
Advance unedited version

Distr.: General
23 June 2016

Original: English

Human Rights Council

Thirty-third session

Agenda item 3

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Working Group on Arbitrary Detention on its follow-up mission to Malta

Note by the Secretariat

The Working Group on Arbitrary Detention conducted a follow-up visit to Malta between 23 and 25 June 2015 at the invitation of the Government. Throughout the visit, the Working Group enjoyed the fullest cooperation of the Government. It had the honour to be received by Her Excellency the President of the Republic and by some of the highest authorities of the State. The Working Group was able to hold confidential interviews with prisoners and detainees in Corradino Correctional Facility, the main prison of the country; the Young Offenders Unit for Rehabilitation Services; Safi detention centre in Safi Barracks; Hal Far open centre; the Forensic Unit at the Mount Carmel Hospital and the newly established Initial Reception Centre for Children

In the present report, the Working Group notes that the Maltese judicial system continues to be affected by lengthy delays in the administration of justice, as well as diminished access by individuals to due process. The Working Group notes with satisfaction that, according to recent amendments to the Penal Code, persons deprived of their liberty now have the right to access to a lawyer immediately after their arrest and during the first 48 hours of their detention, though this right does not apply to police interrogation. Another positive development relates to the age of criminal responsibility, which has been raised from nine to 14 years old. However, juveniles between 16 and 18 years-old, who are children according the Convention on the Rights of the Child (to which Malta is a State Party), continue to be sent to General Courts for adults, instead of the Juvenile Court.

The Working Group takes note that in 2012, a Restorative Justice Act entered into force. It established a new parole system, which has already allowed 38 persons to be released. However this system still requires the necessary financial resources to be fully operational as well as improvement for foreigners to be able to benefit from it. The Government has also taken several measures in order to improve the treatment of prisoners and detainees, such as providing them with educational programmes, mental health and social services.

The Working Group reiterates that the rights to asylum and refugee status are recognized as basic human rights. During the visit, it observed that asylum-seekers, immigrants and refugees who arrive in an irregular manner continue to be systematically and routinely detained. The drastic reduction in arrivals by sea and the improvement in the administrative internal procedures have allowed the reduction of the average detention period to three months. However, those whose applications are rejected may be detained up to 18 months.

The Working Group considers that instead of an automatic and mandatory detention of irregular immigrants, less restrictive measures should be applied, such as deposit of documents; reporting conditions; community release or supervision' designated residence. According to the Working Group, detention should only be applied when all other alternatives have proved it necessary; reasonable in all the circumstances; proportionate to a legitimate purpose; non-discriminatory and subjected to judicial review.

The report mentions that legislative changes have been introduced to reform the automatic nature of the detention for migrants in an irregular situation, refugees and asylum seekers. Legislation concerning the application of the European Union Return Directive has been adopted; the Immigration Act has been amended to open the possibility of challenging the detention; temporary permits to work up to three months have been established and a voluntary return program has been designed. The Reception of Asylum-Seekers Regulation was also amended.

Among the new positive initiatives, the report also highlights the attention given to children and to immigrants with psycho-social and intellectual disabilities. These children will no longer be detained: After an assessment of their identity, health and age by the correspondent governmental agency, namely the Agency for Welfare of Asylum Seekers (AWAS), they will be transferred to special houses or placed under the care of carefully vetted families. For that purpose, a new initial reception centre for children has already been set up.

The report points out that the conditions of detention of migrants in Safi detention centre situated in Safi Barracks have improved. The drastic reduction in the number of detainees has obviously contributed to that improvement. However, the Working Group noted the lack of educational and social programmes and deficiencies in the legal aid provided to detainees. In addition, the Working Group was concerned that a detention facility for migrants was located in military barracks.

The Working Group was informed that there will be an initial review of the detention after a period of seven working days in detention. The Immigration Appeals Board shall grant release when detention is no longer requested. An applicant should be provided with free legal assistance and representation during the review of the lawfulness of his or her detention. Free legal assistance before the Board will be extended but such an extension would not cover proceedings before the Civil, the Constitutional or the European Courts.

According to the Working Group, holding people in open centres without long-term planning for their integration cannot be considered as a suitable solution for themselves and for the Maltese society. Authorities should facilitate the integration of these persons into society, mainly through labour and education programmes but also through alternative housing provided by other stakeholders. The Working Group notes that programmes for the integration of migrants, asylum-seekers and refugees into the Maltese society remain inadequate.

The Working Group recommends ending the regime of mandatory and automatic detention regime for asylum seekers, refugees and migrants in an irregular situation and to replace it with a reception system. The Working Group further recommends the incorporation of the Convention on the Rights of the Child into domestic legislation.

The cooperation of civil society organizations, particularly religious institutions with considerable expertise and experience in these areas, should be searched. No military presence in the management of the detention centres should be authorized.

Long-term planning for people living in open centres should be designed. The Government should explore alternative placement options. The Working Group considers that community-based placements are more respectful of the human rights of migrants, asylum seekers and refugees and more likely to empower them to participate in case resolution processes. Free legal aid should be extended to migrants in an irregular situation, even before the appeal stage of the review process. It should not be limited to applications before the Immigration Appeals Board but be extended to appeals before the Civil, Constitutional and European Courts.

