HUMAN RIGHTS WATCH

Boat Ride to Detention

Adult and Child Migrants in Malta

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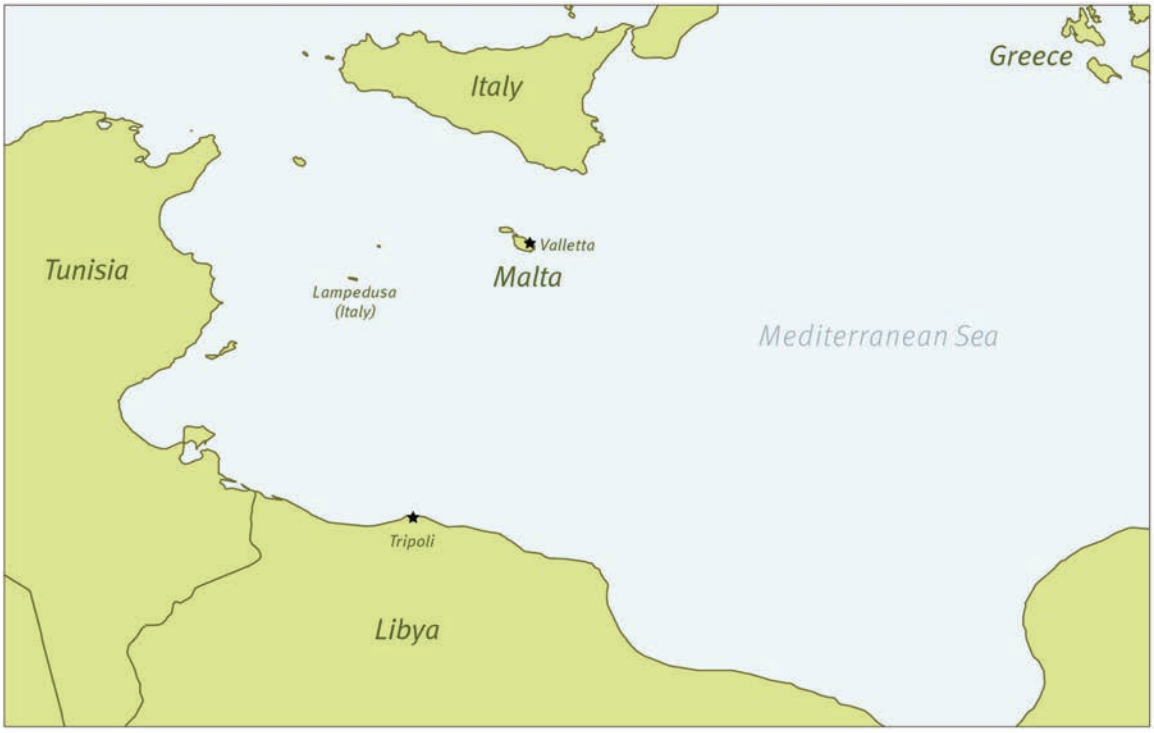
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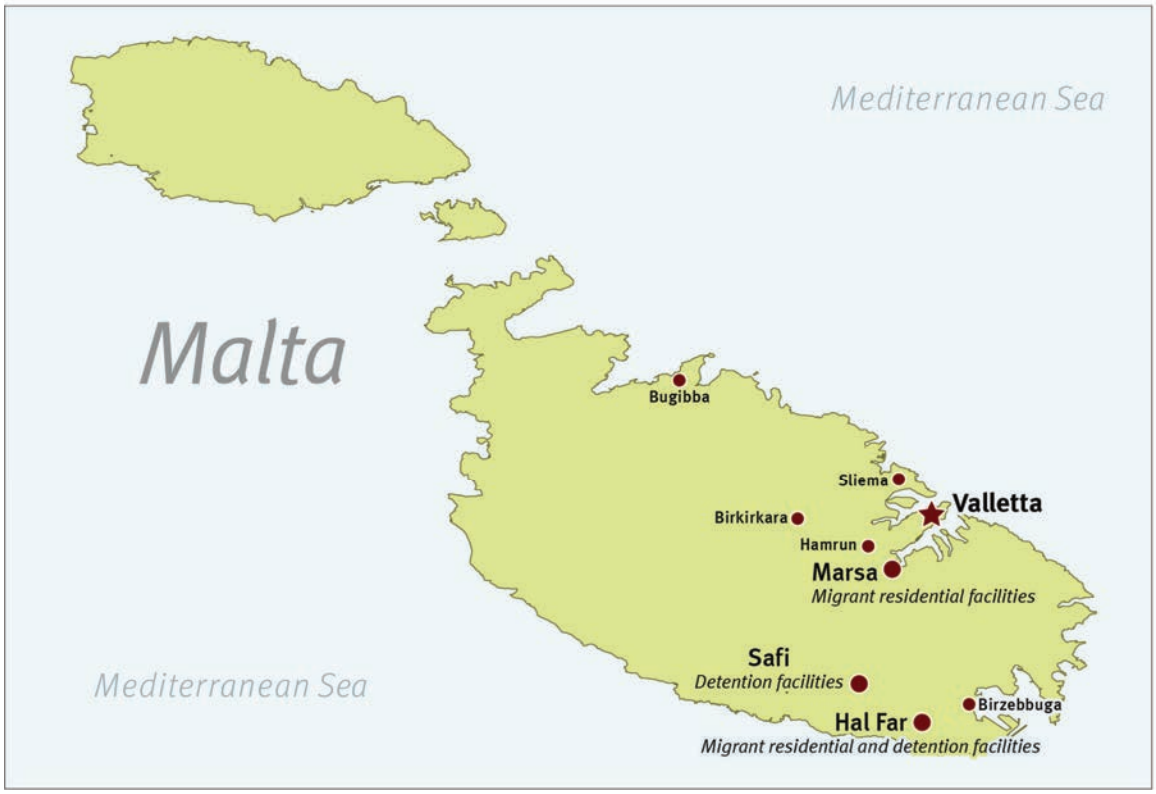
Mediterranean Sea
Malta
Bugibba
Sliema
Valletta
Birkirkara
Hamrun
Marsa
Migrant residential facilities
Safi
Detention facilities
Birzebbuga
Hal Far
Migrant residential and detention facilities
Mediterranean Sea

Summary

> I left Côte d'Ivoire at 16. My family was persecuted, there was violence and war. I went through Niger, Mali, and to Libya, in trucks. Then from Libya to Malta by boat…. For someone at 17 to be in detention, it's not normal. Seven months of detention, it's not normal.
>
> —Stéphane K., an unaccompanied migrant child in Malta, March 2012

> My expectation was that I would come here, apply for asylum and be safe. I didn't expect to be in detention for so long. In the end I don't understand what benefit this will bring to Malta … I don't see why we have to pass through detention before being granted freedom.
>
> —Berhane K., an Eritrean asylum-seeker in Malta, March 2012

Malta routinely detains an average of 1,500 people per year, including children, who arrive in the country by boat without permission, or "irregularly." These are migrants and asylum seekers, typically from Somalia, Eritrea, and other sub-Saharan African countries, who travel to Europe fleeing persecution or in search of a better life. Many have fled violence and conflict, and almost all have made an arduous journey, taking months to cross the Sahara and travel north through Libya. The last stage of that journey is a perilous, multi-day trip across the Mediterranean, typically in overcrowded vessels that are not seaworthy, and without enough food, water, or fuel, before they reach Maltese shores or are intercepted at sea by the Armed Forces of Malta.

Boat migrants arriving in Malta are taken straight to detention if they lack an entry visa (as they virtually all do). This report addresses their arbitrary, indiscriminate, and unfair detention. The report focuses on those who arrive in Malta by boat, as migrants who arrive in Malta by air for the most part are not detained, even if they enter under false pretenses or subsequently claim asylum. Asylum seekers who arrive by boat are detained for up to 12 months, and migrants who do not apply for asylum, or whose asylum claims are rejected, can be detained for up to 18 months. Under international law migrants who do not have permission to enter or stay in a country may be subject to detention, in certain circumstances, and also may be subject to safeguards. However in Malta, the detention

policy operates in an automated, indiscriminate, and blanket manner in violation of international law.

In the course of this virtually automated detention policy, Malta routinely detains unaccompanied migrant children whose age is in question. "Unaccompanied children" are migrants under the age of 18 (typically between 14 and 17) who travel without parents or caregivers. Migrants who claim to be unaccompanied children go through an age determination procedure, which relies on interviews and occasional medical testing to establish age. In 2007 and 2008, for example, around 400 children each year arrived in Malta claiming to be unaccompanied.[1] While they register for and undergo the age determination procedure, Malta keeps these children in detention.

Whereas most children who arrive with their families are quickly moved from detention facilities to open centers, unaccompanied migrant children are detained for longer periods. Malta detains even the most vulnerable migrants. Families with children, elderly people, and people with mental or physical disabilities, are taken to detention, though most are released before the 12 or 18 month time limit.

Unaccompanied migrant children are detained for the duration of their age determination procedure, which can take weeks or months. Among those we interviewed detained between 2008 and 2012 who Malta ultimately determined to be children, the average time in detention was 3.4 months, and the maximum time 7 months. Those who are found to be under 18 are then accommodated in group homes outside detention centers.

Malta applies a very low threshold for determining that an individual should enter the age determination process: anyone who is not "visibly" a child (an ad-hoc cut-off seemingly around 12 or 14 years of age) is detained. During detention, children live and sleep with adults, without any special accommodation for their young age and without access to education. A 15-year-old boy, who was detained with adults and visibly scared when

[1] European Migration Network (Maltese National Contact Point), "Unaccompanied Minors in Malta: Their Numbers and the Policies and Arrangements for their Reception, Return and Integration," Valetta, Malta, May 2009, http://www.mjha.gov.mt/MediaCenter/PDFs/1_EMN-Unaccompanied%20Minors%20Study%20FINAL%20VERSION%20(c).pdf (accessed July 6, 2012), p. 13 (relying on data from the government Agency for the Welfare of Asylum Seekers).

interviewed, said, "It's very difficult to live here at Safi [a detention facility]. I'm afraid to live where people might hit me … I don't have anyone to take care of me."[2]

While Malta justifies its prolonged detention of migrants as a legitimate response to irregular entry, the practice amounts to arbitrary detention prohibited by international law. Prolonged administrative custody, without the possibility of meaningful review, violates the prohibition on arbitrary detention in article 9 of the International Covenant on Civil and Political Rights, and the European Court of Human Rights has found Malta's detention policy to violate the European Convention's provisions on the right to liberty. Children enjoy particular protection under the law: in principle, migrant children should not be detained, and where they are detained it must be as a last resort for the shortest appropriate period of time.

Malta's detention facilities can become overcrowded and unsanitary, though they have improved in recent years. Nonetheless, prolonged detention takes a huge mental toll on migrants, and children especially may experience declining mental health. For example, Kelile T., who reported that he was 17 years old when he arrived in Malta in 2011, was detained for nine months before he was hospitalized for 15 days for mental health treatment, and then returned to detention. He described his experience in detention: "I take medicine now, for sleep. No medicine, I can't sleep … my mind is no good, it is very hard…. I can't, I can't … this is a hard place. I need a free place."[3]

Flawed Maltese and European Migration Policies

Malta's detention policy is part of flawed approaches to migration, both by Malta itself and by the European Union (EU). The central Mediterranean migration route—typically from Libya to Malta or Italy—is a major entrance point to the EU. Since 2002, approximately 15,000 migrants have reached Malta by this route, some intentionally, many by mistake as they stumble across the small island country while hoping to reach Italy. While the number of migrants arriving in Malta is low in absolute terms, Malta now has the highest number of asylum seekers relative to the national population of any country in the industrialized world. Malta, a country of only 400,000 people, received 20.1 asylum seekers per 1,000

[2] Human Rights Watch interview with Amr S., Safi, Malta, April 30, 2012.

[3] Human Rights Watch interview with Kelile T., Safi, Malta, March 3, 2012.

inhabitants in the years 2007-2011, whereas France, the EU member state receiving the largest number of asylum seekers in absolute terms in 2011, received about 3 per 1,000.

Although migrants have been traveling this migration route—in higher or lower numbers—for some ten years, neither Malta nor the EU has developed a sound policy that either respects migrants' human rights or that addresses the high burden placed on Malta. EU asylum rules mean that member states at EU borders sometimes are forced to assume responsibility for a vastly disproportionate share of migrants and asylum seekers. The Dublin II regulation, promulgated in 2003, mandates that an individual's asylum application must be processed in the country where the individual first entered the EU. This places an unfair burden on Malta, which must process these asylum applications in-country and which is obliged to accept the return of any asylum seekers whose first port of entry in the EU was Malta.

The EU has taken some steps towards mitigating this burden, for instance by relocating recognized refugees from Malta to other EU states and providing limited financial support. But these steps have been insufficient to assist Malta in meeting migrants' needs. The case of Malta, like that of Greece, shows the need to revise the Dublin II regulation to permit greater burden sharing in processing and hosting asylum seekers, rather than insisting on the country of first arrival as the primary factor in assessing member state responsibility.

