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# MASTER-THESIS

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„The Maltese practice of detention of asylum-seekers and irregular migrants in light of international standards“

Verfasserin

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## **Abstract (English)**

Malta applies extremely restrictive migration policies, which foresee the detention of anyone entering the country irregularly. Legislation does not provide for the differential treatment of asylum-seekers, who are detained like any other migrant with a view of deportation. The absence of real grounds for detaining asylum-seekers, the prolonged period of detention and the absence of effective legal assistance and legal avenues to challenge detention make this deprivation of liberty unlawful and arbitrary. In fact it overlooks the fundamental principle of non-refoulement, it breaches the right to liberty and security of the person and it renders access to the asylum procedure extremely difficult.

Additionally, although some mechanisms are in place to identify persons belonging to vulnerable groups, they are not efficient enough to release promptly children, families and pregnant women, persons with disabilities and elderly persons from detention, who are thus subjected to a treatment which is not appropriate to their physical and mental needs. Various factors of the detention regime have a deteriorating impact on the physical and psychological well-being of persons, exacerbating the vulnerabilities of vulnerable persons and rendering vulnerable those who were *prima facie* healthy.

One of those factors regards the conditions in detention, which fail to comply both with the international criteria for an adequate standard of living and with the rights of prisoners. The Maltese detention policy does not only infringe the rights of asylum-seekers by clashing with well-established principles of refugee law but it also deprives vulnerable persons and migrants of their human rights by avoiding taking into consideration their human needs.

The Maltese detention of asylum-seekers and migrants solely derives from politics of insecurity which aims to justify their deprivation of liberty by instilling a sentiment of fear towards the unknown. This sentiment exacerbates racist and xenophobic attitudes, which, in turn, render acceptable to society the infringement of asylum-seekers' and migrants' human rights.

## **Abstract (Deutsch)**

Maltas Migrationspolitik ist extrem restriktiv in Bezug auf irreguläre MigrantInnen, die grundsätzlich verhaftet werden. Die Gesetzeslage sieht keine gesonderte Behandlung von AsylwerberInnen vor, die wie alle anderen MigrantInnen verhaftet werden und mit Abschiebung rechnen müssen. Der Mangel an rechtlichen Grundlagen für die Inhaftierung von AsylwerberInnen, die lange Haftdauer, und das Fehlen effektiver Rechtshilfe und rechtlicher Möglichkeiten zur Anfechtung der Inhaftierung, machen diesen Freiheitsentzug rechtswidrig und willkürlich. Dieses System ignoriert das grundlegende Prinzip des Non-Refoulement, verletzt das Recht auf Freiheit und Sicherheit, und macht den Zugang zum Asylverfahren äußerst schwierig.

Außerdem, sind die Schritte um Personen die zu gefährdeten Gruppen gehören zu identifizieren nicht effizient genug, um Kinder, Familien, schwangere Frauen, Menschen mit Behinderungen und ältere Menschen zeitnah aus der Haft und zu entlassen, was zu einer Behandlung führt, die ihre körperlichen und psychischen Bedürfnisse missachtet. Verschiedene Faktoren der Haftbedingungen haben schädliche Auswirkungen auf das körperliche und psychische Wohlbefinden dieser Personen, wodurch sich sowohl der Gesundheitszustand gefährdeter Personen als auch jener anderer gesunder Häftlinge verschlechtert. Einer dieser Faktoren betrifft die Haftbedingungen, die den internationalen Kriterien für einen angemessenen Lebensstandard und den Rechten von Gefangenen nicht entsprechen. Deshalb verletzt die maltesische Migrationspolitik nicht nur die Rechte von AsylwerberInnen durch die Verletzung etablierter Prinzipien des Flüchtlingsrechts, sie betrifft auch die Menschenrechte schutzbedürftiger Personen und MigrantInnen, deren grundlegende Bedürfnisse missachtet werden.

Die maltesische Inhaftierung von AsylwerberInnen und MigrantInnen gründet nur auf einer Politik der Unsicherheit, die Freiheitsentzug rechtfertigt, durch die Angst vor dem Unbekannten zu rechtfertigen versucht. Dieser Ansatz verstärkt rassistische und fremdenfeindliche Einstellungen, die es wiederum gesellschaftlich akzeptabel machen, Menschenrechte von AsylwerberInnen und MigrantInnen zu verletzen.

## Introduction

Malta is a small island of 316 square kilometres situated in the Mediterranean Sea, south of Sicily and north of Libya. Its geographical position makes it particularly subjected to the migration flows coming from north Africa. As a matter of fact, each year between 1500 and 2000 individuals, generally departing from Libya, reach the Malta by boat in an irregular manner.<sup>1</sup>

The majority of asylum-seekers and migrants reaching the island come from Somalia, Eritrea and Syria and other minor groups come from Nigeria, Palestine, Gambia, Ghana, Mali and, in smaller numbers, from other countries.<sup>2</sup> Since the year 2002 to the year 2013 the number of persons being granted international protection has significantly increased and in 2012 and 2013 over 70% of the individuals seeking asylum have been granted some form of protection.<sup>3</sup>

Since 2002, more than 18,000 individuals arrived in Malta by boat and the country has been dealing on the one hand with the practical management of high numbers of boat arrivals during summer months and, on the other hand with the public impression and fear of being unable, due to the dimensions of the island, to cope with the influxes of asylum-seekers and migrants. Those facts and feelings, together with the existence of a very restrictive immigration legislation have led to a practice, whereby anyone entering the country in an irregular manner is detained upon arrival, regardless of his or her being an asylum-seeker or a migrant.