Lastly, the reports highlights that a comprehensive solution to migration flows, and to the situation of refugee and asylum-seekers should involve the countries of origin, the countries of transit and the countries of destination, especially the members of the African and the European Unions.

Report of the Working Group on Arbitrary Detention on its visit to Malta*

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* Circulated in the language of submission only.

I. Introduction

1. The Working Group on Arbitrary Detention, established pursuant to former Commission on Human Rights resolution 1991/42, whose mandate was clarified by Commission resolution 1997/50, and extended for a further three-year period by Human Rights Council resolution 24/7 of 26 September 2013, conducted a follow-up country visit to Malta from 23 to 25 June 2015 at the invitation of its Government. The Working Group was represented by its Second Vice-Chair, Sètondji Roland Adjovi (Benin), and Mads Andenas (Norway), and supported by the Secretary of the Working Group, Mr. Miguel de la Lama, and a staff member from the Office of the High Commissioner for Human Rights, Ms. Yiyao Zhang.

2. Throughout the follow-up visit and in all respects, the Working Group enjoyed the fullest cooperation of the Government of Malta and all authorities whom it dealt with. The Working Group would like to extend its gratitude and appreciation to the Government for its positive response to the Working Group's request to carry out its follow-up visit and for its full cooperation before and during the visit. The Working Group would like to continue the constructive dialogue with the Maltese Government on the issues mentioned in this report.

3. The Working Group was able to meet with and interview some persons deprived of liberty confidentially, without the presence of authorities, guards or witnesses, as required by its mandate.

4. The Working Group would also like to thank the representatives of civil society organisations for their support during the visit and for providing the Working Group with important information and assistance, particularly the Jesuit Refugee Service and the Malta Catholic Action. Additionally, the Working Group wishes to thank colleagues at the Office of the United Nations High Commissioner for Refugees (UNHCR) for their valuable assistance

II. Programme of the follow-up visit

5. During its three-day visit, the Working Group met with various authorities from the executive, legislative and judicial branches of the State. The delegation had the honour to be received by Her Excellency, the President of Malta; the Minister for Foreign Affairs; the Minister of Home Affairs and National Security; the Minister of Justice, Culture and Local Government; the Permanent Secretary of the Ministry for Home Affairs and National Security; Magistrates of the Juvenile Court; the Social Affairs Committee of the Parliament; representatives from the Armed Forces of Malta; the Malta Police Force; the Agency for the Welfare of Asylum Seekers; the Immigration Appeals Board; the Board of Visitors for Detained Persons and the Board of Visitors of the Prisons. The delegation also met with the Ombudsman; the Commissioner for Children; representatives from relevant UN agencies and civil society organizations. The Working Group is very grateful for the cooperation of all the authorities and interlocutors that it met with during the visit.

6. The delegation visited the Corradino Correctional Facility; the Young Offenders Unit for Rehabilitation Services; Safi detention centre situated in Safi Barracks; Hal Far open centre; the newly established Initial Reception Centre for Children, and the Forensic Unit at the Mount Carmel Hospital.

7. The Working Group was able to visit all these places upon its request and to interview, in private, a sample of individuals, some of whom were selected by the delegation, without any restriction.

III. Status of the implementation of recommendations contained in the report on the 2009 Working Group's visit to Malta

8. The following is the analysis of the implementation of the recommendations made by the Working Group at the end of its 2009 visit (see A/HRC/13/30/Add.2, para. 79).

Recommendation made in relation to criminal justice

9. The Working Group recommended in 2009 to allow access to lawyers to persons arrested on suspicion of having committed a criminal offence during the first period of up to 48 hours while in police custody.

10. According to the Constitution, police should either file charges or release a detainee within 48 hours. If the person is not released within the first six hours, the arresting police officer must inform a magistrate. At the moment of the arrest, the arresting police officer should inform the detainee of his or her right to have access to a lawyer and to his or her entitlement to legal aid. During the 2009 visit by the Working Group, access to legal counsel was only permitted after the initial 48 hours period of detention. The right to legal assistance before police interrogation is one of the basic guarantees of a fair hearing. According to Article 6.1 of the European Convention on Human Rights, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.

11. According to article 355 sub-article (1) of the Maltese Penal Code, "Subject to the provision of sub-article (3), a person arrested and held in police custody at a police station or other authorised place of detention, shall, if he so requests, be allowed as soon as practicable to consult privately with a lawyer or legal procurator, in person or by telephone, for a period not exceeding one hour". According to sub-article (3), "Compliance with a request may be delayed if the person making the request is in police detention for a crime and if an officer not below the ranks of superintendent authorises such delay". Sub-article 7 further states that "the delay shall in no case exceed thirty-six hours from the time of the arrest".

12. During its follow-up visit, the Working Group noted that, according to the Maltese authorities, amendments have been made to the criminal code guaranteeing that persons deprived of liberty have the right to consult a lawyer immediately after the arrest. In 2014, the Criminal Code was amended to include a provision, which guarantees the right of the suspects or accused to be informed without undue delay of their procedural rights. As provided in article 534AB, these procedural rights include the right of access to a lawyer and any entitlement to free legal advice (Criminal Code 534AB Right to information and Letter of Rights, added by: IV.2014.25).