Malta's arbitrary detention policy, in addition to violating international standards, does not work to deter migrants from landing on its shores. Migrants may not intend to travel to Malta, and indeed the boats in which they travel lack navigational equipment that would enable them to choose their destination. Some migrants Human Rights Watch spoke with said they did not even know that Malta existed as a country before they landed there.

Though Malta's burden is disproportionately large, detention is neither a legal nor a sound response to boat migration in the central Mediterranean. Both Malta and the EU should enact new policies to respond to their legal obligations to uphold migrants' rights.

- Malta should allow detention of migrants only in exceptional circumstances, with individualized determinations, and access to procedures to challenge detention.

- Malta should treat those who claim to be children as such pending the outcome of age determination proceedings, and release all those with pending claims from detention.
- The EU should reform the Dublin system by having the Dublin regulation take into account equitable burden-sharing among member countries.

Recommendations

To the Government of Malta

- Revise laws and policies pertaining to immigration detention, so that migrants are not detained simply because they have entered without permission.
  - » Allow for detention of asylum seekers only exceptionally;
  - » Give migrants access to a remedy whereby they can effectively challenge their detention, in line with standards laid out by the European Court of Human Rights, and ensure that these mechanisms are accessible for children and persons with disabilities;
  - » Issue official paperwork to start deportation only at the conclusion of due process proceedings to determine removability and after claims for protection or other claims against removal have been considered;
  - » Detain those with pending removal orders only where proceedings to that end are underway and are being pursued with due diligence.

- Bring policies on detention in line with standards articulated by the Council of Europe and the European Convention on Human Rights. Namely:
  - » Execute fully, effectively, and immediately the judgment of the European Court of Human Rights in Louled Massoud v. Malta, which found that detention of Khaled Louled Massoud was arbitrary and in violation of the European Convention;
  - » Give full effect to the Council of Europe Parliamentary Assembly Resolution 1707 (2010) "Detention of asylum seekers and irregular migrants in Europe," in particular by using alternatives to detention wherever possible.

- End the unnecessary detention of unaccompanied migrant children.
  - » Amend legislation to prohibit the immigration detention of migrant children (pending age determination) for the sole reason that they arrived irregularly;
  - » In the interim period while detention continues, use separate detention facilities for those with pending age determination requests;
  - » Change the legal framework of migrant detention so that children detained pending age determination may effectively challenge their detention without waiting for the conclusion of the age determination process.

To the Ministry of Home and Parliamentary Affairs

- Detain migrants, including asylum seekers, only in accordance with a procedure prescribed by law. Detention should occur only if, after a review of all alternatives, it is concluded that in the specific case there is no effective alternative.
  - » Explore the use of open centers as an effective alternative to detention; ensure that open centers are accessible to people with physical disabilities.
- Refrain from detaining potentially vulnerable migrants upon arrival in Malta. Ensure rapid identification and release of vulnerable migrants.
  - » Accelerate and improve process for identifying vulnerable people immediately upon arrival, and transfer them to open facilities rather than detention.
  - » Include screening for mental and physical disabilities as part of initial screening procedures for all migrants.
- Reform the age determination procedure to treat applicants who claim to be children as under age until proven otherwise.
  - » Release those with pending cases to alternate accommodation, such as an open living facility, until age determination is completed.
- Take all practical steps to reduce the time of age determination proceedings, including by:
  - » Supporting the Agency for the Welfare of Asylum Seekers (AWAS) with additional capacity during peak seasons; and
  - » Encouraging faster processing of medical testing.
- Provide for administrative or judicial appeal of age determination decisions.
- Provide unaccompanied children with free legal representation to challenge the legality of their detention (when they are detained) and to assist with asylum applications.

To the Malta Police, Immigration Section

- Refrain from detaining potentially vulnerable migrants upon arrival in Malta.
- Instruct arresting officers and all others with routine contact with migrants to heed migrants' claims that they are children, increase efforts to identify those who might be children, and refer both categories to age determination in a speedy time frame.

To the Detention Services

- Strengthen contingency plans to avert overcrowding and consequent deterioration of conditions during peak migration periods.
- Improve training of detention officers to enable them identify detainees exhibiting mental health problems, and improve available mental health services in detention, based on the principle of informed consent.
- Inform migrants of the availability and the process for the age determination procedure, including information on anticipated timing of the procedure and process for appeal.
- Until such time as children pending age determination are no longer detained as a matter of policy, instruct detention staff and all others with routine contact with migrants to heed migrants' claims that they are children, increase efforts to identify those who might be children, and refer both categories to age determination within a speedy time frame.
- Where children remain in detention pending age determination, provide separate accommodation from adults specifically designed to meet children's needs.

To the Agency for the Welfare of Asylum Seekers

- Further embrace best practices for age determination:
  - » Provisionally treat those claiming to be under 18 as children until age determination is completed.
  - » Refrain from using radiological examinations, in light of strong medical and ethical considerations discouraging their use. In the limited instances where medical tests are carried out, rely instead on non-intrusive and non-invasive examinations

including non-radiological methods of imaging bone density and dental observation; and anthropometric measuring.

  - » Speed up age determination, including by reducing time for medical testing.
  - » If doubts remain that the person is underage, grant the benefit of the doubt.
  - » Provide for administrative or judicial appeal of age determination decisions.

- Inform migrants of the availability of and steps for the age determination procedure, including instructions on the process for appeal.

- Ensure rapid identification and release of vulnerable migrants.
  - » Accelerate and improve process for identifying vulnerable people immediately upon arrival, and transfer them to open facilities rather than detention.
  - » Include more comprehensive screening process for mental and physical disabilities as part of initial screening procedures for all migrants.

To the Office of the Refugee Commissioner

- Provide unaccompanied children with free legal representation in all stages of asylum proceedings.

To the European Union

- Provide financial, material, and logistical assistance to Malta for the reception and processing of migrants and asylum seekers.
  - » Broaden intra-EU relocation of recognized refugees and other migrants with protection status from Malta.
  - » Permit greater family reunification in other parts of the EU of recognized refugees and other migrants with protection status in Malta, particularly with wider family relations for unaccompanied migrant children.
  - » After a lawful deportation order has been issued following due process and the exhaustion of legal remedies, and after voluntary repatriation has been offered, and, in the case of children, a best-interests-of-the-child determination has been made, assist Malta through the European Return Fund in facilitating voluntary and dignified return and reintegration of migrants who do not have a protection need and who can be safely returned to their home countries, for example, by providing

diplomatic assistance with countries of origin to procure travel documents, and financial and logistical assistance to carry out removals.

- Reform the Dublin system by having the Dublin regulation take into account equitable burden-sharing among member countries that genuinely have common asylum standards and procedures by, for example, consideration of joint EU processing within EU countries for specific caseloads.

- In assessing the state responsible for examining asylum claims, accord less weight than under the current Dublin regulation to the country of first arrival. Alternative considerations might go beyond the qualifying family relationships in the Dublin II regulation to include wider family relations (especially for unaccompanied migrant children), community ties, prior residence, language, job skills that might be in demand in one country over another, and personal preference of the applicant.

- Invest in programs in countries of origin in order to address the root causes that compel children to undertake dangerous journeys and educate them and their parents on the risks of those journeys.

Methodology

This report addresses the treatment of migrants, including unaccompanied children, in Malta, focusing on migrants who travel to Malta by boat and either arrive on shore themselves or are intercepted by the Armed Forces of Malta at sea and brought to Malta. It does not address migrants who enter Malta by plane, because they are not typically detained in the same manner or with the same degree of regularity as those who arrive by boat. In this report, the term "migrant" can refer to asylum seekers and people in need of international protection, as well as to economic migrants.

Research was carried out in Malta between February and May 2012. Eighty-eight migrants and asylum seekers between the ages of 10 and 67 were interviewed. Sixteen of the interviewees were female. Twenty-one migrants were, according to their accounts, unaccompanied children at the time of their entry into Malta. Eight were still children when we interviewed them, and the other thirteen were adults. Two reported entering Malta below the age of 16, and the rest were 16 or 17 years old when they entered the country.

Approximately 35 percent of our interviewees were from Somalia, 10 percent from Nigeria, 10 percent from Eritrea, 9 percent from Ethiopia, 9 percent from Ghana, and 9 percent from Ivory Coast. The rest were from Egypt and sub-Saharan African countries including Chad, Guinea, Mali, and Togo.

We conducted most interviews in English or French, and other interviews with the help of interpreters in a language in which the migrant was comfortable (such as Arabic and Somali). We interviewed migrants and asylum seekers in three separate detention facilities (Hermes Block, Safi Warehouse, and Safi B Block), in and around open centers, and in various locations around Malta. We explained to all interviewees the nature of our research and our intentions concerning the information gathered through our interviews, and we obtained verbal consent from each interviewee.

In Malta, Human Rights Watch researchers met a number of government officials concerned with migration, including the Refugee Commissioner, the Children's Commissioner, and officials with the Agency for the Welfare of Asylum Seekers, the Malta Police, the Detention Service, the Children and Young Persons Advisory Board, the Office of

the Children's Commissioner, and the Ministry of Justice and the Family. In addition, we met with representatives from the Maltese offices of the United Nations High Commissioner for Refugees, the European Asylum Support Office, and the International Organization of Migration, as well as staff members of nongovernmental organizations, and human rights lawyers and activists.

All names of migrants interviewed have been replaced by pseudonyms to protect their identity. In some cases we also withhold the migrant's country of origin, or precise details of the migrant's case, in order to avoid the possibility of identifying the individual. Likewise, many staff members of NGOs in Malta are not identified by name at their request.

In line with international instruments, the term "child" refers to a person under the age of 18.[4] For the purposes of this report, we use the term "unaccompanied child" to describe both unaccompanied and separated children as defined by the Committee on the Rights of the Child:

> "Unaccompanied children" are children, as defined in article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. "Separated children" are children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.[5]

In this report, Human Rights Watch does not assess whether the migrants we spoke to qualify for refugee status or other forms of protection. Some, perhaps many, undoubtedly do—and indeed, the Maltese government grants asylum or other forms of protection at relatively high rates compared to other EU border countries.[6] This report instead focuses

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[4] Convention on the Rights of the Child (CRC), adopted November 20, 1989, GA Res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989), entered into force September 2, 1990, ratified by Malta on September 30, 1990, art. 1.

[5] UN Committee on the Rights of the Child, "Treatment of Unaccompanied and Separated Children Outside their Country of Origin," General Comment NO. 6, UN Doc. CRC/GC/2005/6 (2005), paras. 7-8.

[6] Malta has a 58 percent rate of recognition for some form of protected status (though not necessarily asylum), considerably higher than the EU average of 25 percent. See European Commission (EUROSTAT), "Asylum Statistics," data from September 2011, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Asylum_statistics (accessed June 7, 2012).

on how the Maltese government fails to uphold migrants' human rights, regardless of whether or not those migrants have legitimate asylum claims or other protection needs, and how Malta's policies should be improved.

I. Migrants and Asylum Seekers in Malta

In the 10-year period from the beginning of 2002 to the end of 2011, 14,735 migrants traveled by boat to Malta, an average of 1,470 per year.[7] Of the migrants who arrived in Malta by boat in this period, 93 percent applied for asylum.[8] At the time of writing, 838 migrants had arrived so far in 2012.[9] Migrants typically traveled on boats leaving from Libya for Italy, many of which lacked adequate navigation systems and so arrived in Maltese waters instead.

The flow of migrants and asylum seekers to Malta during this 10-year period has not been consistent. Numbers peaked in 2008, with 2,775 migrants entering, and in 2011, 1,579 migrants entered by boat.[10] In 2010 the numbers of migrants entering Malta temporarily dropped. Concurrently, a joint agreement between Libya and Italy (to which Malta was not party) to interdict and forcibly return boat migrants on the high seas between the two countries was in operation.[11] The implementation of this agreement—in which Italian vessels towed migrant boats from international waters back to Libya without even a cursory screening for whether those on board were refugees or sick or injured, and through which the number of boats leaving from Libya was drastically curtailed[12] —may have contributed to the decrease in travel to Malta during that year. Boat migration to both Italy and Malta since resumed, in light of the Arab Spring in 2011 and the suspension of the Libyan-Italian agreement after the collapse of the Libyan regime.

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[7] 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.

[8] 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.

[9] Frontex Watch, "Malta, 2012 Landings," http://www.crimemalta.com/frontexwatch.htm (accessed July 7, 2012).

[10] 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.

[11] Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, September 2009, http://www.hrw.org/reports/2009/09/21/pushed-back-pushed-around-0, p. 4.

[12] Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, September 2009, http://www.hrw.org/reports/2009/09/21/pushed-back-pushed-around-0, p. 11.