For various reasons that will be examined, this system has given rise to much criticism by several international monitoring bodies, by the United Nations High Commissioner for Refugees (UNHCR) and by the European Court of Human Rights. Against the background

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<sup>1</sup> Cf. UNHCR Malta Asylum Trends Fact Sheets 2002-2010, 2011, 2012, 2013, available at: <http://www.unhcr.org.mt/mobile/statistics> (Last accessed: 10/7/2014).

<sup>2</sup> *Ibidem.*

<sup>3</sup> *Ibidem.*

of this criticism, the present work will analyse the detention policy in light of a number of international and regional standards and in light of national legislation.

The first chapter will specifically deal with the detention of asylum-seekers and will highlight how the right to seek asylum, the principle of non-refoulement and the rights to liberty and security of the person and to freedom of movement of asylum-seekers are infringed by this system.

The second chapter will analyse another problematic aspect of the detention system regarding the deprivation of liberty of persons with vulnerability. The respect of the dignity of those groups entails the recognition of some specific rights responding to specific needs, however, it will be shown that the Maltese detention system does not appropriately respond to those needs.

The third chapter will broaden further the group of detained persons considered and will focus on the conditions in detention, highlighting the fact that those are not in compliance with the right to an adequate standard of living and with the rules on the treatment of prisoners, thus infringing the rights of asylum-seekers, but also of migrants. The chapter will also examine the impact that this practice has on the public perception of refugees and migrants.

Finally, the conclusion will be devoted to a brief review of the arguments exposed throughout the thesis and of the position that was supported.

## **Methodology and state of research**

The aim of this thesis is to explore the Maltese practice of detaining asylum-seekers and irregular migrants and to examine it in light of international and regional standards and national law. Although the work specifically focuses on the Maltese system, the conclusions derived can be extended to any country of the European Union which applies such kind of policy. In fact, the thesis primarily provides an in-depth analysis of the international and regional legislation on migration and uses it to evaluate whether the

Maltese policy and legislation do in fact comply with those standards. The research has thus made use of legal analysis, literature review and qualitative research to compare international, regional and national legislation and to evaluate whether the implementation of the detention policy is effectively in compliance with those standards.

Although the detention of asylum-seekers is a topic which has been thoroughly discussed in recent years' literature, it still raises serious issues in various countries of the European Union, thus requiring further research. The present work has tried to give a particular insight and perspective about this issue.

As regards vulnerable groups in detention, special focus has often been placed on children, mainly by comparing their detention with the general principle of the best interests of the child. The present research has analysed more in depth the needs of children and the inappropriateness of detention by examining more in details what the best interests of the child means. Additionally, it has also placed a focus on other vulnerable groups which have been quite ignored throughout literature.

Finally, the last chapter of this work has given a completely new perspective on the detention of asylum-seekers and migrants by examining it in light of prisoners' rights.

## **1. Detention of asylum-seekers: right to seek asylum, principle of non-refoulement and other relevant fundamental rights**

The majority of asylum-seekers and irregular migrants in Malta have reached the island by sea and have entered the country undocumented and without a visa to travel in a regular manner. Under Maltese Immigration law, detention is the automatic consequence of a refusal to grant admission to national territory<sup>4</sup> or of the issuance of a removal order in respect to a particular individual.<sup>5</sup> No specific legislative provision regulates the administrative detention of asylum-seekers. Therefore, no differential treatment is provided for migrants filing a claim for international protection who are thus detained like any other migrant upon whom a removal order is pending.

The Maltese practice of detention of migrants entering the country irregularly, raises serious issues specifically because it does not provide for any provision regulating the detention of asylum-seekers. The purpose of detention being the removal of the individual from national territory, it is very unclear as to how this practice can be applied to asylum-seekers without clashing with well-established international standards.

Seeking asylum is a fundamental right enshrined in several international and regional treaties<sup>6</sup> and the principle of non-refoulement is a core rule of the 1951 Convention Relating to the Status of Refugees, establishing that refugees shall not be returned to territories where their life would be threatened (...).<sup>7</sup> Detention of asylum-seekers for the purpose of removal is thus in contrast with fundamental principles of international refugee law and no other substantial ground is provided for in law to justify this practice.

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<sup>4</sup> Immigration Act, Chapter 217 of the laws of Malta, as amended by Legal Notice 20 of 2013, Art. 10.

<sup>5</sup> *Ivi*, Art. 14.