13. Accordingly, authorities are now allowing detainees to have access to legal counsel during the 48-hour detention period and prior to initial interrogation. The detainee is currently entitled to speak to a lawyer in private, as soon it is practicable, in person or by telephone.

14. The Working Group welcomes the change in the Criminal Code introduced in 2014. It emphasizes that the right of access to a lawyer should be further elaborated and defined by law. Particularly, it should include the right to be assisted by a lawyer during police interrogation. The fact that one is able to contact a lawyer should not affect the right to remain silent, contrary to the current practice as described to the Working Group.

15. The Working Group observed that suspects are still kept in detention for lengthy periods before trial. The maximum time of pre-trial detention is 12 months for those

accused of offences with a maximum sentence of less than four years; 16 months for sentences with a maximum sentence between four and nine years; and 20 months for sentences with a maximum sentence of nine years or more. These time limits do not apply automatically: detainees can still make a bail application once these periods have been completed. The Working Group is of the view that the law shall be more protective of the rights of the accused and puts the burden on the prosecution to prove why such a pre-trial detention shall be prolonged, and more importantly provides for judicial review for any extension.

Recommendations in relation to juvenile justice

16. The Working Group recommended in 2009 to increase the minimum age of criminal responsibility for juveniles to 12 years in accordance with paragraph 32 of General Comment No. 10 (2007) of the Committee on the Rights of the Child; to eliminate the assumption that a juvenile aged between 9 and 14 years could act with “mischievous discretion” and to provide that the juvenile justice system extends to children between the age of 16 and 18 years.

17. During the follow up visit, authorities expressed their intention to address juvenile criminality with a more social approach instead of a punitive one. On 14 February 2014, the Criminal Code was amended to raise the age of criminal responsibility from nine to 14 years old. According to article 35(1) substituted by III. 2014.2. Cap.285, “a minor under fourteen years of age shall be exempt from criminal responsibility for any act or omission”. Act No. 3 2014 as cited in Justice Services, 2014, the age of criminal responsibility was raised to the age of fourteen. The Working Group welcomes the raise of the age of criminal responsibility from nine to 14 years old.

18. In Maltese law, children are deemed to be capable of malicious discretion¹ (*doli capax*) and can be held responsible. Minors under 14 years of age shall be exempted unless they have mischievous discretion. If a minor is found to have mischievous discretion, he or she can be held responsible. The Working Group welcomes the fact that article 36 of the Criminal Code concerning “minors under fourteen but over nine years acting with discretion” has been repealed by Act III.2014.3. The Working Group also welcomes the fact that Article 37 of the Criminal Code, substituted by III.2014.4., further provides that the penalty will be decreased: “in the case where the act or omission is committed by a minor who is aged between fourteen and sixteen years of age with mischievous discretion and in the case where the minor is aged between sixteen and eighteen years, the applicable penalty shall be decreased by one or two degrees”.

19. The Working Group was also pleased to learn about amendments made to the criminal code regarding the criterion of “mischievous discretion” for children between 14 and 16 years, shifting the burden of proof to the prosecution. “Mischievous discretion” should also be proved and not simply assumed.

20. The Working Group remains however concerned that the Juvenile Court can only hear matters involving children who are in conflict with the law under the age of 16 and that children between 16 and 18 years old are still being tried as adults and subject to criminal law and criminal courts for adults, in violation of the CRC. According to article 2 of the Juvenile Court Act, “a child or young person means a person who is under the age of sixteen years”. The Juvenile Court only hears charges against and holds other proceedings relating to children under the age of sixteen years.

¹ It appears to the Working Group that “malicious discretion” is intended to refer to “malicious intent”.

21. The Working Group considers that children under 18 years of age should be treated as children and not be brought before nor sentenced by tribunals for adults. In this regard, the Working Group concurs with the Committee on the Rights of the Child that Malta should bring its juvenile justice system fully in line with international standards (CRC/C/MLT/CO/2 para.66 (b)). In particular, the Working Group reiterates that Malta should extend the scope of its juvenile justice to include all children under the age of 18 years. The Working Group also recalls that the arrest, detention or imprisonment of a child not only shall be in conformity with the law but shall be used only as a measure of last resort and for the shortest appropriate period of time.

Recommendations in relation to detention under immigration authorities

22. Malta ranks second in the world for the number of refugees per square kilometre and has Europe's second-highest rate of granting asylum per capita. In 2008, the increase in the immigrant population exceeded the national birth rate for the first time. Since 2002, more than 19,000 people have reached Malta, a country with a population of 423,000 inhabitants and an area of 316 square kilometres. The Office of the United Nations High Commissioner for Refugees in Malta received 15,832 asylum applications between 2002 and 2012. 2,200 applications for asylum were submitted in 2014, mainly from Libyan citizens.

23. The Working Group is fully aware that thousands of migrants, asylum-seekers and refugees coming mainly from Africa have arrived in Malta since 2002. At first, most people arrived on boats carrying about 30 people. The trend changed during 2008 to larger boats carrying between 100 and 400 persons. In 2008, 2,800 migrants arrived by sea. In 2013, there were 2,006 persons. While the number was drastically reduced in 2014 since most migrants were saved at sea by Italian and Maltese coastguards and taken to Italian harbours, mainly in Lampedusa and Sicilia, hundreds of asylum-seekers continue to arrive in Malta by plane, with or without proper documentation. 2,200 applications for asylum were submitted in 2014, mainly from Libyan citizens.

