



**UPR Submission
Malta
March 2013**

I. Summary and Background

Malta places virtually all migrants who arrive by boat without permission, or “irregularly,” in detention, regardless of the fact that many are fleeing violence or persecution. Though under international law, migrants who do not have permission to enter or stay in a country may be subject to detention, in Malta, detention is automatic and often prolonged, without sufficient judicial review. While some vulnerable people are screened out of detention relatively quickly, asylum seekers can be detained for up to 12 months, and migrants who do not apply for asylum (or who are rejected) can be detained for up to 18 months. Malta routinely detains unaccompanied migrant children until they have been through a formal age determination procedure. Children can be detained for months. When children are detained in this manner, they are held with unrelated adults.

Between the beginning of 2002 to the end of 2011, a total of 14,735 migrants travelled by boat to Malta.ⁱ Of these, 93 percent applied for asylum.ⁱⁱ These migrants and asylum seekers, typically from Somalia, Eritrea, and other sub-Saharan African countries, have almost all taken months to cross the Sahara and travel north through Libya. The boat trips to Malta are perilous, involving basic vessels with limited navigation systems and often have insufficient amounts of food, water, and fuel.ⁱⁱⁱ Boat migrants arriving in Malta are taken straight to detention if they lack an entry visa (as they virtually all do).

II. Automatic, Arbitrary Detention

Malta detains virtually every migrant who arrives by boat for up to 12 months (if an asylum application is pending) or 18 months (if the migrant’s asylum claim has been rejected or he or she has not applied for asylum). There is no evident justification for this prolonged detention, and during detention migrants have no meaningful opportunity for judicial review in order to require the state to show justification. Such detention may therefore constitute arbitrary detention prohibited by international law. Article 9 of the International Covenant on Civil and Political Rights forbids arbitrary detention, and the Working Group on Arbitrary Detention holds that a migrant or asylum seeker placed in detention “must be brought promptly before a judge or other authority.”^{iv} During its previous UPR, Malta was recommended to “avoid arbitrary and discretionary detention particularly of foreigners and adequately reduce the detention period particularly of asylum seekers,” but no step was taken to implement this recommendation.

In July 2010, the European Court of Human Rights found that Malta’s detention of an Algerian asylum seeker, Khaled Loued Massoud, violated the right to liberty guaranteed by the European Convention on Human Rights (ECHR).^v The court argued that Maltese authorities—in light of Malta being a small island with controlled exit by air—could have found less restrictive measures than detention. The court found that insufficient grounds for detention, and the indeterminate length of detention in the law, meant

that the Maltese legal system “did not provide for a procedure capable of avoiding the risk of arbitrary detention” and the detention violated article 5—the right to liberty and security—of the ECHR.^{vi}

As a party to the ECHR, Malta is legally bound to implement the judgment of the Court. Malta has argued that this ruling applies only to the situation of Louled Massoud himself, as “the facts of this case were very particular,” in part because of the length of detention to which Louled was subject.^{vii} Yet the then Commissioner for Human Rights for the Council of Europe asserted that “the general principles enunciated by the Court [in the *Louled Massoud* case] appear to be relevant to the situation of all those who are detained in Malta pursuant to the relevant provisions of the Immigration Act.”^{viii} The Commissioner stated that Malta’s policy of “mandatory administrative detention... is irreconcilable with the requirements of the European Convention on Human Rights.”^{ix}

Lack of Capacity to Challenge Detention

While there are some limited paths available to challenge detention, these are insufficient to cover migrants’ needs or fulfil Malta’s legal obligations. Under the Immigration Act, detention may be appealed to the Immigration Appeals Board, an administrative rather than judicial body, within three days of the issuance of the removal order or where detention is “unreasonable” pending an asylum application.^x However, since Maltese law permits the detention of asylum seekers for 12 months and, for undocumented migrants, 18 months, it is extremely difficult for migrants to establish that their detention is unreasonable.^x Accordingly, this limited appeal is not sufficient to meet international standards. Indeed, in *Louled Massoud v. Malta* the European Court of Human Rights found that the system in place through the Immigration Appeals Board does not constitute an effective remedy under the European Convention on Human Rights.^{xii}

Inadequate Justification for Detention

During its previous UPR, Malta was recommended to “strengthen its efforts to make the legal system for asylum seekers effectively accessible, prevent delays and administrative obstacles and guarantee to asylum seekers the necessary procedural safeguards in detention according to international standards.”

However, Malta detains migrants for entering the country without “right of entry,” in other words those who do not arrive through an official port of entry and come without the necessary documents.^{xiii} This means all boat migrants are detained, even though 93 percent apply for asylum. Malta’s detention policies do not correspond with the limited circumstances in which detention of asylum seekers is permissible.

