerable migrants such as those suffering from mental health problems, chronic illness or other serious medical problems, persons with physical disabilities and victims of trauma and torture, are also usually placed in open centres where staff are in a position to provide little by way of necessary specialised support or services.
32. Since the arrivals from Libya resumed at the end of March 2011, the Commissioner understands that members of vulnerable groups have been accommodated in the Hangar Open Centre in Hal-Far after having been released from detention. At the time of writing this report these include: 14 family units with children (mostly under 3 years of age) and an elderly man in a wheelchair with his wife and daughter, who have been assigned to the hangar; and 12 family units and three pregnant women who have been accommodated in the tent village.

Conclusions and recommendations

33. The initial mandatory detention of persons belonging to vulnerable groups is not compatible with applicable European standards, which prescribe that detention of these persons should be a measure of last resort and not be ordered as a rule.¹³ In particular, the Commissioner draws the attention of the Maltese authorities to Resolution 1707 (2010) on *detention of asylum seekers and irregular migrants in Europe* adopted by the Council of Europe Parliamentary Assembly, according to which unaccompanied minors should never be detained.¹⁴
34. The Commissioner urges the Maltese authorities to ensure that persons belonging to vulnerable groups, including unaccompanied minors, families with children, pregnant women, and people with serious and/or chronic physical or mental health problems, are in all cases placed in accommodation where they have access to adequate care. The placement of persons belonging to vulnerable groups in big open centres that are inadequate for this purpose, including those in Hal-Far and Marsa, must be avoided.

¹³ See in particular: *Guidelines on human rights protection in the context of accelerated asylum procedures*, adopted by the Council of Europe Committee of Ministers on 1 July 2009, XI Detention; European Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Article 17(1).

¹⁴ PACE Resolution 1707 (2010), 9.1.9.

II. Access to international protection

Rescue operations and interceptions at sea

35. Laudable efforts have been made by the Maltese authorities, notably the Armed Forces of Malta (AFM), to rescue migrants on boats present in Malta's search and rescue zone. Alerted in many cases by UNHCR or other organisations that are in contact with migrants, AFM has regularly co-ordinated rescue operations diligently, saving many lives over the past years. At the same time, regular disputes have emerged between Malta and Italy regarding the responsibility to rescue certain boats, where the role played by the Maltese authorities in providing all the necessary support and therefore preventing threats to the lives of migrants has been called into question.
36. In August 2009 the Commissioner sent a letter to the Maltese Minister of Justice and Home Affairs, Mr Carmelo Mifsud Bonnici (and to his Italian counterpart), expressing concern about an incident involving a boat which set off from Libya with more than 70 people on board, mainly Eritreans.¹⁵ The boat was adrift in the Mediterranean for twenty days, apparently without any help from several passing vessels. Only five of the seventy passengers survived. In his letter, which remained unanswered, the Commissioner raised a number of questions concerning responsibilities in the incident and asked about any plans of the Maltese authorities to carry out an investigation into the events.
37. The Commissioner notes that in June 2010 UNHCR expressed concern about delays in a search-and-rescue operation involving a boat coming from Libya and carrying more than 20 people, almost all Eritreans, near Malta. UNHCR noted that Malta and Italy had relied on Libyan vessels to conduct the rescue inside Malta's search and rescue zone instead of intervening and taking the group to a closer and safer port.¹⁶ The migrants, including three women and an eight-year-old child, were all taken back to Libya.
38. In another incident which occurred in July 2010, Malta and Libya divided 55 Somali immigrants who were intercepted in Maltese search and rescue waters into two groups: 27 people were returned to Libya while 28 were transferred to Malta. The Commissioner notes that UNHCR questioned whether the 27 migrants did actually voluntarily embark on a boat which would return them to Libya.¹⁷ He also notes that according to Amnesty International, on their return all 27 were immediately detained in Libya for periods ranging from a few days to a few weeks. In detention, according to reports, all males were lined up against a wall and beaten with batons, while some were given electric shocks during interrogation.¹⁸
39. In connection with all these instances, the Maltese authorities have maintained that they have acted in accordance with their international obligations. The Commissioner understands that Malta considers its obligations in the context of these situations to be limited to ensuring the physical safety of individuals in distress at sea. However, the Commissioner stresses that where a state has effective control, authority or power over third-country nationals rescued or intercepted at sea, that state's human rights obligations notably under the ECHR may be

¹⁵ CommDH(2009)41, Letter from the Council of Europe Commissioner for Human Rights to Mr. Carmelo Mifsud Bonnici, Minister for Justice and Home Affairs of the Republic of Malta, concerning migrants' rights (26 August 2009), published on 10 December 2009.

¹⁶ *UNHCR questions delays in rescue-at-sea operations off Malta*, UNHCR, Briefing Notes, 8 June 2010.

¹⁷ UNHCR statement on rescue operation in Maltese SAR zone, also quoted at <http://www.timeslive.co.za/africa/article561435.ece/UNHCR-questions-immigrants-fate>

¹⁸ Amnesty International, *Seeking Safety, Finding Fear – Refugees, Asylum-Seekers and Migrants in Libya and Malta*, December 2010.

engaged, in accordance with the principles of extra-territorial jurisdiction established in the Court's case-law.¹⁹

Conclusions and recommendations

40. The Commissioner welcomes the Maltese authorities' invaluable efforts aimed at rescuing migrants on boats in the Mediterranean, which have saved thousands of lives over the past years. He strongly encourages the Maltese authorities to maintain their long-standing tradition of rescue, a task which is all the more indispensable in the current context where forced migration from Libya is likely to increase.
41. The Commissioner wishes to highlight that when they exercise effective control, authority or power over third-country nationals rescued or intercepted at sea (including the state's own territorial waters, those of another state and international waters) states have obligations that go beyond search and rescue. These obligations include ensuring effective access to adequate asylum determination procedures and not returning individuals to countries where they would face a real risk of persecution or treatment contrary notably to Articles 2 (right to life) and 3 (prohibition of torture) of the ECHR.
42. In accordance with UNHCR's recommendations on protection with regard to people fleeing from Libya, the Commissioner strongly encourages the Maltese authorities to continue to keep the country's borders open for people who are forced to flee from Libya and are in need of international protection.²⁰