Virtually all boat migrants who arrive in Maltese waters—an average of 1,470 per year—are detained upon arrival. Maltese law mandates that a person who enters the country without "right of entry" shall be designated a "prohibited immigrant" and may be detained.[13] Mandatory detention of a prohibited immigrant occurs under the Immigration Act with the issuance of a removal order, which, although not by law automatic, occurs, in practice, routinely at the time of apprehension.[14] The law says that after the removal order is issued, the prohibited immigrant "shall be detained in custody until he is removed from Malta." Additionally, as a matter of Maltese government policy, prohibited immigrants who apply for asylum will continue to be detained.[15]

Most boat migrants and asylum seekers during this period were from sub-Saharan Africa. The largest group of the migrants—approximately one third—came originally from Somalia, while the second largest group came from Eritrea.[16] Other significant countries of origin included Egypt, Ethiopia, Ghana, Côte d'Ivoire, Nigeria, and Sudan.[17]

Those claiming to be unaccompanied migrant children make up a significant portion of the migration flow to Malta. In 2007 and 2008, for example, around 400 migrants each year arrived in Malta claiming to be unaccompanied children.[18] The rate at which those migrants are found to be children after an age determination process varies: in 2007, 21 percent were found to be children and in 2008, the rate was 8 percent.[19]

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[13] Immigration Act to Restrict, Control and Regulate Immigration into Malta and to Make Provisions for Matters Ancillary Thereto, Cap 217 of the Laws of Malta, 1970, amended repeatedly until 2009, arts. 10(2), 14(2), and 16 ("Immigration Act")

[14] "In practice, upon being apprehended, a prohibited immigrant is issued with a removal order, in accordance with Article 14(2) of the Act." European Court of Human Rights, *Louled Massoud v. Malta*, judgment of 27 July 2010, Application no. 24340/08, http://www.unhcr.org/refworld/docid/4c6ba1232.html (accessed 12 May 2012), para. 15.

[15] "Irregular Immigrants, Refugees and Integration," Maltese government policy document of 2005, cited by the European Court of Human Rights in *Louled Massoud v. Malta*, para. 16. ("While the [asylum] application is being processed, in accordance with a Maltese policy document of 2005 entitled 'Irregular Immigrants, Refugees and Integration,' the immigrant will remain in detention, but no immigrant shall be kept in detention for longer than eighteen months.")

[16] A total of 4,920 people, or 32.9 percent of the migrants came from Somalia, and 2073, or 13.9 percent came from Eritrea. 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.

[17] A total of 1,528 people came from Egypt, 605 from Ethiopia, 546 from Ghana, 664 from Ivory Coast, 944 from Nigeria, and 782 from Sudan during this period. Ibid.

[18] European Migration Network (Maltese National Contact Point), "Unaccompanied Minors in Malta: Their Numbers and the Policies and Arrangements for their Reception, Return and Integration," Valetta, Malta, May 2009, http://www.mjha.gov.mt/MediaCenter/PDFs/1_EMN-Unaccompanied%20Minors%20Study%20FINAL%20VERSION%20(c).pdf (accessed July 6, 2012), p. 13 (relying on data from the government Agency for the Welfare of Asylum Seekers).

[19] European Migration Network (Maltese National Contact Point), "Unaccompanied Minors in Malta: Their Numbers and the Policies and Arrangements for their Reception, Return and Integration," Valetta, Malta, May 2009,

In 2011, there were 61 unaccompanied minors recognized by the Maltese authorities after an age determination process, of whom 29 were from Somalia. In 2011, seven unaccompanied minors were girls.[20] Whereas most children who arrive with their families are accommodated in open centers after a relatively short period in detention, a policy of detaining unaccompanied migrant children pending age determination and a low threshold for placing children in age determination proceedings means that almost all unaccompanied migrant children are detained for weeks or months in detention facilities with unrelated adults.

For the most part, migrants and asylum seekers who arrive in Malta by air are not detained, because they arrive at official ports of entry with the relevant documentation.[21] This report focuses on migrants who arrive by boat, who are considered to have arrived irregularly.

Arduous Journey

The trip to Malta can last many months, according to our interviewees. Typically, migrants might leave their countries of origin in sub-Saharan Africa, travel to Sudan or Mali, then traverse the Sahara by truck or jeep before crossing into Libya. After traveling north in Libya, they board boats to cross the Mediterranean Sea. Stéphane K. described his journey: "I left Ivory Coast when I was 16 years old. My family was persecuted.... I went through Niger, Mali, and to Libya in trucks. Then from Libya to Malta by boat. I'm not sure how many were in my boat, perhaps 100 to 160 people." [22]

The boat trips from Libya to Malta are perilous, involving basic vessels with limited navigation systems that are not seaworthy and often have insufficient amounts of food, water, and fuel.[23] Celeste A., an Ivorian woman who arrived in Malta in 2011, said, "We

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http://www.mjha.gov.mt/MediaCenter/PDFs/1_EMN-Unaccompanied%20Minors%20Study%20FINAL%20VERSION%20(c).pdf (accessed July 6, 2012), p. 13 (relying on data from the government Agency for the Welfare of Asylum Seekers).

[20] Office of the Refugee Commissioner, Malta, Statistics on Category C (Boat Persons) as on 31/12/2011, unpublished document provided to Human Rights Watch by the Office of the Refugee Commissioner, on file with Human Rights Watch.

[21] For instance, in 2011, 276 people who did not arrive by boat applied for asylum. The largest group (127 people) was composed of people from Syria, while the second largest (72 people) was composed of people from Libya. Office of the Refugee Commissioner, "2011 Arrival Statistics ECRI," unpublished document provided to Human Rights Watch by the Office of the Refugee Commissioner, on file with Human Rights Watch.

[22] Human Rights Watch interview with Stéphane K., Marsa, Malta, March 15, 2012.

[23] 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.

were at sea for 10 days. Without eating, without drinking. We arrived here almost dead, and they took us and put us in detention."[24] Maka O., a man who arrived in 2011 from Nigeria, recounted, "We were three days in the sea. The engine had problems and we were floating for three more days. There were 73 people, not enough water, not enough food."[25]

Many boats capsize or go into distress, and may then be assisted by patrols from the Armed Forces of Malta.[26] For instance, Hani H., a Somali migrant who came to Malta in 2008, reported that his boat "bumped with an Italian fishing boat. All 28 of us, all the people in the water. The fishing boat gave us plastic [to use as buoys] and radioed in. A Maltese boat came and took us straight from the sea to detention."[27]

United Nations High Commission for Refugees (UNHCR) estimates that 1,500 people died attempting to cross the Mediterranean to Europe in 2011, which amounts to approximately 2.5 percent of the 58,000 migrants who made the crossing.[28] Indeed, many die on boats that reach Maltese waters. For instance, on May 5, 2012, a boat reached a Maltese beach with 90 Somali passengers who reported that seven had died during their week-long trip from Libya.[29] Many of our interviewees similarly recounted fatalities on their trip. For example, Fethee E., who was 15 years old when he left his native Ethiopia, said, "I came by boat from Libya … I was going to Italia but not eating, drinking … After the boat, I was three days in hospital. We were almost 130 persons [on the boat] and one Nigerian woman died. We were traveling for 10 days."[30]

Many migrants we interviewed, like Fethee, do not set off with Malta as their destination. Rather, they are aiming for Europe generally, or Italy specifically. Aminata H., said, "I arrived in … 2011 by boat from Libya. I didn't know that we were going to Malta. For me, the

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[24] Human Rights Watch interview with Celeste A., Hermes Block, Hal Far, Malta, May 3, 2012.

[25] Human Rights Watch interview with Maka O., Marsa, Malta, April 25, 2012.

[26] Human Rights Watch has previously expressed concern that Malta and Italy, as well as other parties, have disagreed as to who has responsibility to rescue migrants at sea, despite the potential for loss of life. 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; Letter from Human Rights Watch et al. to NATO, "Clarify Response to Deaths at Sea: On Anniversary of Migrant Deaths, Public Disclosure Needed," March 26, 2012, http://www.hrw.org/news/2012/03/26/nato-clarify-response-deaths-sea.

[27] Human Rights Watch interview with Hani H., Hal Far, Malta, April 24, 2012.

[28] "1,500 Died Crossing the Mediterranean Last Year—UNHCR," *Times of Malta*, January 31, 2012.

[29] UNHCR Press Release, "Somalia: Survivors of Sea Voyage to Malta Say Seven Somali Refugees Died," *AllAfrica.com*, May 8, 2012.

[30] Human Rights Watch interview with Fethee E., Marsa, Malta, May 2, 2012.

idea was to go to Italy."[31] Sekou C., a Guinean migrant, agreed: "I came here from Libya by boat. The goal wasn't to get to Malta."[32]

Migrants who arrive in Malta do not necessarily want to stop there. In many cases, they are on boats without navigation systems—and may wish to move on to mainland Europe. Malta has taken the approach of using mandatory detention to dissuade migrants from arriving in Malta. This approach has little deterrent effect in practice, given that migrants often cannot control their destination.

Flight from Poverty, Persecution, War, and Violence

Many interviewees told Human Rights Watch that hardship and violence in their home countries motivated their journeys to Europe. Many also pointed to Europe as a place of greater economic opportunity. Given the high proportion of migrants who arrive in Malta from Somalia, it is no surprise that conflict spurred some migrants' decision to move.

Particularly among the unaccompanied migrant children we interviewed, the death of one or both parents, and violence in their home countries, often triggered their decisions to leave. According to studies by the international NGO Save the Children, unaccompanied migrant children also migrate to contribute to their family's income, seek educational opportunities, or escape violence or conflict.[33]

Many of the migrants we interviewed who came to Malta within the last 18 months told us the increasingly difficult conditions in Libya encouraged them to move on toward Europe. For instance, Maka, from Nigeria, reported, "we were in Libya for three years, but then there was the Gaddafi problem. I lost my father, the Gaddafi rebels killed him…. I had to find my way out, I travelled to Europe." Amadou K.'s story was similar: "I was living in Guinea, then I arrived in Libya and there was the problem of the war, so I decided to leave. My goal was to leave Libya as quickly as possible. I arrived here [in Malta] by chance."[34]

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[31] Human Rights Watch interview with Aminata H., Hermes Block, Hal Far, Malta, May 3, 2012.

[32] Human Rights Watch interview with Sekou C., Marsa, Malta, April 25, 2011.

[33] Save the Children, "Away from Home: Protecting and Supporting Children on the Move," 2008, http://www.savethechildren.org.uk/resources/online-library/away-from-home-protecting-and-supporting-children-on-the-move, pp. 7-10.

[34] Human Rights Watch interview with Amadou K., Marsa, Malta, April 25, 2011.

Asylum in Malta and International Burden Sharing

Malta has the highest rate of asylum applications per population in the industrialized world.[35] Compared to its tiny size—the population of Malta is approximately 400,000 people—the island sees a disproportionately high percentage of the migrants entering the EU.[36] While the EU provides some financial assistance to Malta,[37] it fails to provide sufficient cooperation with relocation programs, asylum determination procedures, and integration options to adequately address the needs of migrants and asylum seekers in Malta.

Ninety-three percent of the migrants who arrive in Malta by boat—almost all of whom are detained upon arriving on the island—apply for asylum. Malta has an efficient asylum-processing system with one of the lowest backlogs in Europe, and a 58 percent rate of recognition for some form of protected status (though not necessarily asylum), considerably higher than the EU average.[38] In 2011, four percent of applicants were granted refugee status.[39] A further 37 percent were granted subsidiary protection.[40] Subsidiary protection is a category of international protection defined by the EU to apply to those facing a "real risk of suffering serious harm" in their country of origin but who do not meet the more stringent requirements of qualifying for asylum.[41] Subsidiary protection gives

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[35] Between 2007 and 2011, Malta received, on average, the highest number of asylum-seekers compared to its national population: 20.1 per 1,000 inhabitants. United Nations High Commissioner for Refugees, "Asylum Levels and Trends in Industrialized Countries: Statistical overview of asylum applications lodged in Europe and selected non-European countries," March 27, 2012, http://www.unhcr.org/4e9beaa19.html (accessed April 26, 2012).

[36] United Nations High Commissioner for Refugees, "Asylum Levels and Trends in Industrialized Countries: Statistical overview of asylum applications lodged in Europe and selected non-European countries," March 27, 2012, http://www.unhcr.org/4e9beaa19.html (accessed April 26, 2012).

[37] For the period 2007-2013 the EU established the General Programme Solidarity and Management of Migration Flows, consisting of four Funds (Refugee, External Borders, Return, and Integration). Malta has been allocated 22.3 million Euros through this programme.

[38] "In 2010, a quarter (25.0 %) of EU-27 first instance asylum decisions resulted in positive outcomes with the grants of a refugee, subsidiary protection status or authorisation to stay for humanitarian reasons." European Commission (EUROSTAT), "Asylum Statistics," data from September 2011, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Asylum_statistics (accessed June 7, 2012).

[39] Seventy-two persons, out of 1,862 cases, were granted refugee status. 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.

[40] Six hundred and eighty-five persons, out of 1,862 cases, were granted subsidiary protection. 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.