<sup>6</sup> UNGA, *Universal Declaration of Human Rights*, Art. 14, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 11, European Union, *Charter of Fundamental Rights of the European Union*, 2000, OJ C364/01 Art. 18, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 354.

<sup>7</sup> UNGA, *Convention Relating to the Status of Refugees*, Art. 33, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 20.

Detention becomes arbitrary when it is not based on clear and individually assessed reasons. The deprivation of liberty of asylum-seekers in Malta is not justified and thus infringes several fundamental rights enshrined in international law.

This chapter will examine the Maltese practice of detention of asylum-seekers in light of the main principles of international and regional refugee law and of some fundamental human rights concerned. The first part will provide an overview of the international, regional and national legal framework which will be used in the second part to provide an in-depth analysis of the Maltese detention system.

## **1.1. Legal framework**

### **1.1.1. International and regional legal framework**

The right to seek asylum, the principle of non-refoulement and other relevant rights which have to be taken into consideration when analysing the practice of detention of asylum-seekers are enshrined in several international and regional legal instruments. In what follows, an analysis of those instruments as regards each of the rights concerned will be provided.

#### 1.1.1.1. Right to seek asylum

Article 14(1) of the Universal Declaration of Human Rights foresees that “everyone has the right to seek and enjoy in other countries asylum from persecution”.<sup>8</sup> Although not explicitly mentioned in any Article of the 1951 Convention Relating to the Status of Refugees, the right to seek asylum is at the core of the obligations listed in this document,

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<sup>8</sup> UNGA, *Universal Declaration of Human Rights*, Art. 14, in Sandy Ghandhi (ed.), *Blackstone’s International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 11.

which aims at assuring refugees protection and the exercise of some fundamental rights and freedoms. The right to seek asylum can also implicitly be derived from Article 7 of the International Covenant on Civil and Political Rights, prohibiting torture or other cruel, inhuman and degrading treatment,<sup>9</sup> as it prohibits to return someone to a territory where his or her life would be at risk, thus requiring States to analyse whether the person would face such a risk if returned. Additionally, Article 13 of the Covenant on Civil and Political Rights explicitly establishes that a person should be allowed to submit reasons against his or her expulsion<sup>10</sup> and this is precisely what seeking asylum implies.

At a regional level, the European Union Charter of Fundamental Rights enshrines this right in Article 18.<sup>11</sup> Significantly, the Charter goes beyond the right *to seek asylum*, speaking rather of the right *to asylum*, thus guaranteeing to persons who qualify for asylum the right of having this status recognized.<sup>12</sup> Even though the right to asylum or to seek asylum is not explicitly mentioned in the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>13</sup> the European Court of Human Rights has held in its first leading case regarding the non refoulement that “the decision by a State to extradite a person may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention”<sup>14</sup> and it has

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<sup>9</sup> UNGA, *International Covenant on Civil and Political Rights*, Art. 7, in Sandy Ghandhi (ed.), Blackstone’s International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 35.

<sup>10</sup> *Ivi*, Art. 13, p. 36.

<sup>11</sup> European Union, *Charter of Fundamental Rights of the European Union*, 2000, OJ C364/01, Art. 18, in Sandy Ghandhi (ed.), Blackstone’s International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 354.

<sup>12</sup> Fundamental Rights Agency (FRA), *Handbook on European Law Relating to Asylum, Borders and Immigration*, Publications Office of the European Union, Luxembourg, 2013, p. 44.

<sup>13</sup> N. Mole, C. Meredith, *Asylum and the European Convention on Human Rights*, Human Rights Files No. 9, Council of Europe Publishing Editions, Strasbourg, 2010, p. 19.

<sup>14</sup> Case of Soering v. United Kingdom, application no. 14038/88, European Court of Human Rights, 7 July 1989, para. 91.

reiterated throughout the years that States must have regard to Article 3 of the Convention<sup>15</sup> which enshrines one of the fundamental values of democratic societies and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the individual's conduct, however undesirable or dangerous.<sup>16</sup> Article 3 of the European Convention on Human Rights, like Article 7 of the Covenant on Civil and Political Rights, thus implicitly prohibits to return an individual to a place where he or she would be at risk of such a treatment. Furthermore, it has to be noted that other rights contained in the Convention for the Protection of Human Rights and Fundamental Freedoms can be considered relevant for the processing of applications for asylum. Particularly, asylum procedures raise issues of return under the right to life, the right to liberty and security of the person, the right to a fair trial, the prohibition of discrimination in the enjoyment of Convention rights, the prohibition of collective expulsion of aliens, the procedural safeguards relating to expulsion of aliens, the prohibition on double jeopardy and the general prohibition on discrimination.<sup>17</sup>

The right to seek asylum is also guaranteed by Article 6 of the Asylum Procedures Directive of the European Union, which states that States shall ensure that each adult having legal capacity has the right to make an application for asylum.<sup>18</sup>

It has to be highlighted that the right to seek asylum brings with it a number of procedural guarantees of which applicants for asylum should be granted full enjoyment. Article 10 of the Asylum Procedures Directive establishes that applicants a) shall be informed in a language they understand of the procedure to be followed and of their rights and obligations during the procedure, b) shall receive the services of an interpreter for submitting their case,

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<sup>15</sup> Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Art. 3, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 258.