24. Today asylum-seekers are arriving mainly by air. As of February 2016, 886 persons had been granted refugee status in Malta; 11,243 individuals had received subsidiary protection; and 1,694 persons had been granted other forms of complementary protection.²

25. In 2009, the Working Group recommended that Malta change its laws and policies related to administrative detention of migrants in an irregular situation and asylum-seekers, so that detention is decided upon by a court of law, on a case-by-case basis and pursuant to clearly and exhaustively defined criteria in legislation, under which detention may be resorted to, rather than being the automatic legal consequence of a decision to refuse admission of entry or a removal order. It also recommended to rule out immigration detention of vulnerable groups of migrants, including unaccompanied children, families with children, pregnant women, breastfeeding mothers, elderly persons, persons with disabilities, people with serious and/or chronic physical or mental health problems

26. Migrants who arrive in an irregular manner continue to be systematically and routinely detained. The detention of these persons is based upon articles 5, 14 and 16 of the Immigration Act related to the offence of illegal entry into the Maltese territory and removal. The period of detention varies from two to 12 months pending adjudication of their asylum requests. The drastic reduction in arrivals by sea and the improvement in the administrative internal procedures have resulted in the reduction of the average detention

² UNHCR Malta: <http://www.unhcr.org.mt/charts/category/17>

period to about three months. The migrants whose applications are rejected are detained up to 18 months.

27. Malta's detention policy affects migrants arriving irregularly in the country. Under Maltese immigration laws, detention is the automatic consequence of a refusal to grant admission to national territory. The practice therefore continues to be to detain all migrants who arrive on the territory in an irregular manner.

28. The Working Group learned during its visit that even persons with a valid visa may be detained if they cannot prove that they have sufficient financial means to stay in Malta. It also learned that others arrive without valid documents or after having destroyed their passports at the moment of their arrival in order to request political asylum or refugee status.

29. It is provided in article 14 of the Maltese Procedural Standards in Examining Applications for International Protection Regulations that a person declared to be a beneficiary of international protection shall be entitled to remain in Malta and to be granted residence permits (Article 14(1)(a) of the Subsidiary Legislation 420.07; Legal Notice 243 of 2008).

30. Aside from a peak observed in 2008, the number of asylum-seekers and refugees arriving in Malta has remained close to an average of 1,600 persons a year. The severe and negative physical and psychological consequences of prolonged detention have been very well documented.

31. The Working Group is of the view that detention should not be used to discourage migrants at risk who wish to apply to asylum in Malta. The Working Group notes that legislative changes are being introduced to reform the quasi-automatic nature of the detention for irregular migrants. The Working Group welcomes the further changes which relevant authorities are currently working on, especially in relation to migrant children and removal orders.

32. The Working Group was informed that the Ministry for Home Affairs and National Security has prepared a bill to amend the Immigration Act of 1970, Cap. 217. In the draft amendment Act, changes are proposed to article 14 of the Immigration Act, which sets out mandatory pre-removal detention to ensure that removal orders are only issued when necessary. According to the proposed revision of article 14(4), all the effects of a removal order shall be suspended if the person who is subject to it has filed an application for asylum and pending the final determination of this application. The removal order shall again come into force following the final rejection of the asylum application. In addition, the proposed revision to article 14(7) provides that the Principal Immigration Officer shall not execute any return decision or removal order if appeals proceedings before the Immigration Appeals Board are pending.

33. However, the Working Group understood during its visit that civil society organizations, especially those with several years of expertise in the assistance to refugees and asylum-seekers, had not yet been consulted on the proposed legislative changes. Thus it encourages relevant authorities to fully consult them during this process. In this regard, the Working Group was pleased that the Social Affairs Committee of the Parliament expressed to the Working Group its commitment in this respect.

34. The Working Group acknowledges that some significant improvements have been made concerning migrants, refugees and asylum-seekers. The Working Group welcomes the establishment of an initial reception system. It is anticipated that this will change the practice of automatically detaining migrants in an irregular situation, refugees and asylum seekers from the outset. A new initial reception centre for children has already been established and should prevent the detention of children. This centre will host

unaccompanied migrant children as well as accompanied migrant children with up to two family members upon arrival, and allow for the registration, medical clearance and age assessment before their eventual transfer to an open centre.

35. According to information received from the authorities, plans are still under way to convert Lysters Barracks detention centre in a temporary initial reception centre for adults. The Working Group also received information that the construction of a new facility to be used as an initial reception centre would soon be initiated. However, the Working Group emphasises that military facilities should not be used for the detention of irregular migrants, especially children.

36. The Working Group visited Safi detention centre situated in Safi Barracks, an army base. The centre, distributed in four blocks, includes special areas for children and families. It contains 134 beds but during the visit, there were only six detainees. Some of them had arrived from Algeria and Syria by plane and had spent 24 hours detained at the Valetta International Airport before being brought to the centre. One detainee had a valid visa but not sufficient financial resources for his stay in Malta. The tourist visa of another detainee had expired. A Nigerian who reported having a permanent resident status in Spain had spent four months in the centre. All detainees had gone through identity checks and medical examinations. Legal Aid was supposed to be provided on Tuesdays but no detainees were seeking legal aid at the time of the visit. Detainees had access to the telephone and were able to meet with relatives for five minutes a day.