Article 31 of the 1951 Refugee Convention, to which Malta is party, states that penalties should not be imposed on account of illegal entry or presence. UNHCR’s guidelines emphasize that the detention of asylum seekers who come “in an irregular manner should... not be automatic, or unduly prolonged.”^{xiv} Under these guidelines, detention of asylum seekers may be permissible in certain circumstances,^{xv} but Malta’s automatic extended detention policy does not fit with any of these exceptional cases. In particular, the policy of detention is not a proportionate response to any potential threat to national security or public order.^{xvi}

III. Treatment of Unaccompanied Migrant Children

During its previous UPR, Malta was recommended to “treat these immigrants and asylum seekers, particularly the most vulnerable persons—children and pregnant women—in the most proper manner.”

However Malta detains all unaccompanied children for whom age is disputed pending age determination, and applies a very low threshold for disputing the age of children. As a result, unaccompanied children as young as 12 may be detained for weeks or months. Children are detained with adults, without any accommodation for their young age, and with no access to education. Once determined to be under 18—and released to other accommodation—children do not receive adequate legal representation. Under international standards, unaccompanied children should not be detained for reasons related to irregular entry, and pending age determination the person claiming to be a child should be treated as such.

Among those we interviewed who were children at the time of the interview or who were children upon arrival in Malta between 2008 and 2011, the maximum time in detention was seven months (for a child in 2011), and the average time in detention was 3.4 months.^{xvii} The Maltese government has indicated that the average length of time a child was detained pending age determination in the first six months of 2012 was 18 days.^{xviii} Fluctuations in the number and timing of arrivals by sea mean that there is no guarantee that detention times will not increase again in the future.

Any period of immigration detention of unaccompanied children is unacceptable. International law states that unaccompanied children should not be criminalized for reasons related to their immigration status or illegal entry,^{xix} and article 37(b) of the Convention on the Rights of the Child (CRC) mandates that the detention of children “shall be used only as a measure of last resort.” The Committee on the Rights of the Child stated in its report following the Day of General Discussion on migrant children that detention of migrant children “contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status.”^{xx} Furthermore, the Commissioner for Human Rights for the Council of Europe has stated that, “as a principle, migrant children should not be subjected to detention.”^{xxi}

Detaining Children with Unrelated Adults

Migrant boys are routinely held in overcrowded conditions with unrelated adult men. While some children reported that they did not feel unsafe while detained with adults, others reported instances of exploitation and violence.

Human Rights Watch documented the detention of three boys co-mingled with adults in a detention center for single men during a visit to Maltese detention facilities in April 2012, all of whom appeared visibly afraid. Detaining unaccompanied migrant children with adults is in clear violation of CRC, article 37, further elaborated in the Committee’s General Comment No. 6. The Committee states “special arrangements must be made for living quarters that are appropriate for children and that separate them from adults.” Malta has not made such arrangements for children pending age determination.

Lack of legal representation in asylum proceedings

Unaccompanied migrant children in Malta receive little or no legal representation, either in challenging their detention or in requesting asylum. The government has made strides in asylum processing in the 10 or so years since it has started receiving significant numbers of asylum applications and now has one of the fastest processing times, highest recognition rates, and lowest backlogs in the European Union. Those responsible for first instance decisions in the Office of the Refugee Commissioner have undergone training on the specific needs of children seeking asylum. While the Maltese government is

to be commended on these steps, and while non-governmental and inter-governmental organizations, including the Jesuit Refugee Service and UNHCR, provide counseling to unaccompanied migrant children in detention, the government should take further action to ensure that unaccompanied migrant children requesting asylum receive legal representation.

As the Committee on the Rights of the Child has articulated, children involved in asylum procedures should, in addition to the appointment of a guardian, be provided with legal representation.^{xxii} The lack of representation in first instance proceedings impacts children's capacity to understand the proceedings and present their case. Likewise, unaccompanied migrant children whose ages are disputed and who are detained for illegal entry do not receive legal representation. According to the European Court of Human Rights in *Louled Massoud*, the Maltese legal system lacks the necessary "effective and speedy remedy" for challenging the lawfulness of immigration detention. Article 37(d) of the CRC mandates that children deprived of their liberty should have prompt access to legal assistance, and the Committee emphasizes that this specifically applies to unaccompanied migrant children in immigration detention.^{xxiii}

IV. Recommendations

Malta should be recommended to:

- Revise laws and policies pertaining to immigration detention so that migrants are not detained simply because they have entered without permission. Specifically:
 - o Allow for detention of asylum seekers only exceptionally.
 - o Give migrants access to a remedy whereby they can effectively challenge their detention, in line with international standards, and ensure that these mechanisms are accessible for children.
 - o Execute fully, effectively, and immediately the judgment of the European Court of Human Rights in *Louled Massoud v. Malta* by applying its findings to the asylum and migration system as a whole.
- End the unnecessary detention of unaccompanied migrant children:
 - o Amend legislation to prohibit the detention of migrant children for the sole reason that they have arrived irregularly in Malta.
 - o In the interim period while detention continues, use separate detention facilities for those with pending age determination requests.
- Reform the age determination procedure to treat applicants as children until proven otherwise:
 - o Release those with pending cases to alternate open facilities until age determination is completed.
- Ensure adequate free legal representation for unaccompanied migrant children.