<sup>16</sup> Case of Salah Sheekh v. the Netherlands, application no. 1948/04, European Court of Human Rights, 11 January 2007, para. 135.

<sup>17</sup> Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Arts.2,5,14 and Art. 4 of Protocol No.4, Art. 1 and 4 of Protocol No. 7, Art. 1 of Protocol No. 12, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, pp. 257-258, p. 260, p. 269, p. 271 and p. 273.

<sup>18</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, Art. 6(2).

c) shall be given the opportunity to speak with UNHCR or any other organisation working on behalf of UNHCR, pursuant to an agreement with the Member State, d) shall be given notice in reasonable time of the decision on their application for asylum, e) shall be informed in a language they understand and shall be given information on how to challenge a negative decision.<sup>19</sup> Article 13 of the same Directive also foresees that the interview to decide on the application for asylum shall be made with the help of an interpreter able to ensure appropriate communication.<sup>20</sup> Additionally, Article 15 and 16 regulate the right to legal assistance and representation. In particular Member States shall allow applicants to consult in an effective manner a legal adviser on matters related to their asylum claim and shall guarantee free legal assistance in case of a negative decision on their asylum application.<sup>21</sup> Additionally, Member States shall ensure full access to the legal adviser to the information in the applicant's file and shall guarantee that he or she has access to closed areas for the purpose of consulting the applicant.<sup>22</sup> Article 23 obliges Member States to ensure that where a decision on a claim cannot be taken within six months, the applicant is either informed of the delay or receives upon request information about the time frame of the procedure.<sup>23</sup> Finally, Article 39 guarantees for the right to an effective remedy before a court or tribunal.<sup>24</sup>

#### 1.1.1.2. Principle of non-refoulement

At international level, the prohibition of expelling, returning or extraditing a person to a State where he or she would face persecution is made explicit under the name of *principle*

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<sup>19</sup> *Ivi.*, Art. 10.

<sup>20</sup> *Ivi.*, Art. 13.

<sup>21</sup> *Ivi.*, Art. 15.

<sup>22</sup> *Ivi.*, Art. 16.

<sup>23</sup> *Ivi.*, Art. 23.

<sup>24</sup> *Ivi.*, Art. 39.

of *non-refoulement* by Article 33 of the 1951 Convention<sup>25</sup> and Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>26</sup>

From the regional point of view, the principle of non-refoulement is enshrined in Article 19 of the European Union Charter of Fundamental Rights and Freedoms.<sup>27</sup> While not explicitly listed among the rights of the Council of Europe Convention on the Protection of Human Rights and Fundamental Freedoms, as already mentioned, the principle can be derived from Article 3 on the prohibition of torture.<sup>28</sup>

The principle of non-refoulement is well-established in a number of Directives of the European Union which Member States have had to transpose in their national legislation. In particular, Article 7 of the Asylum Procedures Directive specifies that an individual has the right to remain in a Member State, pending the examination of their asylum application<sup>29</sup> and Article 21 of the Qualification Directive expresses the duty for States to respect its obligations related to the principle.<sup>30</sup> The principle of non-refoulement is additionally mentioned as a core principle to be respected while applying the provisions contained in the respective Directives, in Article 27 of the Asylum Procedures Directive,<sup>31</sup> in Article 3 of

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<sup>25</sup> UNGA, *Convention Relating to the Status of Refugees*, Art. 33, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 20.

<sup>26</sup> UNGA, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 3, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 76.

<sup>27</sup> European Union, *Charter of Fundamental Rights of the European Union* (2000), OJ C364/1, Art. 19, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 354.

<sup>28</sup> Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Art. 3, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 258.

<sup>29</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, Art. 7.

<sup>30</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L337/9, Art. 21.

<sup>31</sup> *Ivi*, Art. 27.

the Schengen Borders Code<sup>32</sup> and in Articles 5 and 9 of the Returns Directive.<sup>33</sup> It is interesting to note that the principle of non refoulement has even gone beyond regional and international treaties and conventions, as it has become customary international law, thus rendering it applicable also to States which have not ratified any document containing the principle. Already in 1994, UNHCR has expressed the opinion that the principle of non-refoulement had become international custom, based on a consistent practice combined with a recognition on the part of States that the principle has a normative character.<sup>34</sup> The incorporation of the principle of non-refoulement in various international instruments to which a very large number of States have subscribed, together with the various opinions of the United Nations reaffirming the importance of the principle and the recognition and acceptance of the principle also by States not parties to the 1951 Convention, have led to a practice whereby all States are bound to respect the principle under customary international law.<sup>35</sup>

#### 1.1.1.3. Right to liberty and security of the person and freedom of movement

The detention of asylum-seekers brings into question also other fundamental rights which are not directly connected to refugees as such but rather apply to any individual. In particular, the Maltese system of detention raises serious issues regarding the respect of the

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<sup>32</sup> Regulation EC 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L105/1, Art. 3.