Refugee determination procedures

43. Up until May 2009, when figures relating to irregular migration - and therefore asylum applications - started to decrease as mentioned above, Malta had received growing numbers of asylum applications. Between 2006 and 2010, Malta ranked second in the list of industrialised countries receiving the highest number of asylum-seekers compared to their national population (19 applicants per 1 000 inhabitants).²¹ Thus 2 715 applications were processed in 2008 and 2 337 in 2009. Of those processed in 2009, 20 (0.85%) were recognised as refugees while 1 676 (71%) were granted some other form of international protection by the Refugee Commissioner, who is responsible for the determination of asylum claims at first instance. The Commissioner notes that this places Malta at the top of the list of countries with the highest first instance acceptance rates in the EU and beyond.
44. The numbers of asylum applications went down in 2010, with 350 applications processed in that year. Of these, 45 persons were recognised as refugees while 165 were granted subsidiary protection.²² In 2010, Malta also granted temporary humanitarian status to more than 500 individuals whose asylum claims had been rejected in the past, but who had no possibility of returning to their country of origin at that time.
45. The Commissioner is pleased to note that a number of improvements in Malta's asylum procedures have taken place in recent years. The average period of time needed to process asylum applications has been reduced, a circumstance which bears particular relevance in a context where the detention of asylum seekers is maintained until a decision is made. Thus, in 2009 the average duration was 5-6 months, and the Refugee Commissioner indicated that at the time of the Commissioner's visit the duration had been shortened further. The provision

¹⁹ See in particular *Medvedyev and Others v France*, App. No. 3394/03, judgment of 29 March 2010 and *Xhavara and 15 others v Italy and Albania*, App. No. 39473/98, decision of 11 January 2001.

²⁰ See also *Protection considerations with regard to people fleeing from Libya* – UNHCR's recommendations (as at 25 February 2011), 25 February 2011.

²¹ UNHCR, *Asylum Levels and Trends in Industrialised Countries 2010*, 28 March 2011.

²² Eurostat Data in focus 5/2011 - Population and social conditions.

of information to asylum seekers has reportedly improved, notably through a project funded by the European Refugee Fund, whereby the Office of the Refugee Commissioner provides basic information to asylum seekers on arrival and assists them in filling in the preliminary questionnaire with the support of an interpreter. Furthermore, as the above figures relating to the year 2010 indicate, the percentage of recognised Convention refugees has increased. The challenge now is of course maintaining these advances in a context where asylum applications are likely to start increasing again.

46. Some aspects of the asylum procedures however, remain to be addressed. As concerns proceedings before the Refugee Commissioner, there is still no legal aid (free legal assistance). Applicants who want to be represented must therefore either pay for their lawyer or benefit from the limited legal aid provided by the non-governmental sector. Furthermore, asylum seekers and their legal representatives have no access to the case file, and decisions are not sufficiently reasoned, which makes challenging them on appeal particularly difficult.
47. Proceedings before the Refugee Appeals Board, which is responsible for second instance asylum proceedings, do not appear to be effective. Although legal aid is available at the stage of appeals, the quality of the assistance provided is often reported to be poor. The Commissioner was informed that asylum seekers are not heard by the Board, which limits itself to only written proceedings. Furthermore, the access of asylum seekers and their lawyers to their case file is extremely limited. While, as mentioned above, the recognition rate at first instance is remarkably high, the Commissioner notes that only six decisions of the Refugee Commissioner have been overturned by the Board since 2004.
48. Finally, the Commissioner wishes to underline that a number of shortcomings in the asylum procedure result from the mandatory detention regime to which asylum seekers are subjected. Detention makes it very difficult for asylum seekers to obtain documents, which may be with the immigration authorities or friends and relatives outside the country. Many applications are initially rejected because they are not substantiated with convincing evidence. However, the Commissioner notes that a considerable number of applicants have had their claims reviewed and been granted protection following the presentation of new evidence, which they could obtain after release. Detention also makes it very difficult for asylum seekers to lodge appeals within the two-week deadline prescribed by law. Indeed, the only way for detained asylum seekers to appeal is through the staff at the detention centres or through visiting non-governmental organisations, while the Refugee Appeals Board reportedly often rejects appeals filed late.

Conclusions and recommendations

49. The Commissioner welcomes the progress made in several aspects of the asylum system in recent years in Malta, notably as concerns the reduction of the time needed to process asylum applications, improved provision of information on the asylum system to asylum seekers, and the increased rate of recognition of full refugee status. He strongly encourages the Maltese authorities to ensure that these advances are maintained should the numbers of asylum applications rise again.
50. The Commissioner welcomes the fruitful co-operation of the Office of the Refugee Commissioner with UNHCR aimed at strengthening the former's capacity in 2010 and 2011, and encourages the Maltese authorities to ensure that this co-operation is sustained and extended to the Refugee Appeals Board.
51. However, progress is necessary in law and practice concerning a number of issues. In first instance proceedings before the Office of the Refugee Commissioner, these include the need to provide access to legal aid, and to improve access to case files for asylum seekers and their representatives and the motivation of decisions. Second instance proceedings must be an effective tool for review, notably by improving legal assistance and access of asylum

seekers and lawyers to the case files and through the holding of hearings at which asylum seekers may be present.