37. The Working Group also visited Hal Far Open Centre for immigrants, outside Valetta, run by the Ministry for Social Affairs. The centre has a capacity for 800 persons. 260 were persons present during the Working Group's visit. In the open centres, migrants enjoy freedom of movement but are requested though they are requested to undergo daily movement registration and provide details of their whereabouts.

38. The Working Group received information that 889 persons were living in three open centres including Hal Far, which consisted of prefabricated container housing units that had replaced scores of tents. Most of them were asylum-seekers awaiting decisions on their applications. Some migrants whose applications for asylum had already been rejected were also hosted there. Residents were suffering uncomfortable living conditions given inadequate ventilation and high temperatures in the summer months, in addition to the overcrowded condition in each unit. Residents were referred to the centre by immigration authorities.

39. The Working Group was informed that although the open centres were locked and guarded by security officers, residents were allowed to enter and exit the premises freely. Residents were allowed to stay for a maximum period of one year. Their beds would be restored after three weeks of absence so that it could be assigned to another migrant in need. It was brought to the attention of the Working Group that some residents arrived at the centre in April 2014, which means that they had been held there for more than 12 months. The Working Group was informed that during their stay at the open centre, residents were offered accommodation; free food, and were provided with a transportation allowance to enable them to travel to the city centre. In addition, the Working Group was informed that the centre would provide English language courses, computer training and cultural orientation.

40. There were complaints from some residents that the food they were given lacked variety. They had been offered chicken at every meal for a long time and complained about the absence of fruits. A man complained that his religious dietary and fasting observations had not been respected.

41. In this regard, the Working Group encourages the Government of Malta to take all necessary measures to improve the living conditions in the open centres. The Working

Group notes the Government's commitment to address the challenges related to the detention of migrant children. It was informed that upon arrival, children, including unaccompanied children and families with children, would be taken to an initial reception centre for children. The Working Group reiterates that children who find themselves without parental protection are dependent on States to uphold their rights.

42. During its trip, the delegation visited a newly established reception centre for children which had not been used yet. The centre was designed as a temporary facility for registration, medical clearance and when age assessment is necessary. The reception centre, which could host a maximum of 134 persons, was equipped with family rooms, a play room for children, and offices for international organizations/agencies, such as the UNHCR. Residents will be provided with a welcome bag which contains basic personal sanitation items and blankets. Prepared meals would be provided for free to residents. Personnel at the reception centre had collected some clothes and toys to be distributed to migrant children which were stored in two storage rooms shown to the Working Group.

43. In respect of irregular migrants whose age cannot be otherwise determined, an age assessment and determination procedure was implemented by AWAS. The Working Group noted that the procedure involves a psycho-social assessment, with the persons in question being referred to a medical procedure only if necessary. Whenever the relevant assessment leaves room for doubt as to whether the person is a child or not, the authorities consider and treat the person concerned as a child.

44. In its 2009 report, the Working Group also recommended to provide in all cases for automatic periodic review by a court of law on the necessity and legality of detention.

45. The lack of an effective judicial review process of immigration detention constituted one of the main problems observed by the Working Group during its first visit to the country.

46. The Government indicated that review processes of migrants detention had been introduced, including for those migrants due to be returned to their countries of origin. Based on the proposed legislative changes, the first review was to be conducted by the First Immigration Officer within the first three months of the detention, while the Immigration Appeals Board would have jurisdiction thereafter. The Working Group was pleased to learn that according to the proposed amendments, the mandate of this Board would be expanded to a full review of the legality and grounds of the detention, and that the detainee would also be able to challenge their detention before a court, with eligibility to legal aid throughout the process. The Working Group was informed that the Immigration Appeals Board would have the authority to grant release when detention is no longer requested.

47. The Working Group was not in a position to assess the efficiency of this mechanism during its follow-up visit since it was not fully in force yet. However, the Working Group looks forward to receiving information in this regard, including on the capacity of the courts to review the proportionality of the detention.

48. With respect to the recommendation made by the Working Group to provide for an effective remedy for detainees to challenge the necessity and legality of detention at any time of the detention period and ex post facto and define the circumstances, it was brought to the attention of the Working Group that effective and speedy remedies for detainees to challenge the necessity and legality of detention at any time of the detention were still lacking. Although free legal assistance and representation will be provided before the Immigration Appeals Board once the law is enacted, the future new regime will not enable such public defence lawyers to bring procedures before the Civil and the Constitutional courts or the European regional justice mechanisms. The Working Group stresses that the amendments under discussion should ensure that the judicial review of immigration cases cover the necessity and proportionality of the measures taken in each individual case, in

line with the requirements of international law. In this regard, the Working Group encourages the Government of Malta to refer to relevant principles and guidelines in the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37). The new amendments should also allow defence lawyer to bring up cases before all existing tribunals or mechanisms including civil and constitutional Courts, international human rights bodies as well as to the European Court of Human Rights.