Annex: Endnotes

ⁱ Office of the Refugee Commissioner, “Arrivals by Boat 2002-2012,” unpublished document provided to Human Rights Watch by the Office of the Refugee Commissioner, on file with Human Rights Watch.

ⁱⁱ Malta received 14,735 migrants by boat from 2002-2011. Office of the Refugee Commissioner, “Arrivals by Boat 2002-2012,” unpublished document provided to Human Rights Watch by the Office of the Refugee Commissioner, on file with Human Rights Watch. During the same period, 13,735 people applied for asylum. Office of the Refugee Commissioner, “Official Statistics,” unpublished document provided to Human Rights Watch by the Office of the Refugee Commissioner, on file with Human Rights Watch.

ⁱⁱⁱ See, e.g., Judith Sunderland (Human Rights Watch), “Dying to Leave Libya,” commentary, *EUobserver*, May 4, 2011, <http://www.hrw.org/news/2011/05/04/dying-leave-libya>; Joe DeCapua, “Risking Death to Reach Safety in Europe,” *Voice of America*, January 31, 2012.

^{iv} The International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI) of December 16, 1966, entry into force March 23, 1976. Malta acceded to the ICCPR on September 13, 1990. In 1999, the UN Working Group on Arbitrary Detention developed criteria for determining whether the deprivation of liberty of migrants and asylum seekers is arbitrary. The principles mandate that a migrant or asylum seeker placed in custody “must be brought promptly before a judge or other authority,” and that decisions regarding detention must be founded on criteria established by law. Moreover, migrants and asylum seekers in detention must be notified in writing—in a language they understand—of the grounds for detention and that remedy may be sought from a judicial authority empowered to decide promptly on the lawfulness of detention and to order release if appropriate. UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, E/CN.4/2000/4, December 28, 1999, Annex II, Deliberation No. 5, “Situation Regarding Immigrants and Asylum Seekers.”

^v ECHR, *LouledMassoud v. Malta*.

^{vi} ECHR, *LouledMassoud v. Malta*, paras. 71-74.

^{vii} Reply by the Government of Malta to the report by the Commissioner for Human Rights of the Council of Europe, June 9, 2011, section on *LouledMassoud v. Malta*, p. 3, http://www.mjha.gov.mt/MediaCenter/PDFs/1_Hammarberg%20Govt%20Reply.pdf (accessed May 9, 2012).

^{viii} Council of Europe, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Malta from 23 to 25 March 2011*, CommDH (2011) 17, June 9, 2011, para. 13.

^{ix} Council of Europe, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Malta from 23 to 25 March 2011*, CommDH (2011) 17, June 9, 2011, para. 11. Summary.

^x Immigration Act, art. 25A.

^{xi} Immigration Act, art. 25A.

^{xii} ECHR, *LouledMassoud v. Malta*.

^{xiii} Immigration Act, arts. Cap 217 Laws of Malta, article 5(1) and article 14(2).

^{xiv} Office of the United Nations High Commissioner for Refugees, “UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers,” February 1999, para. 3.

^{xv} Detention is permissible in order to verify identity (where identity is undetermined or in dispute); determine the elements of the refugee claim (but not to justify detention for the entire status determination procedure); in cases where asylum seekers have destroyed documents (requiring an intention to mislead authorities); or to protect national security and public order. Office of the United Nations High Commissioner for Refugees, “UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers,” February 1999, Guideline 3.

^{xvi} Given that after 12 or 18 months, the migrant will be released to the community without an individualized assessment of the threat he or she poses: Article 5(1)(f) of the European Convention for the Protection of Human Rights states that “the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition” is justifiable only “in accordance with a procedure prescribed by law.” In *Louled v. Malta* the European Court found that Malta fails to provide such a procedure. ECHR, *LouledMassoud v. Malta*, para. 46.

^{xvii} Human Rights Watch interviewed 11 boys who went through the age determination procedure and were determined to be children. The average time in detention (pending age determination) for these boys was 3.4 months. In a letter of March 9, 2012, and ensuing emails, Human Rights Watch repeatedly requested data from the Agency for the Welfare of Asylum Seekers on the duration and outcomes of the age determination procedures.

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^{xviii} Government of Malta, “Statement by the Ministry for Home Affairs,” Reference Number: PR 1595, Press Release Issue Date, July 19, 2012, <http://gov.mt/en/Government/Press%20Releases/Pages/2012/July/19/pr1595.aspx>, accessed February 20, 2013.

^{xix} UN Committee on the Rights of the Child, General Comment No. 6, para. 62.

^{xx} UN Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, February 16, 2013, <http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/ReportDGDChildrenAndMigration2012.pdf>, accessed February 20, 2013, para. 78.

^{xxi} Council of Europe, Commissioner For Human Rights, Positions on the Rights of Minor Migrants in an Irregular Situation, Position Paper (2010)6, Strasbourg, 25 June 2010, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1654377>.

^{xxii} General Comment No. 6, para. 33.

^{xxiii} General Comment No. 6, para. 63.