<sup>33</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 5 and Art. 9.

<sup>34</sup> UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, para. 3, available at: <http://www.refworld.org/docid/437b6db64.html> (last accessed 27 June 2014).

<sup>35</sup> *Ivi*, paras. 3, 6, 8 and UNHCR, *UNHCR Note on the principle of non-refoulement, November 1997*, para. B, available at: <http://www.refworld.org/docid/438c6d972.html> (last accessed 27 June 2014).

right to liberty and security of the person and the right to freedom of movement, which are both contained in a variety of international and regional legal instruments.<sup>36</sup>

The right to liberty and security of the person is a fundamental right, reflected in the international prohibition of arbitrary detention and supported by the right to freedom of movement.<sup>37</sup> Detention usually becomes arbitrary when it is not grounded and not regulated by any legal provision or when the reasons are not assessed on an individual basis. Article 31 of the Convention establishes that States shall not impose penalties on refugees who coming from a territory where their life or liberty were at risk, entered the country without authorization and that States shall not apply restrictions to the movements of those refugees, other than those that are necessary.<sup>38</sup> The right to liberty and security of the person and the prohibition of arbitrary detention are both contained in Articles 3 and 9 of the Universal Declaration of Human Rights<sup>39</sup> and in Article 9 of the International Covenant on Civil and Political Rights.<sup>40</sup>

At the European level, those rights are contained in Article 6 of the Charter for Fundamental Rights of the European Union<sup>41</sup> and, most importantly in Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is the core provision ensuring the right to liberty at the European level.<sup>42</sup> Detention refers to the deprivation of liberty or confinement in a closed centre, including prisons,

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<sup>36</sup> Cf. UNHCR, *UNHCR's position on the detention of asylum-seekers in Malta*, 18 September 2013, pp. 26-29 and 31-32, available at: <http://www.refworld.org/pdfid/52498c424.pdf> (Last accessed on 13/6/14).

<sup>37</sup> UNHCR, *Detention Guidelines. Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, p. 1, available at: <http://www.unhcr.org/505b10ee9.html> (Last accessed 13/6/14).

<sup>38</sup> UNGA, *Convention Relating to the Status of Refugees*, Art. 31 (1), (2), in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, p. 20.

<sup>39</sup> UNGA, *Universal Declaration of Human Rights*, Art. 3 and 9, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, pp. 10-11.

<sup>40</sup> UNGA, *International Covenant on Civil and Political Rights*, Art. 9, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 35.

<sup>41</sup> European Union, *Charter of Fundamental Rights of the European Union* (2000), OJ C364/1, Art. 6, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 353.

<sup>42</sup> Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Art. 3, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 258.

purpose-built detention, closed reception or holding centres or facilities.<sup>43</sup> The European Convention clearly lists the grounds for which detention may be justified and foresees that a procedure prescribed by law shall be followed. In particular, Article 5 only authorises the deprivation of liberty of third-country nationals to prevent the spreading of infectious diseases, to prevent an unauthorised entry or enforce a deportation or, obviously, on grounds related to any offence the person may have committed.<sup>44</sup> Detention for any reason which is not listed in Article 5, is automatically unlawful and the word “security” which is mentioned in the Article, precisely refers to the protection from unlawful or arbitrary detention.<sup>45</sup>

The right to liberty and security of the person is also at the core of the provisions regulating detention in some EU Directives of the asylum *Acquis*. Article 18 of the Asylum Procedures Directive foresees that a person shall not be detained for the sole reason that he or she is an asylum seeker and that where an applicant for asylum is held in detention, there shall be the possibility of speedy judicial review.<sup>46</sup> Article 15 of the Returns Directive foresees detention as a measure to be applied only if other sufficient and less coercive measures are not available and only with the aim of preparing the return or the removal process of the third-country national. In particular, detention shall be resorted to where there is a risk of absconding or the individual concerned avoids or hampers the return or removal process.<sup>47</sup> The same Article also foresees that States shall provide for a speedy judicial review of the lawfulness of detention and grant the individual the right to take proceedings to challenge the lawfulness of detention and that an individual shall be

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<sup>43</sup> UNHCR, *Detention Guidelines. Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, p. 9, available at: <http://www.unhcr.org/505b10ee9.html> (Last accessed 13/6/14).

<sup>44</sup> Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Art. 5, in Sandy Gandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 258.

<sup>45</sup> N. Mole, C. Meredith, *Asylum and the European Convention on Human Rights*, Human Rights Files No. 9, Council of Europe Publishing Editions, Strasbourg, 2010, p. 143. The precise meaning of the Article and the way it should be implemented will be further analysed from p. 26 onwards.

<sup>46</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, Art. 18.