[41] "Applicants who do not qualify for refugee status, but who cannot return to their country of origin due to a real risk of suffering serious harm (torture or inhuman or degrading treatment, death penalty or execution, serious individual threat to the life or person as result of indiscriminate violence) have the right to subsidiary protection." European Commission Home Affairs, "Who can benefit from international protection in the EU?" http://ec.europa.eu/home-affairs/policies/asylum/asylum_subsidiary_en.htm (accessed May 13, 2007).

recipients fewer benefits than those with full refugee status, in part because it was initially considered a temporary form of protection, and is time limited and subject to review.[42] For instance, EU laws give more limited access to labor markets for people with subsidiary protection than for refugees.[43]

Those not qualifying for asylum or subsidiary protection may still acquire a domestic form of temporary protection, called New Temporary Humanitarian Protection, or "THP(N)," to some migrants who do not qualify for refugee status or subsidiary protection.[44] This status, granted at the discretion of the Office of the Refugee Commissioner, permits migrants to work legally in Malta, but not to travel within the EU, and is subject to yearly review based on criteria set by the Refugee Commissioner. In 2011, 17 percent of those who applied for asylum were granted this status.[45]

Unaccompanied migrant children may apply for asylum, as described above. Care for unaccompanied children is split between three ministries and numerous agencies. After the Minister for Justice, Dialogue, and the Family issues the care order, the child is then placed in a group home run by AWAS, an entity under the Ministry of Home and

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[42] "When subsidiary protection was introduced, it was assumed that this status was of a temporary nature. As a result, the Directive allows Member States the discretion to grant them a lower level of rights in certain respects. However, practical experience acquired so far has shown that this initial assumption was not accurate. It is thus necessary to remove any limitations of the rights of beneficiaries of subsidiary protection which can no longer be considered as necessary and objectively justified." European Commission, "Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of protection granted," Com(2009) 551 final, 2009/0164 (COD), October 21, 2009, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0551:FIN:EN:PDF (accessed May 13, 2012), p. 8.

[43] "Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted," Official Journal L 304 , 30/09/2004 P. 0012 – 0023, Council of the European Union. Chapters II and V of Council Directive 2004/83/EC. Malta introduced subsidiary protection status in 2008 after EU Council Directive 2004/83 EC (5) was transposed into Maltese Legislation. Previously Malta's Refugees Act provided for temporary humanitarian protection, defined as special leave to remain in Malta for those persons who could not have returned safely to their country of origin. Government of Malta, "Office of the Refugee Commissioner: Asylum Procedure," http://mjha.gov.mt/page.aspx?pageid=160#The_Asylum_Procedure (accessed May 9, 2012).

[44] In order to qualify for THP(N), migrants must have been in Malta for more than four years, had their asylum determination process completely finalized, and meet four main criteria: regular, steady and legal work; private accommodation (i.e. outside the open centers); knowledge of English and Maltese; and be of good conduct and character. Office of the Refugee Commissioner, "Welcome Speech and Annual Report, Conference at the Palace Sliema, 14.06.11 ," unpublished document provided to Human Rights Watch by the Office of the Refugee Commissioner, on file with Human Rights Watch.

[45] Three hundred and eighteen persons out of 1,862 cases were granted subsidiary protection. 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.

Parliamentary Affairs. Children under AWAS's care are entitled to education and at that stage their needs fall to the Ministry of Education.[46]

After release from detention, migrants can find it hard to integrate into Maltese society. They sometimes experience xenophobia and racism, have trouble finding work, and have uncertainty around their legal capacity to stay. There are only a few local or national initiatives to help those with legal status integrate into the country.[47] Many migrants want to stay in Malta, but others would like to join family elsewhere in Europe. European policies on relocation within Europe and family reunification are not clear and exacerbate the uncertainty many migrants feel about their situation. While the EU places a heavy burden on Malta and other countries at the external borders of the EU, integration is nonetheless considered an important aspect of responding to the needs of those with international protection.[48]

In 1999, the EU committed to establishing a Common European Asylum System (CEAS) which would harmonize refugee standards and asylum procedures throughout the EU. Despite multiple European Commission asylum directives over the past 12 years, these have failed to remedy wide disparities throughout the EU in the treatment of asylum seekers.

The Dublin II regulation,[49] which ostensibly prevents asylum seekers from 'forum shopping' (or choosing a destination country) based on the idea that under CEAS all claims receive the same process, sets out which member state is responsible for examining an asylum claim. It will normally be the country of first arrival. The regulation means that any asylum seeker who is registered in Malta and travels on to another EU member state can be returned to Malta to have his or her asylum claim heard there. Among its flaws, Dublin II

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[46] Maltese law permits unaccompanied migrant children to attend school, and AWAS has several initiatives to encourage attendance. Human Rights Watch interview with Anne-Marie Pisani, coordinator, Dar il-Liedna group home, Fgura, Malta, May 2, 2012. There are a small number of positive examples of unaccompanied migrant children who have gone on to higher education. There are five students who have enrolled in foundation courses at the Maltese College of Arts, Science and Technology. Human Rights Watch interview with Helen d'Amato, Children's Commissioner of Malta, Santa Venera, Malta, April 26, 2012.

[47] See Republic of Malta, "Irregular Immigrants, Refugees, and Integration: Policy Document," 2005, pp. 26-27.

[48] Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, November 23, 2003, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0109:EN:HTML (accessed May 30, 2011).

[49] Known as "Dublin II" because the 2003 regulation replaces the previous Convention determining the State responsible for examining applications lodged in one of the Member States of the European Communities of 15 June 1990 – Dublin Convention; OJ, C254, August 19, 1997. Council Regulation (EC) No 343/2003, Official Journal L 050 , 25/02/2003 P. 0001 – 0010, March 3, 2003, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0343:EN:HTML (accessed April 26, 2012).

ignores legitimate factors, such as extended family and community ties, that asylum seekers consider when choosing where to apply for asylum, and unfairly allocates the burden of processing asylum claims to the some states on the EU's external borders, such as Greece, which is the main land entry point into the EU, and Malta, which is geographically close to north Africa.

The EU has taken some steps to mitigate this burden, for instance, by relocating recognized refugees from Malta to other EU states,[50] and by providing limited financial support. Only a relatively small number of migrants with protection from Malta have been relocated within the EU or resettled to the United States: From 2007 through mid-May 2012, 985 refugees were resettled from Malta to the United States.[51] In 2010-2011, 228 others were relocated from Malta to other EU member states.[52] Yet the number of people relocated to the EU and the US may not stay consistent in the future, and is insufficient to relieve Malta of its burden. In addition, the EU has failed to develop adequate options for family reunification; for example it has not allowed children who have been granted protection in Malta to join extended family in other European countries.

The European Commissioner for Human Rights has emphasized that a lack of "meaningful international solidarity and co-operation" on the part of other EU countries contributes to the risk of serious rights violations against migrants in Malta.[53] Nonetheless, incomplete cooperation from the EU does not relieve Malta of its obligations to treat migrants and asylum seekers humanely and offer options for long-term integration.

Maltese Institutions Responsible for Migrants

Responsibility for migrants and unaccompanied migrant children is divided among various government entities:

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[50] For instance, in 2011, 288 refugees were relocated. EUREMA (2010-2011): A pilot project for intra-EU re-allocation of beneficiaries of protection from Malta, UN High Commissioner for Refugees. http://unhcr.org/4ef338859.pdf (accessed May 25, 2012).

[51] Annaliza Borg, "Nearly 1,000 refugees relocated to US from Malta since 2007," *The Malta Independent*, May 17, 2012 http://www.independent.com.mt/news.asp?newsitemid=144459 (accessed May 25, 2012).

[52] EUREMA (2010-2011): A pilot project for intra-EU re-allocation of beneficiaries of protection from Malta, UN High Commissioner for Refugees. http://unhcr.org/4ef338859.pdf (accessed May 25, 2012).

[53] 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.

The **Malta Police, Immigration Section** is responsible for border activities, including border control at the airport, seaport, and yacht marinas.[54]

The **Detention Services** are responsible for guarding immigration detention facilities using staff seconded from the police and the armed forces, as well as civilians.[55]

The **Board of Visitors for Detained Persons** is responsible for oversight of the immigration detention facilities, and has the legal authority to visit the facilities monthly.[56]

The **Agency for the Welfare of Asylum Seekers (AWAS)** manages open accommodation facilities; provides services to categories of persons identified as vulnerable, including unaccompanied children; conducts age determinations; provides information to asylum seekers regarding employment, housing, education, health and welfare services offered under national schemes; and liaises with government and civil society to advise on policy and service provision.[57]

The **Office of the Refugee Commissioner** is responsible for an independent eligibility determination process for asylum applications.[58]

The Refugee Commissioner falls under the **Ministry of Home and Parliamentary Affairs**, which reviews each case as recommended by the Commissioner.[59] The Detention Service, the Malta Police, the Board of Visitors for Detained Persons, and AWAS also all fall under the Ministry of Home and Parliamentary Affairs.

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[54] Government of Malta, "Malta Police Special Branch – Immigration Section," , http://www.gdisc.org/index.php?id=187&no_cache=1&tx_gdiscdb_pi3%5BshowUid%5D=28 (accessed May 9, 2012).

[55] Global Detention Project, "Malta Detention Profile," http://www.globaldetentionproject.org/countries/europe/malta/introduction.html (accessed May 9, 2012); Human Rights Watch interview with Lt. Col. Brian Gatt, Commander Detention Service, Ministry for Justice and Home Affairs, Safi Barracks, Safi, Malta, April 26, 2012.

[56] Human Rights Watch interview with Maryanne Agius, Chair of the Board of Visitors for Detained Persons, Sliema, Malta, May 3, 2012.

[57] Government of Malta, "Agency for the Welfare of Asylum Seekers," http://www.mjha.gov.mt/page.aspx?pageid=161 (accessed May 9, 2012).

[58] Government of Malta, "Office of the Refugee Commissioner", http://mjha.gov.mt/page.aspx?pageid=160 (accessed May 9, 2012).

[59] Government of Malta, "Office of the Refugee Commissioner: Asylum Procedure," http://mjha.gov.mt/page.aspx?pageid=160#The_Asylum_Procedure (accessed May 9, 2012).

The **Ministry of Justice, Dialogue, and the Family** is responsible for child policy and child protection. Unaccompanied migrant children are under the custody of the **Children and Young Persons Advisory Board**, which is responsible for reviewing all the care plans related to each minor.[60]

The **Ministry of Foreign Affairs** is responsible for implementing citizenship and immigration legislation and policies including issuing residence permits to third country nationals.[61]

The **Maltese Commissioner for Children**, which promotes the welfare of children and compliance with the CRC, and the **Ombudsman to the people of Malta**, who can investigate complaints against any government department or agency, can also monitor the government's treatment of migrants, including migrant children. [62]

[60] European Migration Network (Maltese National Contact Point), "Unaccompanied Minors in Malta: Their Numbers and the Policies and Arrangements for their Reception, Return and Integration," Valetta, Malta, May 2009, http://www.mjha.gov.mt/MediaCenter/PDFs/1_EMN-Unaccompanied%20Minors%20Study%20FINAL%20VERSION%20(c).pdf (accessed July 6, 2012).

[61] Malta Ministry of Foreign Affairs, http://www.mfa.gov.mt/default.aspx?MDIS=522 (accessed May 9, 2012).

[62] Ombudsman's Charter, December 2004, http://www.ombudsman.org.mt/index.asp?pg=charter (accessed May 9, 2012).

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). However there is no evident justification for this prolonged detention, and during their detention migrants have no meaningful opportunity for judicial review in order to require the state to show such justification. Detention is more costly than alternative reception arrangements for migrants, and does not work as a mechanism for deterring migrants from travel to Malta. Remaining in detention can seriously impact the mental health of migrants, many of whom are fleeing persecution, violence, or exploitation.

Malta's policy of prolonged, automatic immigration detention—without any meaningful possibility of judicial review or remedy—amounts to arbitrary detention prohibited by international law. Article 9 of the International Covenant on Civil and Political Rights forbids arbitrary detention, and the United Nations 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."[63] The Working Group's mandate to investigate arbitrary deprivation of liberty refers to five legal categories for arbitrary detention, including one describing arbitrary detention as "[w]hen asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy."[64] In addition to going against these standards, Malta's practices also violate the prohibition of arbitrary detention in the European Convention on Human Rights (ECHR).[65]

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[63] 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."

[64] Report of the Working Group on Arbitrary Detention, Annex III, para. 8(d), January 17, 2011, http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-47.pdf, (accessed May 9, 2012).

[65] Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.: 005, Rome November 4, 1950. Malta

Malta operates three primary immigration detention facilities[66] and a number of "open" (non-custodial) reception centers. Several open centers house adult migrants and migrants in families after their release from detention.[67] Two open centers are specifically for unaccompanied children who have been screened and determined to be under 18.[68]

Taken from Boats to Prolonged Detention

When boat migrants reach Malta, they are transferred to the Malta Police, Immigration Section, which is responsible for border control.[69] The Immigration Section collects a list of basic biographical data of those on the boat and attempts to identify vulnerable migrants such as young children, people with disabilities, or people who are sick.

