

21 May 2020

Mr. José Guevara Bermúdez,
Chair-Rapporteur,
UN Working Group in Arbitrary Detention

Dear Mr. Guevara Bermúdez,

We are three human rights NGOs operating in Malta, active in various areas and coming together to advocate for the human rights of migrants and refugees. With this letter we wish to file a complaint with you regarding an on-going situation in Malta, with over 150 migrants detained aboard two private vessels – chartered by the Maltese Government – just outside Maltese territorial waters (around 13 miles away from land)

We are extremely concerned at the fate of the migrants and believe their situation to be an **urgent one** in view of their rapidly deteriorating physical and psychological state.

With this letter, we are attaching information on the incident as well as our legal arguments on why we feel that their presence on the 2 boats constitutes arbitrary detention prohibited by international human rights law.

We are also filing a complaint before the Special Rapporteur on the rights of migrants, which explains the list of human rights violations referred to in this document. Whilst we are fully aware of your specific mandate, we feel that information we provide on issues such as inhuman and degrading treatment, dignity and asylum are relevant for your assessment of the current situation.

We would appreciate your Office's urgent intervention in this matter, and remain at your disposal should you require further information.

Yours sincerely,



Katrine Camilleri
JRS Malta



Neil Falzon
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Maria Pisani
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A. Complaint Particulars

State against which the complaint is directed

Malta

Human rights for which violations are being alleged

- a) Prohibition of cruel, inhuman or degrading treatment

Article 5, UDHR

Article 7, ICCPR

- b) Right to liberty and security of the person

Article 9, UDHR

Article 9, ICCPR

- c) Right to be treated with respect for inherent dignity of the human person

Article 1, UDHR

Article 10, ICCPR

- d) Right to an effective remedy

Article 8, UDHR

Article 2, ICCPR

- e) Right to seek and to enjoy asylum from persecution

Article 14, UDHR

Complainants/Victims

We are not able to identify the individual victims, as their detention situation prevents them from accessing lawyers or supporting organisations. We have tried to reach out to them, informally, yet this has not been successful.

Due to this impossibility of identifying individual victims, we are submitting this complaint as three human rights NGOs: aditus foundation, Integra Foundation and JRS Malta.

Steps taken at the national level to remedy the violations

From the moment of their detention aboard the two vessels, the migrants have been denied access to UNHCR and other organisations and, from what we can ascertain, to information on their situation, their rights, available remedies and supporting organisations. It remains impossible for them to seek recourse to the national legal system without such information and support. Without any mandate given from them, there is no juridical interest to file a civil suit or constitutional application in Malta despite the breach of their fundamental rights.

Therefore, no adequate, effective and accessible remedy is currently available locally.

We have sent a letter of concern and formal complaint to the European Commission.

B. Facts giving rise to the complaints

1. NGO Alarm Phone reported on its social media accounts (Facebook/Twitter) that a migrant vessel with approximately 62 people aboard, including 13 women and 6 children, entered the Maltese SAR zone on the night of 28 April 2020. Alarm Phone stated that it had reached out to the Armed Forces of Malta (AFM) to relay the coordinates of the vessel, however, the AFM was allegedly non-responsive to both phone calls and emails.¹ Times of Malta was informed that the dinghy was believed to have departed from Libya on Monday (27 April) night. Sources involved stated that the EU's borders agency FRONTEX was also informed, and it sent a flight in order to establish visual confirmation of the boat in question.² Alarm Phone also said that the private owned fishing boat Dar El Salaam 1 (ex Mae Yemanja), which returned 51 survivors and 5 corpses to Libya shortly after Easter on the 15 April, was heading towards the migrant vessel. The Dar El Salaam that sails under the Libyan flag left from Valletta port on Tuesday evening at 19:19.³
2. On 29 April 2020 Alarmphone reported on its social media accounts that *"We are not able to re-connect to the people in distress after our last contact at 9.10h. RCC Malta and MRCC Italy are informed but refuse to tell us whether a rescue has been launched or not."*
3. On 30 April 2020 Alarmphone reported on its social media accounts that *"the last time we spoke to the people in distress was 24h ago. The 'Rescue Coordination Centre' Malta still fails to clarify the situation"*. On the same day, national news outlets reported that, the fishing vessel Dar El Salaam 1 carried out the rescue of all 57 people aboard the dinghy. It was later announced that the migrants – all of whom are men in good health – would be transferred to a pleasure boat outside Maltese territorial waters.
4. On 30 April, the local media further reported that mattresses and food supplies were seen being loaded onto the Europa II in Sliema, Malta earlier that day. The Europa II left from Sliema on Thursday, 30 April 2020, in the afternoon with a banner of the EU flag strung on its side with the words, 'European Solidarity', printed on it.⁴
5. A government official was reported to have explained: *"Now it is the EU's turn to show solidarity and shoulder responsibility for these migrants. While coordinating the rescue operation from yesterday, the government-initiated communication with the European Commission and other member states for these migrants to be relocated permanently."*⁵ On 30 April, Marine Traffic, a popular vessel tracking website, said the Europa II's tracker is *"out of*

¹ Kurt Sansone 'Rescued migrants to be kept on Captain Morgan vessel outside territorial waters' (Malta Today, 30 April 2020), available at: https://www.maltatoday.com.mt/news/national/102051/rescued_migrants_to_be_kept_on_captain_morgan_vessel_outside_territorial_waters#.XsQGLGgzblW

² Ivan Martin '62 migrants adrift in Malta's search and rescue zone, NGO says' (Times of Malta, 29 April 2020), available at: <https://timesofmalta.com/articles/view/62-migrants-adrift-in-maltas-search-and-rescue-zone-ngo-says.788720>.

³ Ivan Martin 'Private fishing vessel heading for stranded migrants' (Times of Malta, 29 April 2020), available at: <https://timesofmalta.com/articles/view/private-fishing-vessel-on-route-to-stranded-migrants.788738>

⁴ Kurt Sansone 'Rescued migrants to be kept on Captain Morgan vessel outside territorial waters' (Malta Today, 30 April 2020), available at: https://www.maltatoday.com.mt/news/national/102051/rescued_migrants_to_be_kept_on_captain_morgan_vessel_outside_territorial_waters#.XsQGLGgzblW

⁵ Kurt Sansone 'Rescued migrants to be kept on Captain Morgan vessel outside territorial waters' (Malta Today, 30 April 2020), available at: https://www.maltatoday.com.mt/news/national/102051/rescued_migrants_to_be_kept_on_captain_morgan_vessel_outside_territorial_waters#.XsQGLGgzblW

range” since its AIS (automatic identification system) remained switched off. ⁶The Europa II, a Captain Morgan ship onto which the migrants were to be transferred is normally used for coastal cruising. (Passenger License: 445 Passengers / L.O.A.: 34.73m / Engine: VM Diesels, 373kW x2 / Gross Tonnage: 209; Pleasure Craft and it's sailing under the flag of [MT] Malta.)