49. The Working Group had recommended that where a regime of mandatory administrative detention for migrants in an irregular situation remains, Malta should legally define its maximum period rather than relying on Government regulations or policy to make such a determination.

50. The Working Group considers that instead of an automatic and mandatory detention, less restrictive measures should be applied, such as bail; home curfew; deposit of documents; reporting conditions; community release or supervision in designated residence. Detention should only be applied when necessary, reasonable in all the circumstances; proportionate to a legitimate purpose, non-discriminatory and subjected to judicial review. Even though this remains too extended, the Working Group welcomes the change envisaged in the length of detention: the amendments under discussion would establish a maximum period of detention of 18 months for migrants in an irregular situation and nine months for asylum seekers, subject to administrative review introduced in 2014.

51. As to its recommendation to provide for a system of legal aid for immigration detainees, the Working Group observed during its visit that while legal assistance for asylum seekers was provided with the valuable work of non-governmental organizations, such efforts were insufficient to ensure legal aid to all detainees. However, the Government would need to invest more in providing such legal assistance as that is its international obligation.

52. The Working Group was informed that the Government only provides asylum seekers with free legal aid at the appeal stage of the application process, before the Immigration Appeals Board. Government officials indicated to the Working Group that changes would be introduced in the legal aid system and that legal aid would be provided at all stages. An agency has been created with the aim of providing specialized legal aid prior to the appeal stage.

53. However, at the time of its follow-up visit, it was brought to the attention of the Working Group that in practice, access to an effective legal assistance, especially for indigent foreigners, remains very limited. The Working Group noted that persons being held at the immigration detention centre were not clearly aware of their status and rights and that their access to legal aid appeared to be very limited.

54. In this regard, the Working Group recommends that Malta make additional efforts to bring the legal aid system in compliance with international human rights standards, both in terms of resources and effectiveness. Free legal aid should be also provided to appeals before the Civil, the Constitutional and the European Courts, as well as to present cases before international human rights bodies.

55. In 2009, the Working Group observed that Malta was carrying a disproportionate burden and did not have the necessary financial and other resources at its disposal. The Working Group therefore appealed to the international community to assist the Government in bringing its immigration detention regime into conformity with applicable international human rights law and standards while reminding Malta of its international human rights obligations.

56. As of February 2016, 886 persons had been granted refugee status in Malta; 11243 individuals had received subsidiary protection; and 1694 persons had been granted other forms of complementary protection.³

57. Malta ranks second in the world for the number of refugees per square kilometre and has Europe's second-highest rate of granting asylum per capita. In 2008, the increase in the immigrant population exceeded the national birth rate for the first time.

58. The Working Group is also concerned that European States have ignored the migration problems in the Mediterranean for too long. In 2014, European countries accepted to receive from Malta only 150 migrants, while the United States of America agreed to receive 500. According to the Maltese authorities, Malta can only accept 200 asylum-seekers and refugees per year.

59. In this respect, the Working Group fully acknowledges the need for a comprehensive response at the African, European and universal levels to the challenges posed by irregular immigration worldwide. If a shared responsibility in Europe was effective, it could help identify solutions and alleviate the suffering. Furthermore, the Working Group calls on all countries in the vicinity, including countries in the Middle East, to accept refugees and to consider giving financial contributions if they cannot host any.

Recommendations in relation to monitoring mechanisms

60. The Working Group recommended after his first visit to Malta in 2009 to strengthen the status, powers and functions of the Board of Visitors of the Prisons and the Board of Visitors for Detained Persons to provide for more effective monitoring of detention facilities, as designated national preventive mechanisms under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Working Group explained that this would include the extension of their respective mandates to the aspect of legality of detention which is not ordered by a court, including administrative detention and "detention within detention" as a form of disciplinary measure, as well as the publication of all their reports addressed to the Minister of Justice and Home Affairs. The Working Group further recommended to strengthen the status, powers and functions of the Office of the Ombudsman in accordance with the Paris Principles

61. During its follow-up visit, the Working Group received information concerning the monitoring mechanisms, namely the Board of Visitors of the Prison and the Board of Visitors for Detained Persons, the qualifications of the board members and their expertise in relation to detention. The Working Group is convinced that the mandate of the two boards must be protected by law and they should be given authority to request changes in detention conditions, when necessary.

62. The Board of Visitors of Detained Persons was established in 2007. It submits reports and makes recommendations to the Minister of Justice concerning the material conditions of the correctional facility; the educational and integration programmes as well as on medical and psychological care. Staff of the Board visit detention centres once a month, monitor the detention conditions; receive complaints from detainees and conduct interviews with the Centre's authorities. A psychiatrist regularly accompanies the Board members during their visits. The Working Group holds the view that the mandate of this Board could be extended beyond the closed detention centres, such as the mental hospital, the elderly care facilities but also private houses whenever reliable information exists that individuals are deprived of their liberty.

³ UNHCR Malta: <http://www.unhcr.org.mt/charts/category/17>

63. The Working Group is aware that the Ombudsman's jurisdiction is limited to the Public Administration and that this mechanism reports to the Parliament. The Working Group learned during its follow-up visit that the Ombudsman had proposed to appoint a Commissioner on detention services to review complaints and investigate detention related issues. Although this proposal has not been taken up by the Government of Malta, the Working Group understands that the current Ombudsman has the mandate under the Ombudsman Act of 1995 to receive and act upon complaints on administrative actions taken by or on behalf of Government and other authorities in relation to detention and immigration detention. In this regard, the Working Group encourages the Ombudsman to play a more proactive role in receiving and reviewing complaints on public administrative matters from persons deprived of liberty.