<sup>47</sup> *Ivi*, Art. 15 (1).

immediately released if detention is not lawful. Additionally, where a prospect of removal no longer exists, detention ceases to be justified and the person shall be released.<sup>48</sup> This Article also lays down the maximum duration of detention, specifying that it should not exceed six months. This duration may be extended of twelve months by Member States in cases where the removal operation is likely to last longer due to 1) the lack of cooperation by the individual concerned or 2) delays in obtaining the necessary documentation by third countries.<sup>49</sup> It is interesting to stress that those provisions, although not contained in the Reception Conditions Directive, they are actually enshrined in the Recast Reception Conditions Directive, which will have to be implemented by July 2015. As a matter of fact, Article 8 foresees that an applicant may be detained only in order to verify his or her identity, to gather particular information necessary for the determination of the asylum application which are not obtainable without detention, to decide on the right of the applicant to enter the territory, for reasons related to public security.<sup>50</sup> Article 9 of the Recast Reception Conditions Directive further contains specific regulations on the guarantees to be granted to detained asylum-seekers. In particular it establishes that applicants should only be detained for the shortest period possible and only as long as the grounds for detention exist. The detention of applicants shall be ordered in writing and the reasons for detaining should be provided. Furthermore, States shall provide for a speedy judicial review and free legal assistance.<sup>51</sup> The guarantees contained in this Article are also referred to in Article 28(4) of the Dublin III Regulation, which establishes that they should be granted to asylum-seekers detained with a purpose of returning them to the country where they first applied for international protection with the procedure established by the Dublin III Regulation.<sup>52</sup>

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<sup>48</sup> *Ivi*, Art. 15(2) and Art. 15(4).

<sup>49</sup> *Ivi*, Art. 15 (5), (6).

<sup>50</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down minimum standards for the reception of asylum-seekers (recast), OJ L180/96, Art. 8(3).

<sup>51</sup> *Ivi*, Art. 9.

<sup>52</sup> Regulation (EU) of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L180/31, Art. 28(4).

Additionally, the EU Returns Directive also provides for a number of procedural guarantees of which the detainee must be granted full enjoyment. Article 12 foresees that decisions on return or entry-ban shall be issued in writing and reasons for the decision shall be given in fact and in law and information about legal remedies shall be provided.<sup>53</sup> Article 13 foresees that third-country nationals shall be afforded an effective remedy to challenge the return decision and granted access to free legal assistance or advice.<sup>54</sup>

At international level, the right to freedom of movement is enshrined in many of the major international human rights documents. In particular, Article 13 of the Universal Declaration of Human Rights foresees that everyone has the right to freedom of movement and the right to leave or return to his or her country.<sup>55</sup> Article 12 of the International Covenant on Civil and Political Rights contains the same provision, additionally specifying that the freedom of movement shall not be subject to any restriction except those which are provided for by law, are necessary to protect national security (...) and are consistent with the other rights of the Covenant.<sup>56</sup> The right to freedom of movement, including the right to leave one's own country is also included in Art. 5(d) of the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>57</sup> Specifically, Article 26 of the 1951 Convention provides for a right to freedom of movement for refugees lawfully in the territory of the host State, subject only to necessary restrictions which might be imposed.

At a regional level, the right to freedom of movement is established in Article 2 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental

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<sup>53</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 12.

<sup>54</sup> *Ivi*, 13.

<sup>55</sup> UNGA, *Universal Declaration of Human Rights*, Art. 13, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 11.

<sup>56</sup> UNGA, *International Covenant on Civil and Political Rights*, Art. 12, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 36.

<sup>57</sup> UNGA, *International Convention on the Elimination of All Forms of Racial Discrimination*, Art. 5, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 27.

Freedoms.<sup>58</sup> The Article also specifies the exceptions to this right, in the same way as Article 12 of the International Covenant on Civil and Political Rights mentioned above. At EU level, Article 7 of the Reception Conditions Directive establishes that asylum-seekers should have the right to move freely within the territory of the host State or within an area assigned to them by the Member State which shall not affect the sphere of private life and guarantee access to the benefits provided for in the same Directive. An applicant for asylum may be confined to a particular place only for legal reasons or reasons of public order.<sup>59</sup>

### **1.1.2. National legal framework**

The Maltese provisions regulating migration are mainly provided for in the Immigration Act, in the Refugee Act, incorporating the obligations assumed by Malta under the Geneva Convention and under the Directives and the Regulations transposing the EU Directives of the asylum *Acquis*.

#### **1.1.2.1. Right to seek asylum and principle of non-refoulement**

The Maltese Immigration Act<sup>60</sup> regulates, among other things, the treatment of migrants entering the country in an irregular manner. According to Article 5 of the Act, any person entering or staying in Malta without the necessary documentation attesting his or her right to enter or stay in the country may be refused entry and be considered a *prohibited immigrant*.<sup>61</sup> One of the additional clauses in the same Article also specifies that this

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<sup>58</sup> Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Protocol 4, Art. 2, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 268.

<sup>59</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art. 7 (1), (3).

<sup>60</sup> Cf. Immigration Act, Chapter 217 of the laws of Malta, as amended by Legal Notice 20 of 2013.