Maltese law mandates that a person who enters the country without "right of entry" shall be designated a "prohibited immigrant" and may be issued with a removal order.[70] Although the issuance of the removal order is discretionary, in practice the police routinely issue such orders at the time of apprehension and the migrants are taken to detention.[71] The law mandates that prohibited immigrants "shall be detained in custody" once the removal order is issued "until he is removed from Malta."[72] At least initially, detention is imposed indiscriminately on all migrants who arrive by boat, including vulnerable migrants (though many vulnerable migrants are released earlier than others).

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has been a party to the Convention since 1967.

[66] Malta has used a number of detention facilities over time, and has moved groups of migrants between the facilities depending on how many boats are arriving. At the time of Human Rights Watch's most recent visit in April - May 2012, there were three occupied detention facilities: Hermes Block, within the Armed Forces of Malta facility at Lyster Barracks, in Hal Far (consisting of five "zones" housing different groups of migrants including single men, single women, and families); Safi Warehouse (housing single men); and Safi B Block (housing single men). Both Safi Warehouse and Safi B Block are within the Armed Forces of Malta facility at Safi.

[67] The primary "open centers" in use at the time of Human Rights Watch's most recent visit in April - May 2012 were: the Marsa Open Center, in Marsa (housing single men); and four centers in Hal Far: Hal Far Tent Village, Hangar Open Center, Hal Far Reception Center (housing primarily single women), and Hal Far Families Open Center (housing families). All of the Hal Far centers are run by the government Agency for the Welfare of Asylum Seekers, while the Marsa center is run by an NGO, Fondazzjoni Suret il-Bniedem, relying on government funding. There is also a small open center at Balzan, run by the Good Shepard Sisters, a Catholic charity, and several other small facilities.

[68] These facilities are called Dar il-Liedna, in Furga, Malta, and Dar is-Sliem, in Sta Venera, Malta.

[69] Government of Malta, Malta Police Special Branch – Immigration Section, http://www.gdisc.org/index.php?id=187&no_cache=1&tx_gdiscdb_pi3%5BshowUid%5D=28 (accessed May 9, 2012).

[70] Immigration Act, Cap 217 Laws of Malta, arts. 5(1) and 14(2).

[71] Human Rights Watch interview with Supt. Sandro Zarb, International Relations Unit and Supt. Neville Xuereb, Immigration Department, Malta Police, Floriana, Malta, May 1, 2012.

[72] Immigration Act, art. 14(2).

Essentially, migrants are taken from their hazardous journeys at sea straight to detention. For example, Chris K., a Nigerian migrant who said he was 17 years old when he came to Malta, reported, "When I arrived, what happened is like with every other immigrant, they took me to detention and I spent nearly 10 months there before I got my freedom."[73] Dennis M., from Ghana, described his transition from a boat at sea to detention: "The police came out to sea to get us. They asked about our documents, we don't have any documents. They took us to Safi [detention facility] the same day, and we stayed for one year."[74]

Once in detention, migrants attend an information session on the asylum process run by the Office of the Refugee Commissioner, and are then requested to fill out a preliminary questionnaire.[75] The Maltese Immigration Act does not establish a maximum duration for administrative detention, of which immigration detention is a form. However, since 2005 the Maltese authorities have capped detention at 12 months for asylum seekers and at 18 months for those who have not applied for asylum or whose asylum claims have been rejected in the first and second instances.[76] If a migrant's asylum claim is granted before the expiration of the 12-month period, that migrant is released.

While the migrants and asylum seekers are not housed in criminal prisons, many who spoke to Human Rights Watch said that immigration detention inherently feels like a criminal punishment. Hakim A., who arrived in Malta from Eritrea in 2011, observed that he "felt like an animal in detention … detention is like prison."[77] Zerihun A., from Ethiopia, stated "We were just looking for a better life. Detention felt like Guantanamo."[78]

In July 2010, the European Court of Human Rights found that Malta's detention of an Algerian asylum seeker, Khaleed Louled Massoud, violated the right to liberty found in the European Convention on Human Rights.[79] Among the arguments underscoring the court's ruling was the notion that the Maltese authorities—in light of Malta being a small island with controlled exit by air—could have found less restrictive measures than detention. The

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[73] Human Rights Watch interview with Chris K., Marsa, Malta, April 25, 2012.

[74] Human Rights Watch interview with Dennis M., Hal Far, Malta, April 24, 2012.

[75] Human Rights Watch interview with Mario Friggieri, Refugee Commissioner, Valetta, Malta, March 15, 2012.

[76] 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.

[77] Human Rights Watch interview with Hakim A., Marsa, Malta, March 13, 2012.

[78] Human Rights Watch interview with Zerihun A., Hal Far, Malta, March 16, 2012.

[79] ECHR, *Louled Massoud v. Malta*.

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.[80]

As a party to the ECHR, Malta is legally bound to implement the judgment of the European Court of Human Rights. However, 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.[81] However, 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."[82] The Commissioner stated that Malta's policy of mandatory and prolonged administrative detention is "irreconcilable with the requirements of the European Convention on Human Rights (ECHR) and the case-law of the Strasbourg Court, especially following the latter's July 2010 judgment in the case of *Louled Massoud*."[83]

Lack of Capacity to Challenge Detention

While very limited paths are available to challenge detention in Malta, these are insufficient to cover migrants' needs or fulfill 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.[84] However, the Appeals Board may not authorize release when the identity of the applicant has yet to be established (for instance, when the applicant does not have travel or identification documents, as in the case of most boat migrants reaching Malta).[85] This limited appeal is

[80] ECHR, *Louled Massoud v. Malta*, paras. 71-74.

[81] 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 *Louled Massoud v. Malta*, p. 3, http://www.mjha.gov.mt/MediaCenter/PDFs/1_Hammarberg%20Govt%20Reply.pdf (accessed May 9, 2012).

[82] 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.

[83] 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.

[84] Immigration Act, art. 25A.

[85] Immigration Act, art. 25A.

not sufficient to meet international standards: in *Louled 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.[86]

None of the migrants interviewed by Human Rights Watch said they had access to legal proceedings to challenge their detention. For instance, Ali, from Somalia, said, "In prison, you have no lawyer, no rights."[87] According to the European Court of Human Rights in *Louled v. Malta*, the Maltese legal system lacks the necessary "effective and speedy remedy" for challenging the lawfulness of the applicant's detention.[88] The court found that none of the remedies available to migrants[89] were sufficient, leading to a violation of the right to liberty as set out in the European Convention on Human Rights.[90]

Inadequate Justification for Detention

Malta detains migrants for entering the country without "right of entry," in other words not at a port of entry and without the necessary documents.[91] Essentially, 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."[92]

Under these guidelines, detention of asylum seekers may be 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

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[86] ECHR, *Louled Massoud v. Malta*.

[87] Human Rights Watch interview with Ali M., Marsa, Malta, March 13, 2012.

[88] ECHR, *Louled Massoud v. Malta*, para. 46.

[89] As provided by art. 409A of the Criminal Code, art. 25A of the Immigration Act, and the Constitution of Malta.

[90] ECHR, *Louled Massoud v. Malta*, para. 61.

[91] Immigration Act, arts. Cap 217 Laws of Malta, article 5(1) and article 14(2).

[92] 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.

mislead authorities); or to protect national security and public order.[93] 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 (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).[94]

The Maltese authorities have indicated that the detention policy exists in part to deter migrants from coming to Malta.[95] However, it is not an effective deterrent for migrants making the dangerous boat journey from Libya. Factors such as poorly-constructed vessels, engine malfunction, and lack of navigation equipment cause many migrants to arrive in Malta unintentionally. Berhane commented, "In these small boats you can't plan your journey."[96] Nonetheless, he was relieved to reach Malta, saying, "I wouldn't get back in the boats, the risk. I was so happy to land safely."[97]

Most migrants Human Rights Watch interviewed did not know about Malta's detention policy prior to arriving there. For instance, Ghedi H. said he was 17 when he arrived in Malta from Somalia: "I was surprised ... I was going in detention, some people told me. I thought when we go to Europe we will get freedom."[98] Berhane said, "My expectation was that I would come here, apply for asylum and be safe. I didn't expect to be in detention ... I don't understand what benefit this will bring to Malta."[99] Some migrants pointed out that even if they knew there was a detention policy in Malta, their need to flee dangers they faced meant they would have come anyway. For instance, Labaan X., a Somali boy who came to Malta at age 15, stated:

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[93] 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.

[94] 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, *Louled Massoud v. Malta*, para. 46.

[95] "During a meeting with the Commissioner in Valletta, the Maltese authorities stated that the policy of mandatory detention is considered necessary for a number of reasons, including to ensure public order, facilitate the orderly carrying out of the relative procedures and repatriation, and also to act as a deterrent to those who would abuse the system." 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.

[96] Human Rights Watch interview with Berhane K., Birkirkara, Malta, March 1, 2012.

[97] Human Rights Watch interview with Berhane K., Birkirkara, Malta, March 1, 2012.

[98] Human Rights Watch interview with Ghedi H., Valetta, Malta, April 27, 2012.

[99] Human Rights Watch interview with Berhane K., Birkirkara, Malta, March 1, 2012.

> I didn't know Malta existed as a country. I thought it was part of Italia. I didn't have a choice of where to go. I didn't know about detention, I'd never heard of that. But if I had known, I still had to come. My country, and Libya, I couldn't stay there.[100]

Detention without Realistic Prospect of Removal

When a migrant fails to gain asylum or another form of protective status by the end of the initial 12-month detention period, Malta then detains that person for an additional 6 months (for a maximum of 18 months in total), ostensibly in order to remove the person to their country of origin.[101] In reality, Malta cannot return most of these migrants to their countries of origin and simply releases them after 18 months. This policy appears more designed to punish migrants rather than to effectuate their removal.

Cherif M., a Chadian migrant who said he was 17 when he entered Malta, but who was not recognized as a minor under Malta's age determination procedure, said he was feeling the toll of extended detention: "If it were to be a month, two months, OK. But now it's getting to 14 months, it's a problem…. I was in a school before [in Libya], but now in a locked up place like this, it's not OK."[102] Edgard O., an Ivorian, said he was rejected from asylum at the first instance and on appeal: "I went to the interview, told them everything, and I got two rejects … I had been there for one year."[103] Edgard remained in immigration detention for the additional six months of detention applicable to rejected asylum seekers. He asked, "I'm going to spend another six months here, and for what?"[104]

While Malta has transcribed portions of the EU's 2008 Returns Directive into law,[105] its detention practices pending removal violate EU standards. The 2008 Returns Directive, which is binding on Malta, permits member states to detain irregular migrants for up to six more months pending removal in limited circumstances, for instance, when "there is a risk

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[100] Human Rights Watch interview with Labaan X., Marsa, March 13, 2012.

[101] Republic of Malta, "Irregular Immigrants, Refugees, and Integration: Policy Document," 2005, p. 8.

[102] Human Rights Watch interview with Cherif M., Safi, Malta, May 3, 2012.

[103] Human Rights Watch interview with Edgard O., Safi, Malta, April 30, 2012.

[104] Human Rights Watch interview with Edgard O., Safi, Malta, April 30, 2012.

[105] "Part IV of Subsidiary Legislation no. 217.12 incorporates in Maltese Law most of the guarantees of procedural protection for migrants provided for by the EU Return Directive." International Commission of Jurists, "Not Here to Stay: Report of the International Commission of Jurists on its Visit to Malta on 26-30 September, 2011," May 2012, http://documents.icj.org/ICJMaltaMissionReport-Final.pdf (accessed June 6, 2012), p. 13.

of absconding," or the migrant "avoids or hampers the preparation of return or the removal process," with the option of detaining the person for another 12 months if the detainee or his or her home government does not cooperate in the removal operation.[106] Such conditions necessarily require individualized determinations, rather than blanket detention as is seen in Malta. Moreover, it is not evident why in a country the size of Malta, migrants actually subject to removal could not be detained immediately prior to removal rather than held for an arbitrary maximum period and then released. Further, the Returns Directive specifically requires the member state to provide for "speedy judicial review" of such detention, which Malta does not.[107]

Malta fails to fulfill the requirement for reasonable prospects of removal. Detention may "only be maintained as long as removal arrangements are in progress," [108] and "when it appears that a reasonable prospect of removal no longer exists … detention ceases to be justified."[109] Returning migrants to their country of origin can be difficult in the best of circumstances, and especially complicated in cases where migrants have no documentation. Malta faces additional obstacles due to the tiny size of its government and its limited bilateral relationships with the countries of origin of many migrants.

Inadequate Procedures for Identification of Vulnerable Migrants

Vulnerable migrants, including the elderly, unaccompanied children, families with children, and migrants with mental[110] or physical disabilities, are also subject to mandatory detention upon arrival in Malta.[111] It is possible for vulnerable migrants to identify themselves and gain release before the 12 or 18-month period has expired.[112] However, in

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[106] "Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals" (Return Directive), art. 15.