III. Durable solutions for migrants in Malta

52. The Commissioner understands that up until the end of March 2011, when arrivals from Libya resumed, approximately 1% of the Maltese population was estimated to be made up of migrants originating from sub-Saharan Africa, around 2 200 of whom lived in open centres and approximately 2 000 in the community.
53. The Commissioner notes that once they are out of detention, many of the migrants in Malta, including refugees, beneficiaries of subsidiary protection, or persons whose claims for international protection have been rejected, feel that they are in a social limbo. The vast majority express a desire to move to other European countries which, however, return them to Malta under the 'Dublin Regulation'. Unable to integrate in Malta and, in many cases, to return home, frustration and inertia prevail in migrants' communities, as witnessed by the Commissioner during his discussions with a number of migrants. This has prejudicial consequences even on the mental health of the persons concerned, which reportedly deteriorates in some cases as the situation of uncertainty is protracted.
54. The Maltese authorities have stressed that, in consideration of Malta's constraints relating to its small size but also in accordance with the aspirations of the persons concerned, resettlement is the main durable solution that can be envisaged for migrants. In this respect, the Commissioner notes that 2010 has seen progress in the relocation and resettlement of migrants from Malta. Slightly less than 250 persons have been relocated to other countries in the EU (essentially France and Germany) and approximately the same number of persons to the USA, with a few hundred more scheduled to leave in 2011 for this latter country. However, at present, the number of persons returned from other EU members under the 'Dublin Regulation' (560 in 2010) exceeds that of persons resettled or relocated. The Commissioner also notes with interest the recent pledges made by several EU countries following recent arrivals from Libya to accept the relocation of additional beneficiaries of international protection from Malta.
55. While European and international solidarity aimed at offering durable solutions out of Malta is essential and must be strengthened, the Commissioner stresses that progress in this area should be matched by strong efforts on the part of the Maltese authorities to establish viable, long-term solutions in particular for the refugees who reside in Malta.

Lack of opportunities for long-term livelihood in Malta

56. The Commissioner notes that at present, the possibilities for establishing a new life in Malta are extremely limited for most migrants. In particular, with the exception of recognised refugees who may receive benefits on a par with Maltese nationals, the system currently in place to support the migrants, including the beneficiaries of subsidiary protection, appears to the Commissioner not to be conducive to integration. This system effectively marginalises and perpetuates the social exclusion of migrants, who find themselves at serious risk of destitution. In this respect, the Maltese authorities have indicated that the support system in place should not be considered as a social benefit system, but only as a food and transport allowance for residents of open centres.
57. In order to receive a monthly allowance of approximately 130€ (which is reduced to 80€ for those who are returned to Malta from other EU countries under the 'Dublin Regulation') migrants must reside in one of the open centres. If they leave the centre, for instance because they have found a job and try to live in the community, the allowance is

discontinued. However, the Commissioner notes that in a context where jobs available to migrants are seasonal and/or very precarious, migrants who want to leave the open centres and integrate in the Maltese community need a safety net on which they can rely for a while in the likely case that they become unemployed. In this respect, the Commissioner also notes that the majority of those who enjoy subsidiary protection are not eligible for unemployment benefits. Furthermore the requirement for open centre residents to register there three times a week reduces even further the possibilities of finding employment since most job opportunities are located away from the open centres.

58. The Commissioner notes that according to Maltese law, (and in line with the EU ‘Refugee Qualification Directive’²³), asylum seekers and beneficiaries of subsidiary protection are entitled to “access to employment, subject to labour market considerations, *core social welfare benefits*, appropriate accommodation, integration programmes, State education and training, and to receive *core state medical care*, especially in the case of vulnerable groups of persons” (emphasis added).²⁴ The Commissioner notes that the law does not clarify the content of core social benefits and medical care, and finds it difficult to reconcile the system described above with the requirements set forth by both Maltese law and the above EU Directive.
59. The Commissioner also stresses that the lack of effective procedures to facilitate family reunification, and the limited prospects of obtaining Maltese citizenship, present serious obstacles to local integration.

Conclusions and recommendations

60. The Commissioner considers that Malta needs to move from a reactive, “emergency-type” stance towards migration to the establishment of a migration policy and practice able to safeguard the human rights of migrants and provide viable, long-term solutions for those unable to return home. Progress in resettlement and relocation of beneficiaries of international protection from Malta should go hand-in-hand with the opening of clear avenues for local integration, which should be supported by an adequate integration programme and eventually allow for family reunification and access to citizenship.
61. In particular, the Commissioner stresses the need for an overhaul of the system which currently makes financial support for migrants dependent on residence in the open centres. Also the Commissioner believes that making financial support and social assistance available to all beneficiaries of international protection would favour the gradual development of their self-reliance and integration into society.

Racism and xenophobia

62. Many of the difficulties that migrants face are underpinned by embedded racist and xenophobic attitudes, as also highlighted in the work of a number of human rights monitoring bodies in recent years, including the report on Malta published by the European Commission against Racism and Intolerance (ECRI) in 2008.²⁵ The Commissioner underlines that any durable solutions for migrants in Malta can only be successful if accompanied by resolute efforts to combat and eliminate these tendencies.

²³ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

²⁴ Article 14(1)(b)(iii) of L.N. 243 of 2008 on Procedural Standards in Examining Applications for Refugee Status.

²⁵ See ECRI, Third report on Malta, Strasbourg April 2008.