<sup>61</sup> Immigration Act, Chapter 217 of the laws of Malta, as amended by Legal Notice 20 of 2013, Art. 5.

category shall also include persons who are unable to prove that they can support themselves and are therefore likely to become a charge of the public funds.<sup>62</sup> Article 14 establishes that if a person is a prohibited immigrant, a removal order may be issued in his or her regards and the person shall be detained in custody until he or she is removed from Malta.<sup>63</sup> Paragraph 5 of the same Article explicitly specifies that nothing in that Article shall preclude the application of Maltese laws on the right to asylum and the rights of refugees.<sup>64</sup> The Immigration Act thus recognises the right to seek asylum as an obligation that the Maltese laws on migration have to respect.

The procedural guarantees related to the right to seek asylum are provided for in the transposition of the Asylum Procedures Directive and of the Reception Conditions Directive. Article 4A(5) of the Regulations on Procedural Standards in Examining Applications for International Protection foresees that applicants shall be informed about legislation and procedure for international protection free of charge.<sup>65</sup> Article 7 of the same Regulations establishes that an applicant shall be allowed to consult in an effective manner a legal adviser in relation to the application for asylum and that in the event of a negative decision free legal aid shall be provided. In conformity with the directive, the Regulations foresees for the legal adviser to have access to the applicant's file and to the detention centre where the applicant is detained.<sup>66</sup> Article 8 foresees that asylum-seekers shall be informed about the delays or the time frame of their application procedure.<sup>67</sup>

Article 14(5) of the Immigration Act specifies that the Act itself shall not preclude the application of Malta's international obligations with respect to the right to asylum and the rights of refugees.<sup>68</sup> Nevertheless, no explicit mention is made of the principle of non-

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<sup>62</sup> *Ivi*, Art. 5(a).

<sup>63</sup> *Ivi*, Art. 14 (1)-(2).

<sup>64</sup> *Ivi*, Art. 14(5).

<sup>65</sup> Procedural Standards in Examining Applications for International Protection Regulations, Subsidiary Legislation 420.07, legal notice 243 of 2008, as amended by Legal Notice 161 of 2014, Art. 4A(5).

<sup>66</sup> *Ivi*, Art. 7.

<sup>67</sup> *Ivi*, Art. 8.

<sup>68</sup> Immigration Act, Chapter 217 of the laws of Malta, as amended by Legal Notice 20 of 2013, Art. 14(5).

refoulement, thus leaving the meaning of Article 14 open to interpretation and providing for no differential treatment of asylum-seekers.

The absence of an explicit reference to the principle becomes even more problematic considering the fact that as a member of the European Union, Malta has had to transpose into its legislation the Directives of the EU asylum *Acquis*. In fact, Malta has transposed those directives into national regulations, thus creating a gap between the provisions contained in those regulations and the ones contained in the Immigration Act as regards the principle of non-refoulement. The EU Directives have often been implemented through secondary legislation, giving rise to situations where these provisions may contrast with the Immigration Act, which is primary legislation, and thus be disappplied.<sup>69</sup> Article 6 of the Regulations on Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals, transposing the Returns Directive, foresees that a removal of a person shall be postponed where it violates the principle of non-refoulement.<sup>70</sup> The principle is also explicitly provided for by the Refugees Act, where Article 14 (1) establishes that: “a person shall not be expelled from Malta or returned in any manner whatsoever to the frontiers of territories where the life or freedom of that person would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.<sup>71</sup> Additionally, Article 3(3) of the same Regulations, Article 3 of the Regulations on the Reception of Asylum-Seekers (Minimum Standards), transposing the Reception Conditions Directive<sup>72</sup> and Article 12 of the Regulations on Procedural Standards in Examining Applications for International Protection<sup>73</sup> transposing the Asylum Procedures Directive, all foresee that an applicant for international protection shall not be

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<sup>69</sup> 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*, International Commission of Jurists, Geneva, May 2012, p. 11.

<sup>69</sup> Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013, para. 18.

<sup>70</sup> Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Chapter 217 of the laws of Malta, as amended by Legal Notice 81 of 2011, Art. 6.

<sup>71</sup> Refugees Act, Chapter 420 of the Laws of Malta, 2000, as amended by Act VII of 2008, Art. 14 (1).

<sup>72</sup> Reception of asylum-seekers (Minimum Standards) Regulations, Subsidiary Legislation 420.06, as amended by Legal Notice 320 of 2005, Art. 3.

<sup>73</sup> Procedural Standards in Examining Applications for International Protection Regulations, Subsidiary Legislation 420.07, legal notice 243 of 2008, as amended by Legal Notice 161 of 2014, Art. 12.

removed from Malta before the application is finally determined. Although the principle of non-refoulement is not explicitly mentioned, the determination of the application has exactly the purpose of establishing whether the return to a territory may put the life of the applicant at risk and thus to establish accordingly whether the person may or may not be returned, which is in accordance with the principle of non-refoulement.