6. On 1 May (Friday), local news outlets reported that the Maltese government sent a letter to the European Commission, urgently demanding a more ‘predictable and mandatory’ relocation mechanism to be agreed upon in the upcoming EU migration pact. Malta claimed that a total of 128 pledges by Member States (122 of which were made in 2019) to relocate migrants rescued by Malta have yet to materialise.⁷
7. Prime Minister Robert Abela said that the Search and Rescue Convention which Malta is a signatory to clearly states that a country's obligation is to coordinate the rescue of people in distress, which Malta fully complied with. *“We know our obligations and have always abided by them, but we will remain firm in saying that our ports are not safe for the disembarkation of rescued people and that we cannot guarantee the resources for such rescues”*, PM Abela said.⁸
8. On 2 May, local news outlets established that *“The Maltese government is holding what have been described as “intensive discussions” with the European Commission, in a bid to resolve the distribution of 57 migrants rescued at sea.... “there is still no solution in sight,” said a government source”*.⁹
9. News outlet Malta Today also reported that *“all those aboard have been provided with the basic needs. The Red Cross has provided necessary medical check-ups... “the vessel is outside Malta’s territorial waters, and will stay there until a European solution is found,” the source said’*.¹⁰ UNHCR called for greater coordination, solidarity and responsibility-sharing, in view of the increased movements of refugees and migrants in the Mediterranean Sea and despite the COVID-19 pandemic. In all cases, it called for a safe port for disembarkation to be provided without delay, together with a prompt agreement on how to share responsibility amongst States for hosting people. UNHCR reiterated its position that no one should be returned to Libya after being rescued at sea, due to the ongoing conflict in Libya, as well as the routine detention of disembarked migrants and asylum-seekers.¹¹

⁶ Times of Malta ‘All migrants ‘safely aboard’ Captain Morgan boat, as Malta digs in’ (Times of Malta, 1 May 2020), available at: <https://timesofmalta.com/articles/view/all-migrants-safely-aboard-captain-morgan-boat-as-malta-digs-in.789470>

⁷ Jacob Borg ‘128 migrant relocation pledges yet to materialise’, Malta tells EU in letter’ (Times of Malta, 1 May 2020), available at: <https://timesofmalta.com/articles/view/128-migrant-relocation-pledges-yet-to-materialise-malta-tells-eu-in.789302>

⁸ Albert Galea ‘Using private assets for migrant rescues is not against international law – Prime Minister’ (The Malta Independent, 1 May 2020), available at: <https://www.independent.com.mt/articles/2020-05-01/local-news/Using-private-assets-for-migrant-rescues-is-not-against-international-law-Prime-Minister-6736222667>

⁹ Matthew Vella ‘Still no solution from EU’ Malta says of talks with Brussels on migrant stand-off’ (Malta Today 2 May 2020), available at: https://www.maltatoday.com.mt/news/national/102080/still_no_solution_from_eu_malta_says_of_talks_with_brussels_on_migrant_standoff#.XsQSp2gzBIU

¹⁰ Matthew Vella ‘Still no solution from EU’ Malta says of talks with Brussels on migrant stand-off’ (Malta Today 2 May 2020), available at: https://www.maltatoday.com.mt/news/national/102080/still_no_solution_from_eu_malta_says_of_talks_with_brussels_on_migrant_standoff#.XsQSp2gzBIU

¹¹ Matthew Agius ‘UNHCR calls for sharing of responsibility for migrants as Malta standoff continues’ (Malta today, 2 May 2020), available at: https://www.maltatoday.com.mt/news/national/102069/unhcr_calls_for_sharing_of_responsibility_for_migrants_as_malta_standoff_continues#.XsQUBWgzBIW

10. On 3 May, the Times of Malta reported that the Government's stance remained that Europe II was going to stay moored out at sea, 13 nautical miles off Malta until an acceptable agreement is reached with other Member States. Government sources told the Times of Malta that *"in the past, there were occasions where other European states offered to shoulder part of the burden by accepting some of the migrants arriving at our shores. But after that, the same thing happens again and we have to beg someone to help us. We need to stop begging and a proper mechanism is needed"*.¹²
11. On 4 May, the Times of Malta reported that a spokesperson for the EU's executive told the news outlet that the European Commission was ready to coordinate relocation efforts for migrants held on the Europe II only after a disembarkation has taken place. The Commission spokesperson said that finding a place of disembarkation for the migrants on the tourist boat was outside of its remit. Malta, however, continued to refuse bringing the migrants ashore.¹³
12. PM Abela stated that Malta would not allow the migrants to disembark before an agreement is reached within the EU.¹⁴ According to him, the European Commission's proposal for Malta to let the migrants disembark was unacceptable and added that *"we know what happens; they will be allowed in, and no solution will be found."*¹⁵ The Prime Minister stressed that the fact that *"these migrants are on a private vessel is another piece of proof of how the Maltese government always followed its obligations of coordinating rescue"*.¹⁶ He categorically denied any indication or implication that the Maltese government had failed to honour its obligation to save lives or suspend or hinder rescue coordination¹⁷.
13. On the same day, cameraman Charles Ahar and journalist Liam Carter approached the boat for an exclusive report for TVM (a local TV station). They reported that the atmosphere was calm and that *"although facing uncertainty, the immigrants appeared in good health and were overjoyed when they saw the television camera."*¹⁸
14. On 7 May, Malta was involved in two further rescue operations that saved 123 persons in distress within the country's SAR zone. In the first instance, the army's P52 patrol boat rescued 45 people (including 39 men, 3 women, one of whom was pregnant and 3 children, two of