63. The Commissioner notes that according to the 2009 European Union Minorities and Discrimination Survey (EU-MIDIS), Malta was the country in which Sub-Saharan Africans reported the highest rates of perceived discrimination, with 66% of those interviewed declaring to have experienced discrimination during the 12 months preceding the survey. 52% of respondents also felt that discrimination was widespread in Malta.²⁶
64. Discrimination reported notably by migrants with whom the Commissioner spoke and organisations active in the field of protecting the human rights of migrants happens across a wide range of areas. Migrants are discriminated against when seeking employment and often feel compelled to accept terms and conditions inferior to those applied to Maltese citizens to avoid being left destitute or with no source of income. Migrants' access to the private housing market proves particularly difficult due to both poor economic conditions and discrimination. Racial discrimination in access to services is widely reported, with continuing reports of buses not stopping to pick up migrants or not allowing them to board. Discriminatory refusal of entry to places of entertainment such as bars and clubs is also reported to be a common occurrence. There have also been worrying reported instances of racial harassment, especially in the form of derogatory and abusive language, and racist violence.
65. Consistent public, and notably media and political discourse around irregular immigration, particularly at the time when boats from Libya arrived regularly, has been key to creating an atmosphere where racism and xenophobia are widespread. In this discourse, considerations relating to human rights and human dignity have been dwarfed by the consistent portrayal of immigrants as a threat to the national economy and security and more generally, to the preservation of Maltese culture, tradition and identity. According to a media content analysis carried out between July and September 2009, the coverage of matters relating to migration by Maltese media has tended to foster racism and xenophobia, with stigmatising expressions such as "illegal immigrants" being used systematically and derogatory terms, such as "parasites" and "scroungers" to refer to migrants being used at times.²⁷ In line with ECRI's findings in 2008, the analysis also points at the Internet, particularly websites and comment forums made available by Maltese online newspapers as a source of concern.
66. The Commissioner notes that although Malta still registers the highest levels of concern about immigration in the EU, the most recent Eurobarometer surveys have registered a considerable drop of immigration among the issues considered by Maltese citizens as the most pressing that the country has to face.²⁸ While this development is welcome it must obviously be tested against the likely increase in migrant arrivals, due to the armed conflict in Libya.
67. The Commissioner notes the activities of the National Commission for the Promotion of Equality (NCPE), Malta's equality body competent to deal with gender discrimination in employment, training and access to goods and services, and with racial discrimination in access to goods and services. These activities include research, provision of training to various groups and media campaigns aimed at raising awareness of equality and non-discrimination and promoting diversity. The NCPE is also mandated to receive and investigate individual complaints of discrimination. The NCPE received 13 complaints of discrimination on grounds of race since it started to cover this ground in 2007, two of which were filed in 2010. The complaints, which are currently being investigated, concern access to housing and entertainment places, and relations with the State administration.

²⁶ European Union Agency for Fundamental Rights, 2009 European Union Minorities and Discrimination Survey (EU-MIDIS) Main Results Report, 2010.

²⁷ Analysis carried out by the People for Change Foundation and referred to in ENAR Shadow Report 2009/2010, Racism and Discrimination in Malta.

²⁸ Eurobarometer 72 - Autumn 2009, National Report Executive Summary – Malta.

Conclusions and recommendations

68. The Commissioner is seriously concerned at reported manifestations of racism and xenophobia in Malta. He urges the Maltese authorities to intensify their efforts to stem the development of racism and xenophobia in Malta. To this end, it is particularly important that political leaders contribute to the public debate on immigration in a manner that clarifies the importance of human rights and human dignity. It is also crucial that the media ensure that the material they publish does not contribute to creating an atmosphere of hostility, intolerance and rejection towards migrants present in Malta.
69. It is also important that as part of the efforts to provide durable solutions for beneficiaries of international protection in Malta, a robust public information strategy to favour the local integration of these persons in society be developed, targeting civil society, education institutions and the labour market and including a strong focus on equality and non-discrimination.
70. As concerns the legal and institutional framework for combating racism and xenophobia, a strengthening of the role of the National Commission for the Promotion of Equality would be beneficial. In this connection, the Commissioner draws the attention of the Maltese authorities to his Opinion on National Structures for Promoting Equality and to General Policy Recommendation No 7 on National Legislation to Combat Racism and Racial Discrimination issued by the European Commission against Racism and Intolerance (ECRI).²⁹ The Commissioner also encourages the Maltese authorities to sign and ratify Protocol No 12 to the ECHR, which provides for a general prohibition of discrimination, and to ratify the Additional Protocol to the Council of Europe Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

²⁹ See CommDH(2011)2 Opinion of the Commissioner for human rights on National Structures for Promoting Equality and CRI(2003)8 ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, Strasbourg, February 2003.

Appendix

REPLY **by the Government of Malta to the** **Report by the Commissioner for Human Rights of the Council of Europe**

June 2011

Introduction

Maltese society is firmly committed to ever-higher standards of protection of human rights. In the last quarter of a century, significant progress has been made in many sectors, including women's rights and gender equality; children's rights; the rights of lesbian, gay, bisexual and transgender individuals; the rights of elderly persons and persons with disabilities; access to justice, and others.

However, the protection of human rights remains unfinished business. The Government and the Opposition in Parliament, the courts, civil society and the press are determined to strengthen the protection of human rights both by legislation and in real life. Constructive advice from international sources is often useful and always welcome.

The Government respects the independence of the Council of Europe's Commissioner for Human Rights but regrets his bias. In singling out only one aspect of human rights in Malta – that concerning asylum seekers, refugees and illegal immigrants – he ignores those aspects that affect most closely the Maltese people. Thus he regrettably missed an opportunity to contribute to the further improvement of human rights protection in our country.

Furthermore, he makes generous recommendations on improving conditions for refugees, asylum seekers and illegal immigrants without considering the costs of their implementation and without even attempting to assess their political, social and economic impact on Malta. The Commissioner has his priorities. Maltese society, as represented in and out of Parliament, has its own.

Refugees and illegal immigrants – the background and the problem

Malta has traditionally played a constructive role as regards movements of refugees. Early in the 20th century it welcomed refugees from Russia's October revolution. Later in the century, it helped hundreds of Ugandans expelled by the Idi Amin regime, Iraqis fleeing the Saddam Hussein regime and residents of the Balkans fleeing from conflict. In all cases, Malta served as a staging-post until the refugees were resettled in other countries. The few who stayed made a welcome contribution to Maltese society.