[107] Returns Directive, art. 15, para. 2.

[108] Returns Directive, art. 15, para. 1.

[109] Returns Directive, art. 15, para. 4.

[110] In this report, mental disability refers to mental health problems such as depression, bipolar disorder, and schizophrenia. Persons with mental health problems also refer to themselves as having psychosocial disabilities, a term that reflects the interaction between psychological differences and social/cultural limits for behavior as well as the stigma that the society attaches to persons with mental impairments. World Network of Users and Survivors of Psychiatry, Manual on Implementation of the Convention on the Rights of Persons with Disabilities, p. 9 http://www.chrusp.org/home/resources (accessed July 7, 2010).

[111] 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.

[112] "Irregular immigrants who, by virtue of their age and/or physical condition, are considered to be vulnerable are exempt from detention and are accommodated in alternative centres." Republic of Malta, "Irregular Immigrants, Refugees, and Integration: Policy Document," 2005, p. 11.

the course of screening incoming migrants, no procedures ensure that all vulnerable migrants are identified; some of the most vulnerable are also those who are unable to self-identify to a medical practitioner visiting the detention centers. Even with self-identification, the procedures for release can be ad-hoc and rely on AWAS finding alternative accommodation outside of detention centers. People with mental or physical disabilities can also be released, but the procedure for identifying them can be ad-hoc.

Unaccompanied migrant children, who are initially detained pending an age determination procedure if they appear over age 12 approximately, are released once that age determination has been made and transferred to group homes (see Section III, below).

Though families with children are typically released within a short period, even a short time can be difficult. Nyesom A., a Nigerian woman who arrived in Malta in 2011 after her husband died during the journey through Libya, told Human Rights Watch: "I was in detention for two weeks with my twin girls [who were six months old at the time], I had no option."[113] Families are detained together in units segregated from single migrants; if a woman is found to be pregnant or becomes pregnant in detention, the family is released.[114]

Maintaining a presumption of liberty when migrants and asylum seekers arrive by boat would prevent the detention for weeks or months of families, children, and those with mental or physical disabilities. Nonetheless, the Maltese government asserts that detention furthers the public policy objective of identifying vulnerable migrants and facilitating their care, arguing that without detention vulnerable migrants might "abscond the island or 'get lost' in the country" and "would be open to abuse and exploitation."[115] There are better methods of protecting vulnerable migrants other than detention, such as through the provision of adequate social services to migrants in open shelters.

Detention Conditions and Impact on Mental Health

While Malta has taken steps to improve conditions in detention centers in the last two years, the very fact of remaining in detention contributes to declining mental health. In

[113] Human Rights Watch interview with Success, Valetta, March 15, 2012.

[114] Human Rights Watch interview with NGO staff member, Birkirkara, Malta, March 13, 2012.

[115] Reply by the Government of Malta to the report by the Commissioner for Human Rights of the Council of Europe, June 2011, section on *Louled*, http://www.mjha.gov.mt/MediaCenter/PDFs/1_Hammarberg%20Govt%20Reply.pdf (accessed May 9, 2012).

addition, gains made in detention conditions could be eroded if new arrivals result in overcrowding. Malta operates three primary immigration detention facilities,[116]with varying conditions. Safi Warehouse has 200-300 beds in an open space divided only by partitions, with bunk beds. Safi B-Block and Lyster Barracks both have rooms of 16-30 beds, also in bunks. Single men and women are housed separately, as are married couples.

A report from the International Commission for Jurists (ICJ), based on research from a visit in September 2011 when the facilities were relatively crowded, documented dirty and inadequate sanitation conditions in Safi Barracks.[117] During our visits in April and May 2012, each facility had sanitation and hygiene facilities that seem adequate on the surface, though may decline in quality during times of overcrowding. Each facility also has outdoor recreation areas, though at Lyster Barracks access to the recreation area is time-limited and on a rota for different parts of the population, with men always able to look down on women when the women are outside. None of the facilities are fully accessible for people with disabilities.

In 2009, two thirds of the facilities exceeding the maximum density recommended for refugee camps in emergencies.[118] Médecins Sans Frontières documented corresponding problems in adequacy of shelter, hygiene, and sanitation.[119] In 2010, when there was a lull in incoming migrants, the Maltese authorities were able to conduct renovations.[120] However, the risk of overcrowding remains. The ICJ report, commenting on a September 2011 visit, documented further overcrowding, in both Safi Barracks facilities in particular, noting the lack of space for "even a minimal level of privacy."[121]One way to avoid deterioration in detention conditions would be to end the policy of mandatory detention.

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[116] Malta has used a number of detention facilities over time, and has moved groups of migrants between the facilities depending on how many boats are arriving. At the time of Human Rights Watch's most recent visit in April - May 2012, there were three occupied detention facilities: Hermes Block, within the Armed Forces of Malta facility at Lyster Barracks, in Hal Far (consisting of five "zones" housing different groups of migrants including single men, single women, and families); Safi Warehouse (housing single men); and Safi B Block (housing single men). Both Safi Warehouse and Safi B Block are within the Armed Forces of Malta facility at Safi.

[117] International Commission of Jurists, "Not Here to Stay: Report of the International Commission of Jurists on its Visit to Malta on 26-30 September, 2011," May 2012, http://documents.icj.org/ICJMaltaMissionReport-Final.pdf (accessed June 6, 2012), p. 29.

[118] Médecins Sans Frontières, "Not Criminals: Médecins Sans Frontières Exposes Conditions for Undocumented Migrants and Asylum Seekers in Maltese Detention Centers," 2009, pp. 8-10.

[119] Ibid., pp. 8-12.

[120] Human Rights Watch interview with Lt. Col. Brian Gatt, Commander Detention Service, Ministry for Justice and Home Affairs, Safi Barracks, Safi, Malta, April 26, 2012.

[121] International Commission of Jurists, "Not Here to Stay: Report of the International Commission of Jurists on its Visit to Malta on 26-30 September, 2011," May 2012, http://documents.icj.org/ICJMaltaMissionReport-Final.pdf (accessed June 6, 2012), p. 29.

ICJ further notes that the location of detention sites within military facilities conflicts with the underlying purpose of detention (to prevent unlawful entry) and therefore may violate the ECHR; ICJ calls on guidance from the Committee for the Prevention of Torture to argue that "detained migrants should be held in specifically designed centers in conditions tailored to their legal status and catering for their particular needs."[122]

Deteriorating Mental Health

Even without overcrowding, prolonged detention—especially for no clear reason—can have a devastating effect on migrants' and asylum seekers' mental health. The respected medical journal *The Lancet* has published research finding that lengthy asylum detention in the United States correlates with higher rates of post traumatic stress disorder, anxiety, and depression, and that detention exacerbates pre-existing symptoms, including mental trauma sustained while fleeing torture or persecution.[123] According to medical experts in the United Kingdom, children held in immigration centers developed "clinically significant emotional and behavioral problems since being detained."[124] Drawing on an extensive study from Australia's Human Rights and Equal Opportunities Commission, the International Detention Coalition finds that:

> Children who are detained for immigration purposes are at risk of a variety of psychosocial and developmental problems linked to their detention experiences … The experience of detention may mimic the experience of human rights abuses, persecution and terror.… Children and young people who are detained for extended periods of time are more likely than others to experience feelings of isolation, detachment, and loss of confidence.[125]

Lengthy detention caused anxiety for many interviewees in Malta. Dennis M. said, "I spent one year in detention. They didn't free me for one year.… Every day you're not happy. There

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[122] International Commission of Jurists, "Not Here to Stay: Report of the International Commission of Jurists on its Visit to Malta on 26-30 September, 2011," May 2012, http://documents.icj.org/ICJMaltaMissionReport-Final.pdf (accessed June 6, 2012), pp. 28-29.

[123] Dr. Allan S. Keller et al, "Mental health of detained asylum seekers," *The Lancet*, vol. 362, issue 9397 (November 22, 2003), pp. 1721-1723.

[124] Karen McVeigh, "Children made 'sick with fear' in UK immigration detention centres: Weight loss, difficulty sleeping, bed-wetting and sickness among symptoms found at Yarl's Wood," *The Guardian*, October 13, 2009.

[125] International Detention Coalition, *Captured Childhood: Introducing a New Model to Ensure the Rights and Liberty of Refugee, Asylum Seeker and Irregular Migrant Children Affected by Immigration Detention* (Melbourne, 2012), pp. 48-49.

are people being sent home every day, so I am tense." [126] The uncertainty of waiting in detention can be difficult. Aminata H., from Ivory Coast, said, "Detention is not easy. After a year, they have told us nothing, whether they are going to repatriate us or not."[127]

Interviewees asserted that detention caused their overall mental state to deteriorate. Maka, who said he was detained for 10 months, said, "Hal Far [Hermes Block] was very bad. I was going crazy in that place. It was not good for my head." [128] Aatifa T., who had spent 14 months in detention when we interviewed her, said, "When inside, your mind is always closed. We can't open our mind to new things.... For your brain this is not good." [129] Hakim, from Eritrea, observed, "Many who spent time in detention, we don't want to talk about it," adding that the trauma makes it "very difficult to keep [one's] head straight." [130] Celeste said, "The issues, they are from detention. When you get out, you are cured." [131]

Many of the migrants and asylum seekers arriving in Malta experienced trauma before fleeing their home countries. Others experienced traumatic events during their often months-long migration across the Sahara, through Libya, and over the Mediterranean in unseaworthy boats. In addition to having its own negative effects on mental health, prolonged detention can exacerbate that prior trauma.

The arbitrary nature of the detention and the lack of clarity around procedures for liberty can exacerbate mental distress. Ali Konate, a migrant community leader, told Human Rights Watch: "I see many mental problems. People despair because they don't understand what is going on, they are rejected, etcetera."[132]

Many people in detention become depressed.[133] Amina A., from Somalia, was detained at Hermes Block when Human Rights Watch interviewed her: "I went to a mental institution for 14 days because every day I cried, I was more depressed. That's where I had the

[126] Human Rights Watch interview with Dennis M., Hal Far, Malta, April 24, 2012.

[127] Human Rights Watch interview with Aminata H., Hermes Block, Hal Far, Malta, May 3, 2012.

[128] Human Rights Watch interview with Maka O., Marsa, Malta, April 25, 2012.

[129] Human Rights Watch interview with Aatifa T., Hermes Block, Hal Far, Malta, May 3, 2012.

[130] Human Rights Watch interview with Hakim A., Marsa, Malta, March 14, 2012.

[131] Human Rights Watch interview with Celeste A., Hermes Block, Hal Far, Malta, May 3, 2012.

[132] Human Rights Watch interview with Ali Konate, leader of Migrants Network for Equality, Sliema, March 14, 2012.

[133] International Commission of Jurists, "Not Here to Stay: Report of the International Commission of Jurists on its Visit to Malta on 26-30 September, 2011," May 2012, http://documents.icj.org/ICJMaltaMissionReport-Final.pdf (accessed June 6, 2012), p. 32.

miscarriage.... [Now, back in detention] I take sleeping pills every night."[134] Malta provides some access to mental health care for those in detention, including stays in a psychiatric hospital, but this does not address the underlying connection between detention and deterioration in mental health.

Medhane E., an Eritrean migrant who has sought help from medical staff, said, "I have thought of hurting myself ... pouring gas over myself and lighting on fire."[135] Kelile T., who reported he was 17 years old when he arrived in Malta in 2011, and who was detained at Safi when Human Rights Watch interviewed him, spent 15 days in a mental health facility. He said, "I hate my life. These people, all big, big, not same as me. This is prison … I take medicine now, for sleep. No medicine, I can't sleep … my mind is no good, it is very hard.... I can't, I can't ... this is a hard place. I need a free place."[136]

[134] Human Rights Watch interview with Amina A., Hermes Block, Hal Far, Malta, May 3, 2012.

[135] Human Rights Watch interview with Medhane E., Valetta, Marsa, March 14, 2012.

[136] Human Rights Watch interview with Kelile T., Safi, Malta, March 3, 2012.

III. Treatment of Unaccompanied Migrant Children

Malta detains all age-disputed cases pending age determination, and applies a very low threshold for disputing the age of children. As a result, children may be detained for weeks or months, despite alternative available facilities. During detention, children are detained with adults, without any accommodation for their young age, and with no access to school. Once determined to be children—and released to other accommodation—children do not receive adequate legal representation. Under international and European standards, unaccompanied children should never be detained for reasons related to irregular entry, and pending age determination the person claiming to be a child should be treated as such until the determination is complete.

Detention of Unaccompanied Migrant Children

Malta detains all unaccompanied children whose status as children is in question, pending age determination. The age determination procedure can take some months, leaving children in detention for long periods. 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). Among those we interviewed detained between 2008 and 2011 who Malta ultimately determined to be children, the average time in detention was 3.4 months.[137] A 2009 study by the Maltese National Contact Point of the European Migration Network (funded in part by Maltese government funds) found an average detention time of 1.6 months for the 10 unaccompanied minors in their focus group.[138]

International law states that unaccompanied children should not be criminalized for reasons related to their immigration status or illegal entry,[139]and article 37(b) of the Convention on the Rights of the Child (CRC) mandates that the detention of children "shall

[137] 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.