64. The Working Group also takes note of the commitment of Malta to establish a National Human Rights Institution in full compliance with the Paris Principles and encourages Malta to speed up the establishment process of such an institution.

IV Additional findings

65. In regard to correctional facilities, the Working Group visited Corradino Correction Facility, the main prison of the country, which operates under the auspices of the Department of Correctional Services. It has a capacity to hold 540 inmates even though, in May 2014, 640 inmates were residing there. At the time of the visit, there were 543 inmates, including 42 women. 345 inmates were Maltese citizens and 198 were foreigners, including some asylum-seekers. 110 prisoners were in pre-trial detention and 433 were convicts.

66. Some improvements have taken place in the prison over the last three years. Some qualified prisoners had been granted the authorization to work outside the prison. The solitary confinement cells are now very rarely used and even when they are used, the Working Group was informed that it is only for some hours.

67. The Working Group found a 15-year old boy at the Young Offenders Unit of the prison. He had spent two months there, waiting for trial before the Juvenile Court. Children were following educational and integration programmes, provided with the assistance of non-governmental organizations. However the Working Group stresses that children and young offenders should be separated, as recommended by the Committee on the Rights of the Child in line with article 37(c) of the CRC and article 10(2)(b) of the ICCPR.

68. The Working Group notes with concern the limitation in the access to education and training opportunities, especially for female inmates. The Working Group is also concerned that pre-trial detainees are detained together with convicted persons in violation of article 10(2)(a) of the ICCPR, to which Malta is a party. The Working Group welcomes plans for a separate unit for female juveniles.

69. In January 2012, the Restorative Justice Act entered into force. The Act includes a provision for granting parole to prisoners; establishes an Offenders Assessment Board; a Victim Support Unit; a Remission Board and a Victim-Offender Mediation Committee. The Parole Board is headed by a retired judge. The Department of Probation and Parole is currently supervising 23 persons. 38 persons have already been released under parole. However, the parole system needs more financial resources to be fully developed. The current requirements appear to lead to *de facto* discrimination because only citizens of Malta can in practice benefit from parole while foreigners serving sentences lack the consolidated family environment to take advantage of such an opportunity for rehabilitation.

70. It is also essential that the pre-trial detention period is shortened as much as possible.

71. During its visit, the Working Group was pleased to learn from the Government that the military will no longer be involved in managing the detention centres for immigrants. Their role will be restricted to search and rescue activities. However, the Working Group emphasizes that an open reception facility for immigrants should not be established or built on military premises.

72. The Working Group is concerned about the absence of a procedure to identify stateless persons and persons at risk of statelessness.

73. It is of serious concern to the Working Group that there is a lack of long term planning for persons residing at the open centres. Given the limited resources and job opportunities in Malta, many of them are experiencing difficulties to integrate into the Maltese society and this precarious condition can only be a challenge for all, both the migrants and the Maltese society in general, in the years to come, negatively affecting the integration process but also exposing the migrants to the misleading attraction that criminal enterprises sometime present. Effective liberty and humane conditions for those in the open centres would be critical in any assessment of whether they are not indeed a new form of deprivation of liberty.

74. In relation to long term planning for migrants, asylum seekers and refugees residing in Malta, the Working Group recommends that the Government explore alternative placement options. It was brought to the attention of the Working Group that civil society organizations and religious bodies in Malta have years of experience in providing community based placement to migrants, asylum seekers and refugees. And, from the observation on the ground, it appeared that community based placement can better meet the needs of this group of people and empowers them to participate in case resolution process. The Working Group thus suggests that the Government of Malta work together with those civil organizations and religious bodies which have ample experience working in this area to create more opportunities for migrants, asylum seekers and refugees to reside in the community.

V. Conclusions

75. **The Working Group is of the opinion that efforts should be made by the Maltese judicial system to address challenges related to the lengthy delays in the administration of justice as well as the limited access by individuals to due process.**

76. **The Working Group notes with satisfaction the recent amendments to the Penal Code according to which persons deprived of their liberty now have the right to access to a lawyer immediately after their arrest and during the first 48 hours of their detention. However, this right should also applied in all cases where a person is detained by police forces, in order to ensure that police interrogations are conducted in conformity with international human rights obligations.**

77. **The Working Group notes with concern that judicial authorities are, in practice, interpreting that if a detainee makes use of his or her right to have a lawyer, he or she loses the right to remain silent.**

78. **The Working Group commends the authorities of Malta for the recent reforms related to the increase of the age of criminal responsibility, that has been raised from nine to 14 years. However, the Group is concerned that juveniles aged between 16 and 18 years, who are children according the Convention on the Rights of the Child, continue to be sent to General Courts for adults, instead of the Juvenile Courts.**