Up to the turn of this century, asylum seekers in Malta benefitted from a UNHCR resettlement programme. Most were eventually relocated to larger countries with higher absorption capacities. This system, which worked well because it was based on a realistic view of what Malta can and cannot take, was however no longer in place by the time Malta experienced its first serious influx of boat people in 2002. As a result asylum seekers no longer benefitted from the possibility of resettlement and, regardless of their wishes and connections to other countries, were constrained to remain in Malta.

In less than a decade, over 13 500 boat people arrived, or some 3.4 per cent of Malta's population of about 408 000. Those arriving include genuine asylum seekers and economic immigrants not entitled to international protection. This unprecedented influx placed Malta's infrastructure and services under considerable strain.

The Commissioner's report (hereinafter called 'the Report') acknowledges (paragraph 43) that, between 2006 and 2010, Malta ranked second in the list of industrialised countries receiving the highest number of asylum-seekers as a share of the national population. This notwithstanding, in 2009 - the most difficult year – 98 per cent of those who landed lodged an application for asylum; about 72 per cent were given protection. The Report notes that Malta is "at the top of the list of countries with the highest first instance acceptance rates in the EU and beyond" and describes this as "remarkably high" (paragraphs 43 and 47).

The Government appreciates the Report's call for solidarity and burden-sharing and agrees that, with few exceptions, this has not been forthcoming. The commitment towards human rights is not subject to conditions; but it can be threatened by limited financial and human resources and limited absorption capacity. Malta's limitations have been widely acknowledged. A study by the European Parliament concluded that, taking all factors into consideration, Malta is the EU member state with the lowest reception capacity. It added that Malta is facing pressures that are dramatically out of proportion to its capabilities and is in reality the EU member state that is carrying the highest share of the burden.¹

The Report remarks that: *"It is clear that due to its small size, the density of its population and the limited absorption capacity of its labour market, Malta can offer adequate conditions of reception and opportunities for long-term livelihoods to only a fraction of these migrants"* (paragraph 6). This does not exempt Malta from its obligation to respect asylum seekers' rights and, despite the difficulties, it has shown a strong commitment and the political will to abide by these obligations.

The Report acknowledges that within a short time Malta has implemented a series of measures that have left clear and tangible results. There have been marked improvements in the asylum system as regards access to information, legal aid and processing times. The time spent by asylum seekers in detention has been considerably reduced and conditions in closed and open centres have been greatly improved. The Maltese public health service has contributed heavily to treating immigrants of all categories against specific diseases. This has been made possible by substantive investment in infrastructure and human resources through recruitment and training and thanks to the creative use of limited financial resources during a severe international recession. Most of the costs were shouldered by Malta, though international partners also helped.

¹ *'What system of burden-sharing between member states for the reception of asylum seekers?'*, Policy Department C, Directorate-General for Internal Policies, European Parliament, 22 January 2010. <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=et&file=29912>

I. Reception of migrants including asylum seekers

Detention under Maltese law

The Immigration Act (Cap. 217, Laws of Malta, Article 5(1)) states: “*Any person, other than one having the right of entry, or of entry and residence, or of movement or transit ... may be refused entry, and if he lands or is in Malta ... he shall be a prohibited immigrant*”. Without prejudice to the right to apply for asylum, and to remain in Malta whilst an asylum application is being processed in accordance with the Refugees Act (Cap. 420, Laws of Malta), prohibited immigrants are issued with a removal order and detained in accordance with Article 14(2) of the Immigration Act: “*Upon such order being made, such person ... shall be detained in custody until he is removed from Malta....*”

A prohibited immigrant may appeal a removal decision to the Immigration Appeals Board, an independent body established by the Act. He may also challenge his detention. Article 25A(10) of the same Act lays down criteria for release from detention, i.e. “*where in [the Board’s] opinion the continued detention of such person is ... unreasonable as regards duration or because there is no reasonable prospect of deportation within a reasonable time...*” Release may be refused when a final negative decision has been taken within the context of the Refugees Act and the immigrant has not cooperated with the Principal Immigration Officer as regards his repatriation.

Article 25A(11) of the Immigration Act lays down instances where release shall not be granted by the Board, namely: (a) when the identity of the applicant including his nationality has yet to be verified, in particular where he has destroyed his travel or identification documents or used fraudulent documents; (b) when elements on which a claim by applicant under the Refugees Act is based have to be determined and this cannot be achieved in the absence of detention; and (c) where the release of the applicant could threaten public security or public order.

Detention does not follow from an application for asylum but from illegal entry. Irregular migration flows to Malta are mixed. Genuine asylum-seekers and economic migrants who apply for asylum can be distinguished only after a full examination of an asylum application. A prohibited immigrant is served with a removal order.

Detention under international law

The European Convention on Human Rights does not condemn mandatory detention ab initio. Article 5 (1)(f) on the right to liberty and security provides for “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 ...” The European Court of Human Rights has always held that States have the right to limit the movement of those who enter their territory. Such limitation does not constitute a violation of human rights. In *Moustaquim vs Belgium (1991)* the Court ruled that a State has the right “to control the entry, residence and expulsion of aliens” (non-citizens). By analogy, a person not legally present in Malta cannot be allowed to circulate freely within its territory. This is why prohibited immigrants are housed in detention centres.