¹² Matthew Xuereb 'Captain Morgan ship out at sea until solution for migrants found' (Times of Malta, 3 May 2020), available at: <https://timesofmalta.com/articles/view/captain-morgan-ship-out-at-sea-until-solution-for-migrants-is-found.789164>

¹³ Jacob Borg 'Commission 'ready to coordinate migrant relocation' after disembarkation' (Times of Malta, 4 May 2020), available at: <https://timesofmalta.com/articles/view/commission-ready-to-coordinate-migrant-relocation-after-disembarkation.785471>

¹⁴ Massimo Costa 'Malta PM: ports shut to migrants until EU agrees relocation' (Malta Today, 4 May 2020), available at: https://www.maltatoday.com.mt/news/national/102124/robert_abela_testifying_in_migrant_magisterial_inquiry#.XsQZLWgzbiU

¹⁵ Albert Galea 'Watch: Migrants stranded on private ferry to remain there until European solution is found – PM' (The Independent, 4 May 2020), available at: <https://www.independent.com.mt/articles/2020-05-04/local-news/PM-testifies-in-court-case-filed-by-Repubblika-6736222745>

¹⁶ Albert Galea 'Watch: Migrants stranded on private ferry to remain there until European solution is found – PM' (The Independent, 4 May 2020), available at: <https://www.independent.com.mt/articles/2020-05-04/local-news/PM-testifies-in-court-case-filed-by-Repubblika-6736222745>

¹⁷ Albert Galea 'Watch: Migrants stranded on private ferry to remain there until European solution is found – PM' (The Independent, 4 May 2020), available at: <https://www.independent.com.mt/articles/2020-05-04/local-news/PM-testifies-in-court-case-filed-by-Repubblika-6736222745>

¹⁸ TVM 'EXCLUSIVE FOOTAGE: Play football at sea, waiting to know their destiny' (TVM, 4 May 2020), available at: <https://www.tvm.com.mt/en/news/exclusive-footage-played-football-at-sea-waiting-to-know-their-destiny/>

whom were aged 18 months and 2 years) from a dinghy. In the second instance, the rescue was carried out by a private fishing vessel which was directed by the AFM to the site of another migrant boat in distress. The fishing boat picked up 78 migrants (including 68 men, 5 women, one of whom was pregnant, and 5 children).¹⁹

15. Government sources said an exception for humanitarian reasons was made to bring ashore the women and children (each accompanied by an adult).²⁰ However, the remaining 105 people were transferred onto a second Captain Morgan vessel, the Bahari. The Bahari set off shortly after 4 pm from Sliema, Malta on the same day in order to take the migrants aboard and then anchored just outside Maltese territorial waters, similarly to the Europe II which was still situated 13 nautical miles off the coast on Hurd's Bank.²¹ The Malta Independent reported that there are 57 migrants on board the Europa II and 105 on board the Bahari.²² The Malta Independent reported that 'the government is calling on the EU to help relocate the rescued migrants. So far, only Portugal has replied, offering to take 6 migrants'.²³
16. On 8 May, the UN High Commissioner for Human Rights stated that the rescued migrants being held on board ships outside territorial waters must be "urgently disembarked". *"We call for restrictions on the work of rescuers to be lifted immediately. Such measures are clearly putting lives at risk. ...We are also aware of claims that distress calls to relevant Maritime Rescue Coordination centres have gone unanswered or been ignored, which, if true, seriously calls into question the commitments of the states concerned to saving lives and respecting human rights,"* the UN added.²⁴
17. The EU Commission said that for Malta to qualify for funds to maintain the rescue operation being carried out by the vessel Captain Morgan and others, it has to observe all the legal conditions. TVM was informed that while Malta's request was being treated with urgency, the fact that the ships were outside Malta's territorial waters was an indication that Malta was not eligible for funds because international waters do not fall under European jurisdiction. It was

¹⁹ Neil Camilleri 'Government charters second Captain Morgan vessel as another 123 migrants are rescued' (The Malta Independent, 7 May 2020), available at: <https://www.independent.com.mt/articles/2020-05-07/local-news/Government-charters-second-Captain-Morgan-vessel-as-another-123-migrants-are-saved-6736222883>

²⁰ Neil Camilleri 'Government charters second Captain Morgan vessel as another 123 migrants are rescued' (The Malta Independent, 7 May 2020), available at: <https://www.independent.com.mt/articles/2020-05-07/local-news/Government-charters-second-Captain-Morgan-vessel-as-another-123-migrants-are-saved-6736222883>; Julian Bonnici 'Malta places 100 more migrants on captain Morgan Vessel but takes in pregnant Woman and Children' (LovinMalta, 7 May 2020), available at: <https://lovinmalta.com/news/malta-places-100-more-migrants-on-captain-morgan-vessel-but-takes-in-pregnant-woman-and-children/>

²¹ Neil Camilleri 'Government charters second Captain Morgan vessel as another 123 migrants are rescued' (The Malta Independent, 7 May 2020), available at: <https://www.independent.com.mt/articles/2020-05-07/local-news/Government-charters-second-Captain-Morgan-vessel-as-another-123-migrants-are-saved-6736222883>; Matthew Xuereb 'Second Captain Morgan ship leaves Sliema to house 120 rescued migrants' (Times of Malta, 7 May 2020); Kurt Sansone 'Malta rescues 123 migrants, to be transferred to second Captain Morgan vessel' (Malta today, 7 May 2020), available at: https://www.maltatoday.com.mt/news/national/102194/malta_rescues_123_migrants_to_be_transferred_to_second_captain_morgan_vessel#.XsQd32gzblW

²² Neil Camilleri 'Government charters second Captain Morgan vessel as another 123 migrants are rescued' (The Malta Independent, 7 May 2020), available at: <https://www.independent.com.mt/articles/2020-05-07/local-news/Government-charters-second-Captain-Morgan-vessel-as-another-123-migrants-are-saved-6736222883>

²³ Neil Camilleri 'Government charters second Captain Morgan vessel as another 123 migrants are rescued' (The Malta Independent, 7 May 2020), available at: <https://www.independent.com.mt/articles/2020-05-07/local-news/Government-charters-second-Captain-Morgan-vessel-as-another-123-migrants-are-saved-6736222883>