79. The Working Group acknowledges with satisfaction that in 2013, a new Parole system was established; nevertheless the Working Group is aware that the parole system needs more financial resources in order to be fully operational.
80. The Working Group welcomes the measures adopted by the Government in order to improve the treatment of prisoners and detainees, such as providing educational programmes, vocational training, mental health care and social services.
81. The significant reduction in the number of arrivals since 2013 has contributed to the improvement of the situation. More people found at sea by Maltese and Italian guard coasts are being transported to Italian harbours. Most migrants in an irregular situation are now coming to Malta by air.
82. The Working Group reiterates that the right to seek and enjoy asylum should be recognized as a basic human rights in accordance with the Universal Declaration on Human Rights and relevant international applicable law.
83. The Working Group was able to verify substantial changes in the system of treatment of these persons compared to the situation prevailing during its first visit in 2009. The Working Group is nevertheless of the view that Maltese Government should employ more resource to enable its public servants to be sensible to the fact that refugees and asylum-seekers have experienced traumatic events and are fleeing their places of origin due to fear of persecution. Therefore Asylum-seekers, immigrants and refugees who arrive in Malta in an irregular manner continue to be systematically and routinely detained.
84. The Working Group notes the legislative changes already introduced to reform the automatic nature of the detention for migrants in an irregular situation, refugees and asylum seekers. The Working Group was notably able to verify substantial changes in the system of treatment of these persons compared to the situation prevailing during its first visit in 2009. Legislation concerning the application of the European Union Return Directive has been adopted; the Immigration Act has been amended in order to allow the challenge of the detention; temporary permits to work up to three months have been established, and a voluntary return program has been designed.
85. However, the period of detention still varies from two to 12 months pending adjudication of their asylum requests. The drastic reduction in arrivals by sea and the improvement in the administrative internal procedures have allowed the reduction of the average detention period to three months. Those with rejected applications are still detained up to 18 months. Automatic detention continues to be the norm and early release the exception, a situation which is not in conformity with international law. Authorities asserted that initial detention is necessary in order to identify the detainee; verify her or his nationality; establish their age and the state of their physical and psychological health. These reasons cannot justify detention during long periods of 12 months. In the case of people whose application for asylum has been refused and who are awaiting deportation, their detention can last for 18 months.
86. The Working Group is also aware of the positive steps taken by the Government in order to establish a new system of reception of asylum-seekers, refugees and immigrants in an irregular situation, through the establishment of Initial Reception Centres (IRC). After one week in an IRC, immigrants, refugees and asylum-seekers will be transferred either to an open centre or to a detention centre, like Safi Barracks, on the basis of an individual detention order which could be appealed before the Immigration Appeals Board.

87. The Working Group would like to highlight the positive measures in relation to children and to migrants with psycho social and intellectual disabilities Children will no longer be detained: after registering their identity, health and age by the correspondent governmental agency, AWAS, they will be transferred to special houses or placed under the care of foster families.

88. The Working Group found migrants in an irregular situation and asylum seekers in Corradino Correctional Facility, the main prison of the country where 543 persons are currently detained. The Working Group could observe that people in pre-trial detention continue to be held together with convicts, in contravention of international norms.

VI. Recommendations

89. The Working Group welcomes the cooperation received from the Government of Malta during its follow-up visit and wishes to continue this cooperation. The Working Group would like to make the following recommendations:

1. In relation to migrant, asylum seekers and refugees

(a) To end the regime of mandatory and automatic detention regime for asylum seekers, refugees and migrants in an irregular situation and to replace it by a reception system;

(b) To end military presence in the management of the detention centres;

(c) To ensure that immigrants in an irregular situation, refugees and asylum-seekers are informed about their rights as well as the regulations and procedures since their arrival to Malta;

(d) To further reduce the duration of administrative detention of immigrants in an irregular situation. The Working Group recommends that detention should be applied when results necessary, reasonable in all the circumstances, proportionate to a legitimate purpose; non discriminatory and subjected to judicial review. The criteria of necessity and responsibility should always be respected. In addition, the Working Group recommends that less restrictive measures should be applied, such as bail; home curfew; deposit of documents; reporting conditions; community release or supervision designated residence;

(e) To extend free legal aid to immigrants in an irregular situation, refugees and asylum-seekers before the appeal stage of the review process. It should be not limited to recourse before the Immigration Appeals Board but be extended to appeals before the Civil, Constitutional and European Courts, as well as international human rights bodies;

(f) To design long-term planning for people living in open centres. The Government should explore alternative placement options. The Working Group suggests that the Government of Malta work together with civil organizations and religious bodies which have ample experience in providing community-based placement to create more opportunities for migrants, asylum seekers and refugees to reside in the community;

(g) To prioritise the cooperation of civil society organizations, particularly religious institutions with considerable expertise and experience in these areas. These organisations have a substantial contribution to make regarding the legislative drafts

that the Government is preparing in order to design a new system of reception of immigrants, refugees and asylum-seekers not based on detention.

2. In relation to criminal justice

To improve facilities to work and to follow educational, social and integration programmes in the correctional facilities and detention centres while equal opportunities should be provided to female and male inmates.

3. In relation to juvenile justice

(a) To incorporate the Convention on the Rights of the Child into domestic legislation, with regards to the scope of its juvenile justice system;

(b) To separate persons below 18 years old from adults in correctional facilities and detention centres. The Working Group stresses that children should not never be detained together with adults.