Louled Massoud v Malta (judgment of 27 July 2010)

The Report refers to the judgment in *Louled Massoud v Malta* where the Court found Malta to be in violation of Article 5, paragraphs 1 and 4, of the Convention. It found that, as the applicant did not have an effective and speedy remedy under domestic law for challenging the lawfulness of his detention, the national system failed to protect him from arbitrary detention. The facts of this case were very particular. The violation found by the Court referred to the failure by the authorities to continue with the preparations for deportation. This judgment cannot be extrapolated to other cases where the authorities continue with their efforts to remove the person during the 18-month detention period.

The Government does not subscribe to the conclusions that the Report draws from this judgment. It is in the process of submitting an Action Plan and Action Report and looks forward to a constructive discussion with the Council of Europe's Department for the Execution of Judgments. The Convention lays down that the Council of Europe's Committee of Ministers is entrusted with monitoring the execution of judgments and should exercise this role from a purely legal perspective. If political and other considerations were to cloud or pollute the legal analysis of the process, there would be a risk of going beyond what the Court has actually decided. For this reason the Government is uneasy at the way the Commissioner addressed this issue and would have preferred a more prudent and cautious approach.

Detention Policy

Malta's policy of administrative detention was adopted after serious and careful consideration of all its implications in the context of Malta's realities. It is the subject of an ongoing consultation process with all the relevant stakeholders. Detention permits the authorities to make arrangements for the removal of prohibited immigrants. The authorities seek to remove such persons, without prejudice to any asylum application, within the 18 months of detention. Prohibited immigrants often land without any identification documents; this makes their deportation more difficult. The authorities must establish their identity and communicate with their country of origin. This process can take long as it depends on the cooperation (or lack of it) of the prohibited immigrant, his lawyers and the authorities of the country of origin.

The maximum duration of detention of 18 months is reduced to 12 months for asylum seekers. If an asylum application is still pending after 12 months, the person is released. The Office of the Refugee Commissioner, Malta's asylum determination authority, determines asylum cases within an average of 6 months. Most genuine asylum seekers are released within such timeframe. This detention regime does not apply to vulnerable migrants, including pregnant women, unaccompanied minors and disabled persons whose freedom is restricted only until the necessary medical clearance is obtained. They are then housed in open centres catering for their needs. As the Report notes (paragraph 29) the release of pregnant women and families with children is prompt. The release of vulnerable classes is delayed only in cases subject to necessary verification.

Administrative detention provides a controlled environment to conduct procedures in an orderly and efficient manner. Among these are:

Application for asylum

Within five days of the arrival of a group of immigrants, members of the Office of the Commissioner for Refugees visit detention centres and distribute an information booklet deliver an audiovisual presentation. The members of the Office hold meetings with groups of six and assist those who wish to apply for protection to complete their application. The Report gives credit to Malta's success in processing asylum requests (paragraph 45). The Maltese authorities believe there is a direct link between this success and the controlled environment provided by administrative detention.

Medical screening and treatment

On arrival irregular immigrants are medically treated on the spot for urgent conditions, such as dehydration, sunburn or hypothermia. A more thorough medical examination takes place after the migrants' assignment to places of detention. As a result of the living conditions prior to their arrival in Malta and/or the journey itself, some immigrants need close medical attention and treatment. In a small and densely-populated island these medical controls are essential.

Identification of vulnerable individuals

In the case of large-scale arrivals, human and material resources come under pressure. It is crucial to provide a controlled environment to facilitate prioritizing vulnerable cases. If migrants were released directly into the community on their arrival many would probably end up without access to basic needs, housing and the labour market and would be open to abuse and exploitation. Those who do not qualify for protection and face eventual deportation would be tempted to abscond the island or 'get lost' in the country. The Maltese authorities are satisfied that irregular immigrants have more than adequate access to medical services and are not aware of a single case of homelessness. The policy of detention contributes this orderly state of affairs.

Services provided to detainees

The detention service, established in 2005 to administer detention facilities, falls under the responsibility of the Ministry for Justice and Home Affairs. It is made up of personnel seconded from the police force and the Armed Forces of Malta under one command separate from the prison authorities. The service is tasked with the security of the closed centres and provides: adequate accommodation, including necessary toilet and shower facilities; basic needs, such as food, clothing, hygiene and a safe environment; access to medical care; access to the Commissioner for Refugees and NGOs; and the means of contacting home or their country representative in Malta.

There are currently three closed centres: Safi Barracks, Lyster Barracks and Ta` Kandja. As of 8th April 2011 there were about 1040 persons in the centres. In 2006 the Detention Centre Rules and Standing Instructions were published. They provide for the regulation and management of these centres and for the welfare and entitlements of detained persons, religious observance, correspondence, health care and any possible complaints, as well as the use of security measures, such as powers of search and removal from association in certain circumstances.

Constant refurbishment of the centres is co-financed with European Funds. The detention service embarked on projects to access EU funds to ensure that standards

outlined in EU directive 2003/9/EC (Minimum Standards of Reception) are maintained despite the large influx of illegal immigrants. Interviewing facilities were greatly improved and vehicles provided for transporting migrants. Medical services are provided and the centres have been equipped with basic medical equipment. The Report notes that detainees should have “access to a diversified diet and water other than from the tap”. Tap water in Malta is potable and does not pose any health risks.

Alternatives to detention

The Report invites the Government to consider alternatives to detention and refers to Council of Europe Parliamentary Assembly’s (PACE) Resolution 1707 (2010). The Government is committed to living up to the standards laid down by that resolution. However, implementing the alternatives referred to would be difficult, if only because the influx of immigrants is unpredictable and disproportionate to the country’s capacities. The non-binding resolution proposes a general and one-size-fits-all approach which is unrealistic in Malta’s circumstances.

One of the alternatives it suggests is that recently arrived immigrants be placed in open or semi-open centres. This may sound humane, but it is hard to imagine how it could function in practice. The Government reiterates that without the controlled environment of administrative detention it would be difficult to make the appropriate assessments, cater for immediate needs and give priority where needed. Providing the same safeguards in an open or semi-open centre would require a complex and impractical structure for which Malta does not have the resources. In any case erratic and unpredictable arrivals would soon overwhelm the structure and make it unsustainable.