²⁴ Kurt Sansone 'UN human rights commissioner calls for disembarkation of migrants held on ships' (Malta Today, 8 May 2020), available at: https://www.maltatoday.com.mt/news/national/102216/un_human_rights_commissioner_calls_for_disembarkation_of_migrants_held_on_ships#.XsQhrmgzblW

said that the EU Commissioner for Internal Affairs, Ylva Johansson, last Wednesday spoke with Minister for Internal Affairs, Byron Camilleri, and their discussion remained ongoing to find a solution.²⁵

18. On 9 May, the Times of Malta reported that A European Commission spokesperson told Times of Malta that it was examining the funding request made by Malta, however, it was not mentioned exactly how much funding Malta had requested. *“A government spokesperson told Times of Malta, however, that it would “continue to insist that this initiative will be funded by the European Union. “Malta, the smallest member state, is facing disproportionate pressures and has enormous challenges related to the protection of the EU’s southern borders, which it is dealing with. Therefore, it will continue to reiterate the importance of EU solidarity...”*²⁶
19. On 10 May (Sunday), a government spokesperson told Malta Independent that Captain Morgan had been chosen to provide the two vessels because this was the company that offered the cheapest price. The Office of the Prime Minister said that it would be publishing the costs at the end of the operation and the government would keep on insisting that these costs should be covered by the European Union.²⁷
20. On the same day, Public Health Superintendent Professor Charmaine Gauci stated that swab tests were being carried out among the migrants aboard the Captain Morgan vessels, as well as on the vulnerable migrants who were brought ashore on 7 May. Professor Gauci said the authorities want to provide the necessary treatment for everyone, tests were being examined at the Mater Dei laboratory enabling authorities to ensure the virus was not present on the vessels or among those brought to Malta.²⁸
21. On 11 May, Malta Today reported that Malta had received a request from the European Commission for details of the 162 rescued migrants kept on two ships just outside territorial waters. The information requested include the migrants’ names, date of births, their country of origin, their language and whether they have relatives in Europe.²⁹
22. On 11 May, Commissioner Mijatov wrote a letter to the Maltese authorities, stressing that *“prompt disembarkation in a place of safety is an integral part of states’ search and rescue obligations.”* She called upon the Maltese government to ensure that that *“no action is taken by Malta that would result in the return to and disembarkation in Libya of persons rescued or intercepted at sea”*. Further, she urged Malta *“to ensure that the human rights of persons rescued at sea are never put at risk because of current disagreements between member states*

²⁵ Nigel Mifsud ‘Doubts about whether vessels with boarded immigrations in international waters qualify for funds’ (TVM, 8 May 2020), available at: <https://www.tvn.com.mt/en/news/dubji-kemm-malta-tista-doubts-about-whether-vessels-with-boarded-immigrants-in-international-waters-qualify-for-funds-fondi-ghal-vapuri-biex-izommu-immigranti-fibhra-internazzionali/>.

²⁶ Bertrand Borg ‘Malta’s offshore migration solution faces EU funding clash’ (Times of Malta, 9 May 2020), available at: <https://timesofmalta.com/articles/view/maltas-offshore-migration-solution-faces-eu-funding-clash.790976>.

²⁷ Neil Camilleri ‘Migration – Captain Morgan: Government says it went for cheapest option, will publish costs’ (the Malta Independent, 10 May 2020), available at: <https://www.independent.com.mt/articles/2020-05-10/local-news/Migration-Captain-Morgan-Government-says-it-went-for-cheapest-option-will-publish-costs-6736222960>

²⁸ TVM ‘Covid-19 tests on migrants aboard Captain Morgan vessel’ (TVM, 10 May 2020), available at: <https://www.tvn.com.mt/en/news/covid-19-tests-on-migrants-aboard-captain-morgan-vessel/>

²⁹ Kurt Sansone ‘European Commission asks Malta for details of migrants held on ships’ (Malta today, 11 May 2020), available at: <https://www.maltatoday.com.mt/news/national/102273/european-commission-asks-malta-for-details-of-migrants-held-on-ships#.XsQiV2gzbIX>

*about disembarkation, and that humanitarian considerations always take priority.*³⁰ PM Robert Abela divulged the information in parliament that each Captain Morgan vessel chartered by the government to accommodate migrants rescued by the AFM was costing around €3,000 per day.³¹

23. On 16 May, Malta Today reported that *“representatives of three NGOs have written a joint letter to EU Commissioner for Home Affairs Ylva Johansson, urging the EU to intervene with the Maltese authorities and find a swift solution to the ongoing detention of 167 rescued migrants who are being held offshore on Captain Morgan boats”*.³²
24. On the night of 14 May, a third Captain Morgan ship, the Atlantis, sailed out beyond Malta’s territorial waters and has been alongside Bahari. According to Times of Malta, the Atlantis was sent to replace Bahari at its current position (13 nautical miles east of Valletta).³³
25. Bahari was expected to dock in Sliema on 15 May.³⁴
26. On 19 May Alarmphone reported on their social media accounts that the migrants being detained aboard one of two tourist cruise vessels at sea started a hunger strike. They reported that *“desperate migrants had recently made contact with them, detailing attempts of suicide and hunger strikes” The prisoners say ‘anxiety, hopelessness and depression increased’ & that there is no sufficient health care & food. They have asked us to raise their suffering in public: ‘We are now in a deplorable situation’. We call on Malta to immediately end this inhumane imprisonment!*³⁵
27. On 21 May UNHCR and IOM issued a statement urging European states to disembark the migrants, *“it is unacceptable to leave people at sea longer than necessary, especially under difficult and unsuitable conditions.”*³⁶

C. Human rights violations

³⁰ TVM *“Malta is fulfilling its obligations according to the Search & Rescue convention – PM”* (TVM, 11 May 2020), available at: <https://www.tv.com.mt/en/news/malta-is-fulfilling-its-obligations-according-to-the-search-rescue-convention-pm/>

³¹ Keith Micallef *‘3,000 a day for Captain Morgan vessels to house migrants offshore’* (Times of Malta, 11 May 2020), available at: <https://timesofmalta.com/articles/view/captain-morgan-vessels-housing-migrants-costing-3000-each-daily.791378>; John Paul Cordina *‘Captain Morgan paid 3,000/day for boat hosting asylum seekers’* (Newsbook, 11 May 2020), available at: <https://newsbook.com.mt/en/captain-morgan-paid-e3000-day-for-boat-hosting-asylum-seekers/>

³² Matthew Agius *‘NGOs write to EU Commissioner for intervention on Captain Morgan migrants’* (Malta today, 16 May 2020), available at: <https://www.maltatoday.com.mt/news/national/102378/ngos-write-to-eu-commissioner-for-intervention-on-captain-morgan-migrants?fbclid=IwAR2lFfanKhHaoujHUnObcFQMDk8FIUftxmf28DApmXwBIXGNw9tB0bXxAHw#.XsQmdGgzblV>.