[138] European Migration Network (Maltese National Contact Point), "Unaccompanied Minors in Malta: Their Numbers and the Policies and Arrangements for their Reception, Return and Integration," Valetta, Malta, May 2009, http://www.mjha.gov.mt/MediaCenter/PDFs/1_EMN-Unaccompanied%20Minors%20Study%20FINAL%20VERSION%20(c).pdf (accessed July 6, 2012), p. 16.

[139] UN Committee on the Rights of the Child, General Comment No. 6, para. 62.

be used only as a measure of last resort." 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."[140]

Best practices indicate that, pending age determination, the person claiming to be a child should provisionally be treated as such.[141] Malta should treat children pending age determination as children, and detain them only as a measure of last resort. While placing migrants pending age determination in the unaccompanied minor facilities is not appropriate, there is no reason why they could not be released to alternate facilities to prevent prolonged detention of children.

Low Threshold for Disputing Age

Malta's trigger for questioning the age individuals claim to be, and thus detaining them, is low: interviewees reported seeing children as young as 12 detained while undergoing age determination procedures.[142] When migrants arrive by boat in Malta, the Malta Police Immigration Section takes virtually all of the passengers to detention.[143] Even if unaccompanied children identify themselves as children during this initial contact, they will most likely still be taken to detention. According to the Agency for the Welfare of Asylum Seekers (AWAS) and Detention Services, only age disputed cases are detained, with those who are "visibly" children released from detention within 24 hours[144] and placed in the care of AWAS.[145] In practice, however, the cut-off for those who are "visibly" children is around 12 to 14 years old, with children who appear older presumed to be adults—and detained—until an age determination is carried out.[146]

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[140] 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.

[141] Save the Children, UNHCR, UNICEF (Separated Children in Europe Program), Statement of Good Practice, 4th Revised Edition, D5 and D6 (2009).

[142] Human Rights Watch interviews with Abdi M. and Ghedi H., Valetta, April 27, 2012.

[143] Human Rights Watch interview with Supt. Sandro Zarb, International Relations Unit and Supt. Neville Xuereb, Immigration Department, Malta Police, Floriana, Malta, May 1, 2012.

[144] Human Rights Watch interview with Supt. Sandro Zarb, International Relations Unit and Supt. Neville Xuereb, Immigration Department, Malta Police, Floriana, Malta, May 1, 2012.

[145] E.g. Human Rights Watch interview with Lt. Col. Brian Gatt, Commander Detention Service, Ministry for Justice and Home Affairs, Safi Barracks, Safi, Malta, April 26, 2012.

[146] Human Rights Watch interview with Supt. Sandro Zarb, International Relations Unit and Supt. Neville Xuereb, Immigration Department, Malta Police, Floriana, Malta, May 1, 2012.

For example, on April 30, 2012, Human Rights Watch met with three boys detained in an immigration facility who said they had been taken straight into detention after arriving by boat two days earlier. Two of the boys, aged 15 and 16, were visibly children according to Human Rights Watch's assessment: we were able to walk down a crowded hallway inside the detention facility and identify them by sight, having no previous knowledge of children detained in that facility. On the day of arrival, all three boys said they told the arresting authorities their birthdate during a routine data collection, but none were provided with information about procedures to establish that they are minors.[147]

Their experience is similar to that described by other interviewees. Bello E., who said he was 16 when his boat was intercepted near Malta, reported, "Before we knew it, we were in detention … I tried to tell I was 16. They didn't accept it, they sent me back into Safi [detention center] … I had not committed a crime. Why was I in prison?"[148] Labaan X., a Somali who said he came to Malta in 2008 when he was 15 years old, and was 18 years old when we interviewed him, described to Human Rights Watch what happened after arriving: "I got off the boat and went straight to detention. I said I was a child. But I spent three months in detention before they put me in a home for young people."[149]

Detaining Unaccompanied Children with Unrelated Adults

Detained migrant boys are routinely held, pending age determination, in overcrowded conditions with unrelated adult men. The Convention on the Rights of the Child (CRC) indicates that, in exceptional cases where children are detained, they should receive care appropriate to their age, including ability to contact family, appropriate medical treatment and psychological counseling, and access to education.[150] Detained children do not have access to education or any other care related to their age.

The Convention on the Rights of the Child, as well as the International Covenant on Civil and Political Rights oblige states parties to separate adults from children in detention,[151] and the Committee on the Rights of the Child reinforces that this obligation specifically applies to

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[147] Human Rights Watch interviews with Amr S., Khaled M., and Hossein D., Safi, Malta, April 30, 2012.

[148] Human Rights Watch interview with Bello E., Marsa, March 13, 2012, and follow up interview, Marsa, April 25, 2012.

[149] Human Rights Watch interview with Labaan X., Marsa, Malta, March 13, 2012.

[150] General Comment No. 6, para. 63.

[151] CRC, art. 37(c), ICCPR, art. 10(b). The CRC only allows the joint detention of children and adults if it is in the child's best interest. Ibid.

migrant children in detention.[152] The European Court of Human Rights held in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* that the prolonged detention of an unaccompanied child jointly with adults amounted to inhuman or degrading treatment, in part because such detention conditions were not adapted to the extreme vulnerability of the unaccompanied child, causing "considerable distress" and "serious psychological effects."[153]

Seventeen-year-old Stéphane K., an Ivorian who was 16 when he arrived in Malta in 2011, was detained in one room with 200-300 adult men. "The room wasn't that big—we had bunk beds," he told Human Rights Watch.[154] Kibreab A., an Eritrean who arrived in Malta at the age of 17 in 2009, said he was detained with unrelated adults for five months before being moved to a children's facility. He complained to Human Rights Watch that the room in detention was small for the 50 people that were staying there.[155]

Children may be exposed to periodic violence in detention facilities when detained with adults.[156] While some children reported that they did not feel unsafe while detained with adults, others reported instances of exploitation and violence. Ghedi H., who was detained with adult men in 2008 when he was 17 years old, said, "Sometimes … adults would take my food because there's not enough."[157] Abdi M., a Somali migrant who was detained at the same time as Ghedi, and who was 17 years old when detained, related what happened to him at the Safi detention facility:

> Every day a big man from Mali came and said, "Give me your food." And one day I said no, and he hit me. I was out on the floor [unconscious] for

[152] "Special arrangements must be made for living quarters that are appropriate for children and that separate them from adults[.]" UN Committee on the Rights of the Child, General Comment No. 6, para. 63.

[153] European Court of Human Rights, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (Application no. 12178/03), Judgment of October 12, 2006, available at http://www.unhcr.org/refworld/docid/45d5cef72.html (accessed June 7, 2012), paras. 58, 103.

[154] Human Rights Watch interview with Stéphane K., Marsa, Malta, March 15, 2012.

[155] Human Rights Watch interview with Kibreab A., Marsa, Malta, March 14, 2012.

[156] There have been periodic riots at the detention facilities to which detained children were exposed. Human Rights Watch interview with Lt. Col. Brian Gatt, Commander Detention Service, Ministry for Justice and Home Affairs, Safi Barracks, Safi, Malta, April 26, 2012. See also International Commission of Jurists, "Not Here to Stay: Report of the International Commission of Jurists on its Visit to Malta on 26-30 September, 2011," May 2012, http://documents.icj.org/ICJMaltaMissionReport-Final.pdf (accessed June 6, 2012), pp. 20-21 (discussing a particularly serious riot on 16 August 2011 spurred by notification of deportation to some detainees, and noting the use of tear gas and rubber bullets to subdue the violence).

[157] Human Rights Watch interview with Ghedi H., Valetta, Malta, April 27, 2012.

> half an hour. I told the soldiers but they said, "We don't care." No one helped me, I just cried and went to sleep.[158]

During Human Rights Watch's visit to Maltese detention facilities in April 2012, we met with three boys who were housed with adults in a detention center for single men. Two of the boys, who reported their ages as 15 and 16 years old, were visibly scared. Amr S., the 15 year old, said, "It's very difficult to live here at Safi. I'm afraid to live where people might hit me… I don't have anyone to take care of me."[159] Edgard O., a 26-year-old Ivorian man who was detained in the same facility as the boys, commented: "To be honest with you, I was a little bit concerned to see they were here [the boys.] Fifteen years old—he doesn't deserve this."[160]

Lengthy and Incomplete Age Determination Procedures That Prolong Detention

Age determination procedures in Malta can take several months, leaving children in detention pending the outcome. AWAS has, to its credit, instituted a relatively sophisticated age determination procedure in the roughly 10-year period that unaccompanied children have been arriving by boat. Nonetheless, the procedure needs several improvements—including a reduction in processing time (including the time taken for medical testing), increased provision of information to incoming children, and a process by which children can be released from detention pending age determination.

According to the CRC, age determination should be prioritized immediately after arrival in the country, and that the best interests of the child should be a guiding principle in these proceedings.[161] Furthermore, children should never be detained for reasons related to their immigration status. Malta's lengthy age determination procedures, in combination with routine detention of children in age disputed cases and low threshold for disputing age, stands in opposition to these principles.

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[158] Human Rights Watch interview with Abdi M., Valetta, Malta, April 27, 2012.

[159] Human Rights Watch interview with Amr S., Safi, Malta, April 30, 2012.

[160] Human Rights Watch interview with Edgard O., Safi, Malta, April 30, 2012.

[161] CRC article 8, General Comment No. 6 para. 31 (a).

Labaan, the Somali boy who arrived in Malta at 15 years old in 2008, said: "I had to wait for three months in detention. Two months before they [AWAS age determination officials] questioned me."[162] Kibreab A., who was 17 when he arrived in Malta from Eritrea in 2009, told us he was detained for five months before being released to a children's home.[163] After leaving the Ivory Coast and traveling for several months, Stéphane K., an Ivorian boy, told Human Rights Watch he was 16 when he reached Malta in 2011. He was detained for seven months awaiting age determination, which he described as deeply disturbing: "For someone [at that age] to be in detention, it's not normal. Seven months of detention, it's not normal. Shut in, I can't go out. It's not normal."[164]

An NGO staff member who routinely works within the detention centers told Human Rights Watch that in 2008 and 2009 some asylum procedures actually moved more quickly than age determination procedures. Accordingly, some adult asylum seekers who arrived at the same time (and even on the same boat) as children awaiting age determination were released from detention while the children remained behind bars.[165] This could have the effect of discouraging children from disclosing their age for fear that it could extend their period of detention.

Age determination in Malta is conducted by an age assessment team from AWAS composed of a social worker, psychologist, and a coordinator.[166] Most unaccompanied children arrive without identity papers, such as passports and birth certificates. Maltese authorities rely on medical testing—in particular, bone x-rays—where initial interviews by the age assessment team are inconclusive.[167] However, medical examinations used to

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[162] Human Rights Watch interview with Labaan X., Marsa, Malta, March 13, 2012.

[163] Human Rights Watch interview with Kibreab A., Marsa, Malta, March 14, 2012.

[164] Human Rights Watch interview with Stéphane K., Marsa, Malta, March 15, 2012.

[165] Human Rights Watch interview with NGO staff member, Birkirkara, M February 27, 2012.

[166] Human Rights Watch interview with Sarah Borda Bondin, Service Manager, Agency for the Welfare of Asylum Seekers, Ministry for Home and Parliamentary Affairs, Sliema, Malta, April 30, 2012. Good practices in age determination—a challenging field—are multidisciplinary; UNHCR and the Committee on the Rights of the Child have both recommended that states not base age determinations solely on the child's physical appearance, but also consider psychological maturity and the margin of error of medical exams, and to give the child the benefit of doubt. United Nations High Commissioner for Refugees (UNHCR), "Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum" (hereafter UNHCR Guidelines), February 1997, http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae6b3360 (accessed September 1, 2008), section 5.11; General Comment No. 6, para. 31 (i).

[167] Human Rights Watch interview with Sarah Borda Bondin, Service Manager, Agency for the Welfare of Asylum Seekers, Ministry for Home and Parliamentary Affairs, Sliema, Malta, April 30, 2012. Many other European countries also use medical testing to determine the age of unaccompanied migrant children, though the science is inexact. "Methods for assessing the

determine age are problematic because they are subject to margins of error of up to five years.[168] In addition, radiological testing is unnecessarily intrusive; the Separated Children in Europe Program, a coalition of Save the Children and UNHCR, asserts that such testing must be avoided and non-invasive medical testing, such as physical development assessments, should be used instead.[169] In cases where Maltese authorities turn to medical testing, they use the result as one factor in a multidisciplinary assessment.[170]

In Malta, medical testing can add months to the age determination process.[171] Christophe G., a 17-year-old Ivorian who arrived in Malta when he was 16 in 2011 and spent a total of six months in detention, reported: "After the [x-ray] machine, I waited [in detention] for one or two months more, it was one month after that that my friend left, and then one month more, so two months more total."[172] The Committee on the Rights of the Child emphasizes that, when children are in immigration detention, "all efforts, including acceleration of relevant process, should be made to allow for the immediate release."[173]

On a more positive note, a group of children was detained for a very short period in early 2012. Dalmar H., Nadif K., Korfa A., and Erasto M., all Somali boys aged 17, said they were detained for two weeks when they arrived in the same boat in January 2012.[174] However, fewer migrants cross the Mediterranean during the winter months, because of worse weather conditions than in the summer; this is not representative of a fundamental change in Malta's policies.