The same holds for the other alternatives proposed by the PACE resolution. Following his visit, the Commissioner issued a press release suggesting that, in view of the decrease in the number of arrivals in 2010, Malta could perhaps revise its policy. A few hours after the press release was issued, 500 migrants arrived, followed by a further 1000. This illustrates how the current situation in North Africa soon makes rash recommendations inoperative. Therefore, the Government will continue to pursue its twin policy objectives of ensuring appropriate conditions of detention, and reducing to the extent possible the time asylum seekers spend in detention

Open Centres

The Agency for the Welfare of Asylum Seekers (AWAS)² operates seven open centres and helps other entities run another three. Their total capacity in 2010 peaked at 3,000 persons and, as of 4 April 2011, they accommodated 1450³ persons. The well-being of

² The Organisation for the Welfare and Integration of Asylum Seekers (OIWAS) was set up in June 2007 to meet the new and growing needs of asylum seekers and protected persons, in particular as regards accommodation, social welfare and integration. In March 2008 it was incorporated in the Ministry for Justice and Home Affairs. In 2009 the Agency for the Welfare of Asylum Seekers (AWAS) was established and took over from OIWAS.

³ ‘International protection’ refers to refugees and beneficiaries of subsidiary protection. A further 305 persons enjoy temporary humanitarian protection. This does not emanate from EU law but is granted by Maltese policy to those not qualifying for ‘international protection’ but who, in the Refugee Commissioner’s view, should be allowed to remain in Malta, e.g. minors and persons requiring specific medical care.

residents in the centre, including their mental health, is monitored and all stakeholders are strongly committed to their duty. Recruitment of staff, including social workers, is ongoing but financial and human resources are not unlimited. Residents are referred to mainstream healthcare, which are also under pressure. In the last few years, members of the medical professions have gained considerable experience about the needs of asylum seekers. Malta is one of only seven EU Member States that has specific procedures for vulnerable categories of asylum seekers⁴. These are constantly being updated to reflect the latest best practices

The open centres help residents move on to the next step in their lives. The Report recommends that the Hal-Far open centre, which includes the tent village, be shut down. This would be unrealistic because of the large number of residents at this and other centres. It would inevitably result in a high risk of homelessness, as it is not easy to construct several smaller centres to accommodate all the persons in question. Since the boat people phenomenon started in 2002, the authorities have put in place a system of reception centres offering accommodation for much longer than that normally offered in reception centres in other countries.

The open centres offer basic services. Refurbishment is ongoing, particularly with the assistance of co-financing under the European Refugee Fund. At the “Hangar” open centre, for instance, new sanitary and dining facilities were provided recently. As the Report notes (paragraph 23) “*extensive refurbishment work*” is underway in Marsa open centre. Strict gate control has been introduced to limit access to registered residents, staff and authorized visitors. This should help prevent overcrowding which followed when residents of other open centres moved to the Marsa centre without authorization.

Vulnerable groups

The Report notes that the release of members of vulnerable groups from detention is normally prompt and delayed only for purposes of verification. If this system were not subject to control it would be open to abuse and would be rendered unsustainable. The overall aim of the policy is to have a viable system that makes it possible to prioritise those who need most assistance. This can only function if it is administered pragmatically. The Government is fully committed to continue to improve the conditions of accommodation of vulnerable groups. However, in view of the large number of vulnerable persons, some have had to be accommodated at Hal Far Open Centre.

II. Access to international Protection

Rescue operations and interceptions at sea

As regards search and rescue at sea, the Report acknowledges that the Armed Forces of Malta (AFM) have saved the lives of thousands of persons. The AFM have always responded to incidents within Malta’s search and rescue area, either by deploying their

⁴ This was stated in the Preliminary Note drawn up by the Free University of Brussels for the Study on the Identification of Asylum-Seekers with Special needs, carried out for the Commission, under the European Refugee Fund:
<http://www.ulb.ac.be/assoc/odysseus/ERF/Study.doc>

own assets or by coordinating the assets of other parties. Such operations aim to guarantee the physical safety of the rescued persons by ensuring that they are taken to the nearest safe port of call. In so doing, the AFM have always complied with their international obligations, including in the cases referred to in the Report.

Refugee determination process

All detained persons are given a pamphlet, available in 11 languages, informing them of their rights, including their right to appeal the removal order and to challenge detention. Irregular immigrants are informed of their right to apply for asylum. In 2010 the Office of the Refugee Commissioner continued to implement the ERF project “Post Application Client Preparation and Asylum Determination Interviewing Centre for Asylum Seekers” whereby asylum seekers are given all the necessary information about the asylum procedure. They are also assisted by interpreters provided by the Office and helped to fill their preliminary registration form. The Refugee Commissioner’s Office has also invested in training programmes funded by the ERF.

The majority of illegal immigrants file an application for international protection. In 2008, 98% of them did so. As the Report notes (paragraph 43): *“Between 2006-2010 Malta ranked second in the list of industrialized countries receiving the highest number of asylum-seekers compared to their national population”* and *“is at the top of the list of countries with the highest first instance acceptance rates in the EU and beyond”*.

The Report acknowledges that the recognition rate is *“remarkably high”* (paragraph 47), but notes that few decisions of the Refugee Commissioner are reversed. This follows logically from the fact that so many of them are accepted in the first instance. A genuine case for asylum would not normally be rejected; most of the rejected applications are manifestly unfounded. The Report raises concerns that the lack of legal aid at first instance and detention itself may jeopardize the success of an application. The very high rate of acceptance shows that this is not so. There is absolutely no evidence or indication that this perceived threat has ever materialized.