³³ Amy Borg *‘Another Captain Morgan ship, the Atlantis, chartered to host more migrants’* (Newsbook, 15 May 2020) available at: <https://newsbook.com.mt/en/another-captain-morgan-ship-the-atlantis-chartered-to-host-more-migrants/>;

³⁴ Karl Azzopardi *‘Captain Morgan’s Atlantis replaces Bahari in housing migrants outside territorial waters’* (Malta today, 15 May 2020), available at: <https://www.maltatoday.com.mt/news/national/102360/captain-morgans-atlantis-replaces-bahari-in-housing-migrants-outside-territorial-waters#.XsQIL2gzblU>

³⁵ *Vide* Times of Malta *‘Migrants aboard Captain Morgan boat are on hunger strike – NGO’* (Times of Malta, 19 May 2020), available at: https://timesofmalta.com/articles/view/migrants-aboard-captain-morgan-boat-are-on-hunger-strike-ngo.793082?fbclid=IwAR2b2SzRB1uiaEUT63god_2sjwMZfrHyYKcEk5MpHJXKIuE2Vi3tPDiUeWA

³⁶ <https://www.unhcr.org/news/press/2020/5/5ec664284/unhcr-iom-urge-european-states-disembark-rescued-migrants-refugees-board.html>

A note on jurisdiction

The above-listed facts and circumstances leave no doubt that Malta is exercising full control and authority over the individuals being held on board the vessels. It is clear that the migrants and the entire situation falls within Malta's extraterritorial jurisdiction, thereby triggering its human rights obligations.

The Human Rights Committee has recognised the extra-territorial application of the ICCPR in various occasions:

“States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.

As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.

*This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation”.*³⁷

Legal considerations on rights violations

a) Right to be free from torture or to cruel, inhuman or degrading treatment or punishment

The migrants aboard the two Captain Morgan vessels are de facto detained and are under full and exclusive control of the Maltese authorities.

³⁷ Human Rights Committee, General Comment No. 31 [80], CCPR/C/21/Rev.1.1326 May 2004

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhb31WiQPl2mLFDe6ZSwMMvmQGVHA%3D%3D>; vide HRC 29 July 1981, *Celiberti de Caserigo v Uruguay*, no. 56/1979, para. 10; and HRC 29 July 1981, *Lopez Burgos v Uruguay*, no. 52/1979, para. 12. 82 Ibid. 83 Ibid. 84 *Celiberti de Caserigo v Uruguay*, para. 10 Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, para. 10 (“States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party”). With regard to the issue of state control over an area outside national territory, see also, inter alia, Human Rights Committee, Concluding observations on Israel, CCPR/C/ISR/CO/3, para. 5; Committee against Torture, Concluding observations on Israel, CAT/C/ISR/CO/4, para. 11; European Court of Human Rights, *Al-Skeini and others v United Kingdom*, Application No. 55721/07, paras 139 and 149; European Court of Human Rights, *Ivantoc and others v Moldova and Russia*, Application No. 23687/05, paras 116 to 120; European Court of Human Rights, *Ilaşcu and others v Russia and Moldova*, Application No. 48787/99, paras 314 to 316; European Court of Human Rights, *Cyprus v Turkey*, Application No. 25781/94, para. 77; European Court of Human Rights, *Loizidou v Turkey (Merits)*, Application No. 15318/89, para. 52.

Material detention conditions on board can be considered as inhuman or degrading treatment for numerous reasons. Migrants have been kept on the vessels for more than 20 days, not to mention the days they spent on a dinghy before being rescued.

The two vessels are cruise ferries usually used to carry passengers for several hours for harbour cruises and parties, and not to host people for days. The said vessels are neither equipped with suitable means for sleeping nor with suitable sanitary equipment or washing facilities. Furthermore, such vessels are cruise ships not meant to rescue people at sea and are therefore not equipped with health care equipment.

To our knowledge, no proper identification of vulnerable and/or unaccompanied minors was conducted after rescue to cater for the needs of the most vulnerable. We are also unaware of the procedures in place to ensure regular provision of food, water and other essential items.

We were also informed that some migrants developed skin disease due to the time at sea and that no appropriate health care is available for them.

The above-mentioned inadequate material conditions are leading to the deterioration of their mental health. Migrants are being kept on board without being given any information on their situation and on whether they will be disembarked in Europe, returned to Libya or returned to their countries of origin. They are also not given the right to communicate with anyone. We are informed that this unbearable situation led to anxiety, hopelessness and depression among the group and that several migrants attempted to commit suicide on board. We are also informed that some of them started a hunger strike to protest against this de facto detention³⁸.

In line with jurisprudence from other human rights bodies, the Human Rights Committee clearly specified that *“the prohibition in Article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim”*³⁹. Mental distress is clearly recognised by the HRC as an equally valid form of suffering as physical pain.

This on-going de facto detention is clearly reaching the level of severity necessary for considering the situation as inhumane treatment in terms of Article 7. We submit that the cumulative effect of so many factors amounts to a violation of Article 7 ICCPR: the duration of time that the migrants have been detained out at sea, the indefinite and arbitrary nature of their detention, the inadequate material living conditions, the failure to attend any special needs, the uncertainty as to their future, the unsuitability of the vessels to accommodate persons for more than a couple of hours. For example, in *Deidrick v. Jamaica*⁴⁰, the HRC decided that the fact that the prisoner was locked-up in his cell for 23 hours a day, with no mattress, no artificial light, no integral sanitation, inadequate medical services, deplorable food and no recreational facilities reached the threshold to be considered a violation of Article 7.

³⁸ Alarmphone

³⁹ Human Rights Committee, General Comments, No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6621&Lang=en

⁴⁰ *Deidrick v. Jamaica*, Communication No. 619/1995, U.N. Doc. CCPR/C/62/D/619/1995 (4 June 1998), available at: <http://hrlibrary.umn.edu/undocs/session62/view619.htm>.