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age of migrant children must be improved," Council of Europe press release, CommDH018(2011), August 9, 2011, https://wcd.coe.int/ViewDoc.jsp?id=1818617&Site=DC (accessed May 12, 2012).

[168] "Age determination is an inexact science and the margin of error can sometimes be as much as 5 years either side." Royal College of Paediatrics and Child Health, The Health of Refugee Children: Guidelines for Practitioners (London: 1999), p. 13. Pediatricians have further argued that it amounts to a violation of medical ethics to expose children to radiation in X-rays for non-medical purposes. Ibid., pp. 13-14

[169] Separated Children in Europe Program, Position Paper on Age Assessment in the Context of Separated Children in Europe, 2012, p. 9.

[170] Human Rights Watch interview with Sarah Borda Bondin, Service Manager, Agency for the Welfare of Asylum Seekers, Ministry for Home and Parliamentary Affairs, Sliema, Malta, April 30, 2012. Good practices in age determination are that medical examination is just one possibility for assessment, along with personal interviews, searches for documentation, and psychological evaluation. Council of Europe, Parliamentary Assembly, Unaccompanied Children in Europe: Issues of Arrival, Stay and Return, Rapporteur: Ms Mailis Reps, Estonia, Section 3.2.2, para. 30, available at: http://assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12539.pdf.

[171] [171] Human Rights Watch interview with Sarah Borda Bondin, Service Manager, Agency for the Welfare of Asylum Seekers, Ministry for Home and Parliamentary Affairs, Sliema, Malta, April 30, 2012.

[172] Human Rights Watch interview with Christophe G., Fgura, Malta, May 3, 2012.

[173] General Comment No. 6, para. 61.

[174] Human Rights Watch interviews with Dalmar H., Nadif K., Korfa A., and Erasto M., Marsa, Malta, March 15, 2012.

Despite the relatively quick release of children in January 2012, there does not appear to be any permanent detention policy change.[175] AWAS has made clear attempts to take policy steps to shorten the process, including by setting internal benchmarks for preliminary interviews with children within 10 working days of arrival, and by participating in training initiatives through common European mechanisms.[176] But as long as Malta continues to detain children pending age determination, any delay in the procedure prolongs the violation of children's rights.

Lack of Screening, Reliance on Self-identification, and Lack of Information on Procedures

Children lack adequate information about the age determination process (including whether documents are accepted and whether there is an appeal). Some migrants who request an age determination procedure are seemingly ignored: interviewees reported telling authorities they were minors but never receiving age determination. Other children never request an age determination because they lack information on the procedure.

For example, Perry O., a Ghanaian migrant, said he traveled to Malta shortly before he turned 17 in 2008. He reported that he told the detention guards that he was 16 years old, but he was never interviewed by AWAS or given a medical test to determine his age. He did not know if the guards ever reported his claim to AWAS.[177] Chris K., from Nigeria, said he was 17 when he arrived in 2007. He reported: "I told them I was a child but they still put me in detention for 10 months. I told the police when I came in."[178] Like Perry, Chris said he never received an interview with AWAS and does not know what happened to his claim.

A number of interviewees chose not to inform authorities that they were children, often on the advice of fellow migrants. Ousmane H., from Mali, said: "I came when I was 17. I spoke no English, I had no-one who could understand me. I was told by a Somali guy not to reveal my age."[179] Bello, a Nigerian migrant who said he reached Malta when he was 16 years old,

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[175] Human Rights Watch interview with Alex Tortell, Director of the Agency for the Welfare of Asylum Seekers, Ministry for Home and Parliamentary Affairs,, Valetta, Malta, March 14, 2012.

[176] Human Rights Watch interview with Sarah Borda Bondin, Service Manager, Agency for the Welfare of Asylum Seekers, Ministry for Home and Parliamentary Affairs, Sliema, Malta, April 30, 2012.

[177] Human Rights Watch interview with Perry O., Sliema, Malta, March 16, 2012, and follow up, Bugibba, Malta, April 28, 2012.

[178] Human Rights Watch interview with Chris K., Marsa, Malta, April 25, 2012.

[179] Human Rights Watch interview with Ousmane H., Sliema, Malta, March 14, 2012.

had a similar story: "The captain told all the people on my boat not to say we were below 18." [180] Bello later tried to report his real age:

> Before we knew it we were in detention. They just record your details, you don't know what we're supposed to do…. When I got information from immigration, I rushed back to say I'm 16. I went back to the security to tell them I was a child … They didn't accept it; they sent me back into Safi [the detention facility].[181]

There is no appeal of the age determination process within AWAS (and while an appeal to the Immigration Appeals Board is possible, it is rarely done), nor is there any clear guidance on whether documents are accepted.[182] Cherif M. reported that he was 17 when he arrived in Malta in 2011. He waited one month in detention for his initial interview with AWAS, he said, and was rejected: "A friend faxed my photocopied birth certificate from Chad. AWAS wouldn't take it."[183]

The government should do more to provide children with reliable information about the age determination procedure. Children receive no guidance on the content of the procedure, whether documents will be useful, or whether they can appeal. Malta has taken considerable steps in providing information to migrants about the process for asylum, including by conducting information sessions to every incoming migrant. It could easily do the same for the age determination process.

Lack of Legal Representation in Asylum Proceedings and in Challenging Detention

Unaccompanied migrant children in Malta receive little or no legal representation, either in requesting asylum or in challenging detention in age-disputed cases. The Maltese government relies heavily on non-governmental and inter-governmental organizations, including the Jesuit Refugee Service and UNHCR, to provide counseling to unaccompanied

[180] Human Rights Watch interview with Bello E., March 13, 2012.

[181] Human Rights Watch interview with Bello E., Marsa, March 13, 2012, and follow up interview, Marsa, April 25, 2012.

[182] Human Rights Watch interview with Sarah Borda Bondin, Service Manager, Agency for the Welfare of Asylum Seekers, Ministry for Home and Parliamentary Affairs, Sliema, Malta, April 30, 2012.

[183] Human Rights Watch interview with Cherif M., Safi, Malta, May 3, 2012.

migrant children and other vulnerable migrants in detention. However, this is insufficient to meet the government's obligations to provide children in asylum proceedings with legal representation.

Children involved in asylum procedures should, in addition to the appointment of a guardian, be provided with legal representation, according to the CRC.[184] The lack of representation in first instance proceedings means it is harder for children to understand the proceedings and present their case. For example, Labaan said he struggled to understand the asylum procedure: "I had three interviews with two different people. It made me confused."[185]

Each unaccompanied child in Malta is, at the conclusion of the age determination procedure, assigned a guardian when the Minister for Justice, Dialogue, and the Family issues a care order for the child, at the direction of the Children and Young Persons Advisory Board.[186] According to the CRC, the guardian's job should be much broader than that of a legal representative (as above, for asylum proceedings or to challenge detention): the guardian, who need not be a lawyer, should be consulted on all actions taken for the child in order to ensure that the child's "legal, social, health, psychological, material and educational needs are adequately covered.[187] Nonetheless, this is not a substitute for legal representation.

The Maltese government has made considerable strides in asylum processing in the 10 or so years since it started receiving significant numbers of asylum applications, and now has one of the fastest processing times and lowest backlogs in the EU. Simultaneously, those responsible for first instance decisions in the Office of the Refugee Commissioner have undergone training on the specific needs of children seeking asylum through the EU-sponsored European Asylum Curriculum, and the Refugee Commissioner has urged his staff to view children's cases in light of child-specific forms of persecution and appropriate credibility standards. While the Maltese government is to be commended on these steps, children applying for asylum still do not enjoy the requisite assistance.

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[184] General Comment No. 6, para. 33.

[185] Human Rights Watch interview with Labaan X., Marsa, Malta, March 13, 2012.

[186] Human Rights Watch interview with Mario Friggieri, Refugee Commissioner, Valetta, Malta, April 27, 2012; Republic of Malta, "Irregular Immigrants, Refugees, and Integration: Policy Document," 2005, p. 21.

[187] General Comment No. 6, para. 33.

As noted above, in meeting with Human Rights Watch, the Refugee Commissioner stressed that Malta has one of the highest rates of asylum applications per capita in the industrialized world—20.1 applicants per 1,000 inhabitants—and that even those not granted asylum still tend to receive other forms of protection. He pointed to this as a reason why it is not necessary for all migrants to be provided with legal representation in the first instance. [188] While this may be a valid argument for adults, provision of legal representation to unaccompanied migrant children is required by law, and necessary to protect the interests of this vulnerable group. Such representation is unlikely to be financially burdensome: there are approximately less than 100 unaccompanied children who claim asylum each year.

Likewise, unaccompanied migrant children 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 on the Rights of the Child has emphasized that this specifically applies to unaccompanied migrant children in immigration detention.[189]

[188] Human Rights Watch meeting with Mario Friggieri, Valetta, Malta, April 27, 2012.

[189] General Comment No. 6, para. 63.

IV. Conclusion

Malta detains an average of 1,500 migrants per year in violation of international law. The migrants detained are overwhelmingly poor, fleeing violence and conflict, or in search of a better life. Yet when they reach Malta, an entrance point for the European Union, they are detained for up to 18 months, despite the fact that 93 percent of them are asylum seekers. Even vulnerable migrants—including children, those with mental and physical disabilities, and the elderly—are detained.

There is no evident justification for this prolonged detention, and during their detention migrants have no meaningful opportunity for judicial review in order to require the state to show such justification. The automated, indiscriminate, and blanket detention policy does not deter migrants from coming to Malta: most migrants who arrive by boat, typically crossing the Mediterranean in unseaworthy vessels with insufficient navigation systems, are not aiming to reach Malta but instead intend to travel to Italy.

Unaccompanied migrant children can travel for months in hazardous conditions before reaching Malta. Yet these resilient and resourceful children are not spared detention in Malta: rather, they are locked up for weeks or months until their age determination procedures are concluded. During this time, they are detained with unrelated adults, a further violation of international standards on detention of children.

Among those we interviewed who were found to be children in age determination proceedings, the average length of time spent in detention was 3.4 months. Children should only be detained as a last resort, and for the shortest period possible. Malta's age determination proceedings must be restructured to prevent extended detention of children. Crucially, anyone who makes an application for age determination must be presumed a child until the outcome of the proceedings, and must be released from detention.

Malta must revise its migrant detention policies for adult and child migrants alike, and end the continued mental stress imposed on migrants kept in prolonged detention. Maltese laws should allow detention of migrants only in exceptional circumstances, with individualized determinations, and access to procedures to challenge detention.

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Boat Ride to Detention

Adult and Child Migrants in Malta

Since 2002, approximately 15,000 migrants have landed on the tiny European island nation of Malta, arriving in the country by boat without permission, or "irregularly." Malta has placed virtually all of these migrants—many of whom are fleeing violence or persecution—in detention. This automated, indiscriminate, and blanket detention policy violates international law at the very border of the European Union.

The central Mediterranean migration route—through which migrants from sub-Saharan Africa typically travel from Libya to Malta or to Italy in rickety boats—is a major entrance point to the EU. This report documents the experiences of migrants, including unaccompanied children, who reach Malta by boat, or whose boats are intercepted at sea by the Armed Forces of Malta and taken directly to detention.

Under international law migrants who do not have permission to enter or stay in a country may be subject to detention, in certain circumstances, and subject to safeguards. However in Malta, detention is automatic and prolonged, without safeguards. Asylum seekers who arrive by boat are 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. Even the most vulnerable migrants—such as families with children, elderly people, and people with mental or physical disabilities—are taken to detention.

Malta routinely detains unaccompanied migrant children pending age assessment. "Unaccompanied migrant children" are children traveling without parents or other guardians; typically they travel in dangerous conditions for many months before reaching Malta. As the children lack documents proving that they are under 18 years old, Malta detains these children until they have been through a formal age determination procedure. This means children can be detained for months; the average length of time in detention for our interviewees was 3.4 months. During this period, children are detained with unrelated adults without any special provisions for the fact they are minors.

Malta should urgently revise their detention policies to detain migrants only in exceptional circumstances in accordance with the law, and should refrain from detaining those requesting age determination until they have been found to be adults.

(front cover) A 15-year-old boy and a 16-year-old boy detained in an adult detention facility. Upon arriving in Malta, they told the authorities their birth dates as part of routine data collection, but were not provided with information about procedures to establish themselves officially as minors, and were taken directly to adult detention.

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