Specific recommendations

The Report expresses concern that Malta’s successful asylum system could be jeopardized if numbers of arrivals rise again. That, of course, is a real possibility, but the Refugee Commissioner’s staff was increased and there is a commitment to provide reinforcements if needed. An increase in arrivals would impact negatively the processing time. If developments in the region were to overwhelm Malta’s capacities, the only viable long-term solution would be immediate solidarity and burden sharing.

The Report recommends that free legal aid be given at first instance. This depends on resources. Over the years the Government has improved the quality and quantity of free legal services offered at the appeal stage. It is now deemed important to continue investing in legal aid where it is most critically needed. The issue of free legal aid at first instance is still under discussion with the EU.

III. Durable solutions for migrants in Malta

Integration Projects

AWAS was awarded funding under the European Refugee Fund for projects that provide services to refugees and beneficiaries of protection. These involved an employment-support initiative, the provision of language teaching, as well as Project Sparklet, which supported closed and open centres through the profiling of migrants, action research and knowledge transfer. The Mare Nostrum Project, organised by the Institute of Health Migrants and Poverty (Rome), Migrant Health Unit Primary Health Department and Department of Diseases Prevention, is still in progress and a screen programme for all migrants in open centres for communicable diseases is being conducted.

The Report acknowledges that “... *Malta can offer adequate conditions of reception and opportunities for long-term livelihoods to only a fraction of ... migrants*” (paragraph 6). Its proportionally large share of asylum responsibility and exceptionally high acceptance rate lead to a disproportionate number of beneficiaries of protection. This assumes more serious implications in the context of Malta’s geographic and demographic characteristics and in the light of current geo-political realities.

The Government does not share the Report’s view that immigrants in Malta find themselves at serious risk of destitution. This is certainly not the case in practice. Over 2000 migrants have found employment and reside in private accommodation. However, it is true that the labour market is small and opportunities for immigrants are limited. Coupled with the fact that Malta is never the migrants’ destination of choice, this makes efforts at integration particularly difficult. Most immigrants will always try to join friends, family and larger ethnic communities in mainland Europe.

Specific Recommendations

The Government does not share the Report’s view that Malta’s stance to migration is just “reactive “and “emergency type”. It agrees that there is a need for further investment in integration programmes but the country’s limitations cannot be changed. In view of the situation in the southern Mediterranean, there is no indication that the rate of arrivals will stabilize. It would, therefore, be premature to consider introducing amendments to policies on family reunification and citizenship.

The Report advises an overhaul of the system of benefits and financial assistance. The proposal to detach financial assistance from residence at the open centres carries risks and can in some instances undermine efforts at integration. Furthermore, Malta is already dedicating a substantial proportion of its GDP to the upkeep of its system of international protection⁵. The combination of a constant flow or arrivals and lack of solidarity make it extremely difficult to commit additional funds for this purpose.

Racism and xenophobia

The Report makes reference to ECRI’s Third Report on Malta (2008). The Government, in its turn, refers to its reply to that report.

⁵ [See](#) footnote 1, above.

In addition, the condemnation and elimination of racial discrimination have been pursued through the enactment of criminal and civil legislation. Racial discrimination is prohibited by the Constitution, the European Convention on Human Rights (incorporated into domestic law by Chapter 319 of the Laws of Malta) and by other international conventions to which Malta has adhered. Amendments made to the Criminal Code in 2002 and 2009 include provisions making incitement to racial violence or hatred an offence.

Article 82A (1) lays down that *“Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent ... to stir up violence or racial hatred ... shall ... be liable to imprisonment for a term from six to eighteen months.”* Articles 82B and C deal with the offences of condoning or trivialising genocide, crimes against humanity, war crimes and crimes against peace, which are directed against a group defined by reference to race, colour, religion, descent or national or ethnic origin. Bodies corporate may also be held responsible for such offences⁶ and may be punished by means of a fine, as well as, in certain cases, the suspension or cancellation of the licence, the temporary or permanent closure of any establishment used in the perpetration of the offence, or the compulsory winding up of the body corporate⁷.

The Criminal Code also provides that racist or xenophobic motivations constitute an aggravation (Article 83B).

The Constitution and the European Convention on Human Rights prohibit discrimination on grounds of race in relation to civil and political rights. Thus, while sector specific legislation applies indiscriminately with no reference to race, any law, policy or practice which is considered to be racially discriminatory may be challenged.

In 2007, the Equal Treatment of Persons Order⁸ was adopted, transposing the provisions of the European Union's *Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*. This Order provides additional protection against racial discrimination, with reference to a number of sectors, and also applies indiscriminately. The same Order provides for additional measures to facilitate the exercise of the right of redress by victims of racial discrimination. Article 15 provides that where any of the Order's provisions are violated, the person in question may institute civil proceedings requesting the Court to order the defendant to desist and to order the payment of compensation for damages. The plaintiff would be required to prove less favourable treatment, while the defendant would be required to prove such different treatment is justified.

In addition, Article 13(1) reverses the burden of proof in civil proceedings involving racial discrimination, providing that: *If a person who considers that he or she has been discriminated against establishes ... facts from which it may be presumed that there has been direct or indirect discrimination against him or her, the burden of proving that there*

⁶ Article 82E(1)

⁷ Article 82E(2)

⁸ Legal Notice 85 of 2007

has been no discrimination shall lie on the person, establishment or entity against whom the allegation of discrimination is directed.

The Order also envisages the assistance of the National Commission for the Promotion of Equality which may refer a matter to the Court on behalf of the victim. Moreover, Article 7 prohibits victimisation for having made a complaint to the lawful authorities or for having initiated or participated in proceedings for redress on grounds of alleged breach of the provisions of these regulations, or for having disclosed information ... to a designated public regulating body, regarding alleged acts of discrimination or discriminatory treatment.