We also note that the Human Rights Committee clearly stated that Article 7 allows for no limitations even in situation of public emergency⁴¹. No exceptions to the prohibition on torture and cruel, inhuman or degrading treatment and punishment are permitted. The current pandemic due to Covid-19 and the measures taken by the Maltese authorities to tackle it cannot be used to justify any violations of Article 7.

b) Right to liberty and security of the person

The migrants are being held on private vessels, and it looks like the intended duration of their detention or – as a minimum – the current forecast – is that this could be for an indefinite period. We submit that the migrants are deprived of their personal liberty, as a consequence of their arrest and de facto detention.

Whilst it is clear that the migrants are being held aboard private vessels, it is also clear that these vessels have been chartered by the Maltese Government and that they are presently under the authority and control of the Government. This is clear from the facts, as explained above. The Human Rights Committee has made it clear that, “*when private individuals or entities are empowered or authorised by a State party to exercise powers of arrest or detention, the state party remains responsible for adherence and ensuring adherence to Article 9.*”⁴²

The reason for such detention in law is unclear, if at all existent. We are unable to access the detained migrants so are unable to comment as to whether they have been provided with any information as to their detention and the reasons for it in fact and in law. The only reason for the detention, as evidenced through public statements made by the Prime Minister, appears to be for the purpose of applying political pressure on the EU to provide greater assistance to the State. The Human Rights Committee has made clear that “[a]rrest or detention that lacks any legal basis is...arbitrary”.⁴³ We therefore submit that the migrants are being held arbitrarily on these two vessels.

We underline that the notion of ‘arbitrariness’ also includes elements of “*inappropriateness, injustice, lack of predictability and due process of law*”.⁴⁴ Regrettably, the migrants are currently detained on

⁴¹ Human Rights Committee, General Comments, No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6621&Lang=en

⁴² Human Rights Committee, General Comment No. 35 ‘Article 9 (Liberty and security of person), CCPR/C/GC/35 16 December 2014 <https://www.nichibenren.or.jp/library/ja/kokusai/humanrights_library/treaty/data/HRC_GC_35e.pdf>.

⁴³ Human Rights Committee, General Comment No. 35 ‘Article 9 (Liberty and security of person), CCPR/C/GC/35 16 December 2014 <https://www.nichibenren.or.jp/library/ja/kokusai/humanrights_library/treaty/data/HRC_GC_35e.pdf>.

⁴⁴ Human Rights Committee, General Comment No. 35 ‘Article 9 (Liberty and security of person), CCPR/C/GC/35 16 December 2014 <https://www.nichibenren.or.jp/library/ja/kokusai/humanrights_library/treaty/data/HRC_GC_35e.pdf>; *vide* 1134/2002, Gorji-Dinka v. Cameroon, para. 5.1; 305/1988, Van Alphen v. Netherlands, para. 5.8; Human Rights Committee, Mukong v Cameroon, Communication No. 458/1991, para. 9.8. See also, inter alia, Human Rights Committee, Mikhail Marinich v Belarus, Communication No. 1502/2006, para. 10.4; Human Rights Committee, Fongum Gorji-Dinka v Cameroon, Communication No. 1134/2002, para. 5.1; Human Rights Committee, Jalloh v. The Netherlands, Communication No. 794/1988, para. 8.2; Human Rights Committee, Van Alphen v. The Netherlands, Communication No. 305/1988, para. 5.8. The Human Rights Committee further specified: “This means inter alia that remand in custody pursuant to arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime”, Human Rights Committee, Mikhail Marinich v Belarus, Communication No. 1502/2006, para. 10.4; see also, inter alia, Human Rights Committee, Kulov v Kirghizstan, Communication No. 1369/2005, para. 8.3. See also, inter alia, Inter-American Court of Human Rights, Gangaram Panday v Suriname, para. 47 (“[...] no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality”).

the private vessels without any legal justification, without any legal certainty, without predictability and without due process of the law. Furthermore, detention ought not “*last longer than absolutely necessary and...the overall length of possible detention is limited*”.⁴⁵ The detention of these two groups of migrants appears to have no time limitation and thus indefinite. As a result, again, the detention of such migrants cannot but be considered as arbitrary.

Various factors, such as being kept *incommunicado* and a lack of access to information, contribute to the reality that the migrants have no opportunity to demand reassessment,⁴⁶ re-evaluation⁴⁷ or access safeguards against unlawful and arbitrary detention. “*Deprivation of liberty without effective safeguards against unlawful and arbitrary detention cannot be considered as fulfilling the purpose of article 9 ICCPR*”.⁴⁸ Such safeguards permit Articles 9(3) and 9(4) ICCPR to function effectively.⁴⁹ Being unable to access such safeguards as a result of various circumstances, including being kept *incommunicado* means that, for instance, the migrants on such vessels are unable to utilize the principle

⁴⁵ Human Rights Committee, General Comment No. 35 ‘Article 9 (Liberty and security of person), CCPR/C/GC/35 16 December 2014 <https://www.nichibenren.or.jp/library/ja/kokusai/humanrights_library/treaty/data/HRC_GC_35e.pdf>

⁴⁶ 560/1993, A. v. Australia, paras. 9.3–9.4; 794/1998, Jalloh v. Netherlands, para. 8.2; 1557/2007, Nystrom v. Australia, paras. 7.2–7.3; ⁴⁶ Human Rights Committee, General Comment No. 35 ‘Article 9 (Liberty and security of person), CCPR/C/GC/35 16 December 2014

<https://www.nichibenren.or.jp/library/ja/kokusai/humanrights_library/treaty/data/HRC_GC_35e.pdf>.

⁴⁷ 6 1324/2004, Shafiq v. Australia, para. 7.2; ⁴⁷ Human Rights Committee, General Comment No. 35 ‘Article 9 (Liberty and security of person), CCPR/C/GC/35 16 December 2014

<https://www.nichibenren.or.jp/library/ja/kokusai/humanrights_library/treaty/data/HRC_GC_35e.pdf>

⁴⁸ Amnesty International ‘The Human Rights Committee’s New General Comment on the Right to Liberty and Security of Person’ (Amnesty International, 20120

<<https://www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/AmnestyInternational.pdf>>

⁴⁹ Amnesty International ‘The Human Rights Committee’s New General Comment on the Right to Liberty and Security of Person’ (Amnesty International, 20120

<<https://www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/AmnestyInternational.pdf>> ; OHCHR ‘Liberty and security: Human Rights Committee clarifies limits on detention’ (OHCHR, 30 October 2014)

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15236&LangID=E>> *vide* ‘With regard to mechanisms similar to the ones detailed at article 9(3) and 9(4) ICCPR, the European Court of Human Rights has underlined the following: “It must also be stressed that the authors of the Convention reinforced the individual’s protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. The requirements of Article 5 §§ 3 and 4 with their emphasis on promptitude and judicial control assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention [...]. What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection. [...] The Court emphasises in this respect that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since”, European Court of Human Rights, Kurt v Turkey, Application No. 15/1997/799/1002, paras 123-124. See also, inter alia, European Court of Human Rights, Medvedyev and others v. France, Application No. 3394/03, 29 March 2010 (Grand Chamber), para. 118 (“The Court also notes the importance of the guarantees afforded by Article 5 § 3 to an arrested person. The purpose of this provision is to ensure that arrested persons are physically brought before a judicial officer promptly. Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment”); InterAmerican Court of Human Rights, Habeas corpus in emergency situations, Advisory Opinion OC-8/87, paras 35 and 36 (“In order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here habeas corpus performs a vital role in ensuring that a person’s life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment [...] This conclusion is buttressed by the realities that have been the experience of some of the peoples of this hemisphere in recent decades, particularly disappearances, torture and murder committed or tolerated by some governments”).

of habeas corpus enshrined in Article 9(4).⁵⁰ The existing deprivation of liberty is not only arbitrary but also violates the safeguards contained in Article 9(2) to 9(4) of the ICCPR.⁵¹

*“In this regard secret and/or incommunicado detention constitutes the most heinous violation of the norm protecting the right to liberty of human being under customary international law. The arbitrariness is inherent in these forms of deprivation of liberty as the individual is left outside the cloak of any legal protection.”*⁵²

The Human Rights Committee has also made it clear that “*elements of reasonableness, necessity and proportionality*” must be considered. Whilst we appreciate the challenges faced by Malta in coping with the arrival of asylum-seekers by sea during the Coronavirus outbreak, alternative and less invasive means of achieving the same ends ought to have been considered. Exposing migrants fleeing Libya to the conditions on such vessels impinges upon the migrants’ humanity and inherent dignity.

“...factors such as the influx of large numbers of immigrants regardless of their status, asylum-seekers, refugees and stateless persons cannot be used to justify the departure from these standards.”

*“Thus, a State can never claim that illegal, unjust, or unpredictable deprivation of liberty is necessary for the protection of a vital interest or proportionate to that end.”*⁵³

We cannot but conclude that the decision to keep migrants detained on private vessels, is unreasonable, unnecessary and disproportionate.

Moreover, the decision to detain the migrants upon such vessels does not appear to have taken into consideration relevant factors on an individual basis, nor to have taken into consideration the physical and mental health effects and vulnerabilities of the persons concerned.⁵⁴ While women and some children were permitted to disembark, we are unable to ascertain as to whether there are further vulnerable persons or unaccompanied minors present and whether any further assessment in regard to such have been carried out.

We also highlight that, as established by the Human Rights Committee, arbitrary deprivation of liberty is part of the peremptory norms of international law (*jus cogens*) and states can never invoke Article 4 ICCPR as a justification for this practice.⁵⁵ Hence, although Article 9 ICCPR is not explicitly listed in

⁵⁰ Human Rights Committee, General Comment No. 35 ‘Article 9 (Liberty and security of person), CCPR/C/GC/35 16 December 2014 <https://www.nichibenren.or.jp/library/ja/kokusai/humanrights_library/treaty/data/HRC_GC_35e.pdf>

⁵¹ Human Rights Committee, *Shams and others v Australia*, Communication No. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004, para. 7.3; Human Rights Committee, *Abbassi v Algeria*, Communication No.1172/2003, para. 8.3 (house arrest); Human Rights Committee, *Bakhtiyari*; Amnesty International ‘The Human Rights Committee’s New General Comment on the Right to Liberty and Security of Person’ (Amnesty International, 2012)

<<https://www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/AmnestyInternational.pdf>>

⁵² Human Rights Council, ‘Report of the Working Group on Arbitrary Detention’, 24 December 2012, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/189/35/PDF/G1218935.pdf?OpenElement>, para. 60.

⁵³ Human Rights Council, ‘Report of the Working Group on Arbitrary Detention’, 24 December 2012, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/189/35/PDF/G1218935.pdf?OpenElement>

⁵⁴ Human Rights Committee, General Comment No. 35 ‘Article 9 (Liberty and security of person), CCPR/C/GC/35 16 December 2014 <https://www.nichibenren.or.jp/library/ja/kokusai/humanrights_library/treaty/data/HRC_GC_35e.pdf>

⁵⁵ Human Rights Committee, General Comment 29, States of emergency (article 4), CCPR/C/21/Rev.1/Add.11, para. 11 (“States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence”); Human Rights Committee, General Comment 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of

article 4 (2) ICCPR, the absolute prohibition of arbitrary detention is non-derogable.⁵⁶ To this end, we also refer to the Working Group's assessment on "*the consensus that the prohibition of arbitrary deprivation of liberty is of a universally binding nature under customary international law.*"⁵⁷

c) Right to be treated with humanity and with respect for the inherent dignity of the human person

Living conditions aboard the vessels must be extremely challenging, as these are boats generally used for parties or for tours of Malta's coast. Such vessels are not equipped to host people for long periods of time. There is great concern as to: ever-deteriorating hygiene conditions, over crowdedness, exposure to weather conditions on the vessels, lack of communication with outside world, lack of ability to exercise and the exposure to uncertainty as to duration of such detention and uncertainty as to their futures. There is also great concern in regard to such migrant's ability to access appropriate medical assistance, adequate food and water, adequate information, adequate sleeping arrangements which are not cramped and/or exposed to the weather conditions, adequate clothing and concern regarding the personnel physically managing the vessels and the training of such personnel.

Detention conditions that have been considered by the Human Rights Committee⁵⁸ as violating article 10(1) have included: (1) lack of adequate bedding; (2) inadequate hygienic or sanitary conditions; (3) denial of exercise; (4) denial of medical treatment or inadequate medical attention; (6) denial of food, or inadequate quality and quantity of food.⁵⁹ Although each of these conditions taken individually may not be considered as a violation of article 10(1), the combination of two or more has been consistently considered a breach of article 10(1) ICCPR.⁶⁰

Taking into consideration all the above, we submit that the migrants are being subjected to an ongoing violation of article 10 ICCPR.

the Covenant, CCPR/C/21/Rev.1/Add.6, para. 8. See also, inter alia, Working Group on Arbitrary Detention, Liu Xia v China, Opinion No. 16/2011. para. 12; Working Group on Arbitrary Detention, Liu Xiaobo v China, Opinion No. 15/2011. para. 20. See also the ICRC's Customary International Humanitarian Law Database, Rule 99 (prohibition of arbitrary deprivation of liberty), accessible at www.icrc.org/customary-ihl/eng/docs/home.

⁵⁶ Amnesty International 'The Human Rights Committee's New General Comment on the Right to Liberty and Security of Person' (Amnesty International, 20120

<<https://www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/AmnestyInternational.pdf>>

⁵⁷ Human Rights Council, 'Report of the Working Group on Arbitrary Detention', 24 December 2012, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/189/35/PDF/G1218935.pdf?OpenElement>.

⁵⁸ HRC, General Comment No. 21, "Humane treatment of persons deprived of their liberty" (110 April 1992), §3, in UN Doc. HRI/GEN/1/Rev.7 < <https://www.refworld.org/docid/453883fb11.html>>; Article 10(1) ICCPR states: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Article 10 complements, for those who have been deprived of their liberty, the prohibition of torture and ill-treatment. Not only may detainees not be subjected to treatment contrary to Article 7, but they also have a positive right to be treated with respect. This provision means that detainees may not be "subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons."²² It therefore covers forms of treatment which would not be sufficiently severe to qualify as cruel, inhuman or degrading under Article 7.23; Association for the Prevention of Torture & Center for Justice and International Law 'Torture in International Law. A Guide to jurisprudence' (apt, CEJIL, 2008) < https://www.apt.ch/content/files_res/jurisprudenceguide.pdf>.

⁵⁹ Magdalena Sepulveda 'The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights' (Intersentia, 2003); *Vide* Christopher Brown, v. Jamaica, Communication No. 775/1997, views of 23 March 1999. Errol Smith and Oval Stewart v. Jamaica, communication No. 668/1995, views of 8 April 1999, and Lancy Gallimore v. Jamaica, Communication No 680/1996, views of 23 July 1999

⁶⁰ Magdalena Sepulveda 'The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights' (Intersentia, 2003).

While women and some children were permitted to disembark, we are unable to ascertain as to whether there are further vulnerable persons or unaccompanied minors present and whether any further assessment in regard to such have been carried out. We express greater concern that vulnerable person and/or unaccompanied minors may be currently exposed to such conditions.

We again acknowledge the strain migration presents upon Malta but as the Human Rights Committee has stated “*treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party.*”⁶¹

d) Right to an effective remedy

In General Comment No. 31⁶², the HRC underlines that the ICCPR Article 2 requires States to “*ensure that individuals also have accessible and effective remedies to vindicate those rights*”, and also to provide victims of violations with effective reparation that can involve restitution, rehabilitation and measures of satisfaction such as public apologies, guarantees of non-repetition and changes in laws and practices.

As highlighted in the facts above, the migrants aboard the two vessels are physically prevented from making any contact whatsoever with those means that would enable to seek redress for their current on-going situation. Whilst this is relevant, in particular, for their alleged violation of their right to liberty, we submit it is also relevant in the context of their overall situation. The fact that a violation is on-going does not deny this right of its significance and applicability, since every moment the migrants spend aboard the vessels exposes to continuous violations that they are unable to bring to an end and for which they are unable to obtain redress.

e) Right to seek and to enjoy asylum from persecution

The men aboard the vessels left their countries origin for various reasons, which reasons may include fear of persecution, violence, war or civil strife. In Libya, refugees are unable to secure protection for a number of reasons. Not only has Libya not ratified the 1951 Geneva Convention, but the State has not established a functioning asylum procedure to identify and protect refugees from return to their countries of origin. Furthermore, the security situation in Libya has – for years – led to the departure of thousands of Libyans and nationals, in an attempt to find safety elsewhere, including Malta.

Boat with refugees leaving Libya have been reaching Malta for around 20 years. Whilst the actual travel modalities have changed over the years, what has never changed is the fact that almost every person reaching Malta by boat has sought international protection here. Furthermore, a glance at Malta’s recognition rates⁶³ indicates a relatively high number of persons recognised as being in need of international protection. It is therefore arguable that persons reaching Malta by sea, having left from North Africa, are persons exercising their right to seek asylum in Malta.

⁶¹ HRC, General Comment No. 21, “Humane treatment of persons deprived of their liberty” (110 April 1992), §3, in UN Doc. HRI/GEN/1/Rev.7 < <https://www.refworld.org/docid/453883fb11.html>>.

⁶² HRC, General Comment No. 21, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, (29 March 2004), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsjYoiCfMKoiRv2FVaVzRkMjTnjRO%2bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWq%2fhW%2fTpKi2tPhZsbEJw%2fGeZRASjdFuuJQRnbJEaUhby31WiQPI2mLFDe6ZSwMMvmQGVHA%3d%3d>

⁶³ UNHCR Malta, <https://www.unhcr.org/mt/figures-at-a-glance>

The migrants aboard the two vessels are being held outside Malta's territorial waters, with limited or no contact with any national authority before which they can express their intention to seek asylum. Furthermore, as explained above, it is unlikely that the men have been informed of the possibility to apply for asylum at all as it is clear from Malta's actions and statements that it is intended for the men to be relocated to other EU Member States. We also submit that all the men must be considered by Malta as being asylum-seekers, in view of the above-made considerations. Holding them just outside national territory underlines the acknowledgement – and consequential fear – by Malta that the men will attempt to access the national asylum procedure and remain 'stuck' in Malta.

To date, over 3 weeks from their interception and detention, no steps have been taken by Malta to register or process the asylum claims of the men.

By denying access to territory to asylum-seekers, Malta is violating their fundamental right to seek and enjoy asylum in Malta.