#### 1.1.2.2. Right to liberty and security of the person and freedom of movement

Concerning the rights to liberty and security of the person and to freedom of movement, it is necessary to analyse the national provisions regulating the detention of prohibited migrants. Article 10 of the Immigration Act foresees that persons to whom entry in the country is refused, shall be temporarily detained<sup>74</sup>. Article 14 (2) of the same act provides that when a removal order is issued, the person against whom the order is issued shall be detained in custody until he or she is removed from Malta.<sup>75</sup> Article 11(8) of the regulations<sup>76</sup> transposing the Returns Directive, establishes that a person may be kept in detention only in order to carry out the return and removal procedure, where a) there is a risk of absconding and b) the third-country national avoids or hinders the return or removal procedure. Article 11(13) explicitly foresees that the third-country national shall be released from detention if the removal cannot take place due to legal or other considerations.<sup>77</sup> In practice, this means that the only reason for detaining a migrant shall lay with the removal purpose. In line with the Returns Directive, Article 11(15) of the corresponding regulations lays down the maximum duration of detention to 6 months extendable of another 12 months if there is a lack of cooperation by the third-country national or if there are delays in obtaining the necessary documents. In addition to those reasons provided for in the

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<sup>74</sup> Immigration Act, Chapter 217 of the laws of Malta, as amended by Legal Notice 20 of 2013, Art. 10.

<sup>75</sup> *Ivi*, Art. 14(2).

<sup>76</sup> Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Chapter 217 of the laws of Malta, as amended by Legal Notice 81 of 2011, Art. 11(8).

<sup>77</sup> *Ivi*, Art. 11(13).

Directive, Regulations also add that detention may be extended of twelve months where “the Principal Immigration Officer may deem necessary”,<sup>78</sup> thus making the decision on the duration of detention discretionary, contrary to what is provided for in the asylum *Acquis*. The Returns Directive, only foresees that the period of detention may be extended for a lack of cooperation with the third-country national or for delays in obtaining the necessary documentation from the third country and does not mention at all the possibility for a host country to take the decision on the basis of other discretionary reasons.<sup>79</sup> In fact, if the Returns Directive were to contain such a clause, they would render superfluous to specify the reasons for prolonging the detention of third-country nationals, as they would give free hands to States to make the decision on grounds they consider legitimate, with the further risk of letting the arbitrary prolonging of detention go by unjudged.

The procedural safeguards regarding the right to receive information on the reasons for the return decision and to have access to free legal assistance are provided for in Article 11 of the Returns Regulations.<sup>80</sup> Provisions regulating the right to have access to an effective remedy are contained in Article 11(10) which foresees the possibility for detained third-country nationals of instituting proceedings before the Immigration Appeals Board<sup>81</sup> and further in the Immigration Act, legitimising appeals before the Immigration Appeals Board against removal orders and to request various forms of release,<sup>82</sup> in the Criminal Code, allowing for a recourse before the Court of Magistrates<sup>83</sup> and in the Constitution, providing for a remedy before the Civil Court.<sup>84</sup> Nevertheless, as will be shown later on, although those remedies are provided for by law, they do not appear to be effective, as the Returns Directive would on the contrary require.

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<sup>78</sup> Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Chapter 217 of the laws of Malta, as amended by Legal Notice 81 of 2011, Art. 11(15).

<sup>79</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 16(6).

<sup>80</sup> Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Chapter 217 of the laws of Malta, as amended by Legal Notice 81 of 2011, Art. 11.

<sup>81</sup> *Ivi*, Art. 11(10).

<sup>82</sup> Immigration Act, Chapter 217 of the laws of Malta, as amended by Legal Notice 20 of 2013, Art. 25(A).

<sup>83</sup> Criminal Code, Chapter 9 of the Laws of Malta, Art. 409A.

<sup>84</sup> Constitution of Malta, 1964, as Amended by Acts VII and X of 2014, Art. 46.

Articles 5, 6 and 7 of the Refugees Act regulate the establishment and the work of the Refugee Appeals Board.<sup>85</sup> In particular, individuals whose claim has been rejected by the Refugee Commissioner can file an appeal within fifteen days from the notification of the decision.<sup>86</sup> Article 7(3) explicitly establishes that when an appeal is filed, an applicant who is in custody in virtue only of a deportation or removal order shall be released pending the decision of the Board.<sup>87</sup> As a matter of fact, persons who file an appeal against the decision of the Refugee Commissioner, are still to be considered as asylum-seekers and thus not to be detained. Nevertheless, the Immigration Act does not provide either for a specific provision prohibiting refoulement of asylum-seekers or for one regulating the administrative detention of asylum-seekers, who thus may be detained with a view of deportation in the same way as any other migrant. This clearly contradicts the provisions contained in the Refugees Act, as no mention is made of the fact that persons seeking asylum, be they waiting for a decision at first or second instance, should be released from detention. In practice, as will be shown in the next paragraph, due to the unclear provisions of the Immigration Act, persons are detained even though they have applied for protection or their appeal to the Refugee Appeals Board is pending, contrary to the above mentioned provisions of the Refugees Act.

Additionally, the Regulations transposing the Asylum Procedures Directive do not make any mention to the provisions on detention contained in Article 18 of the Directive, in particular to the one foreseeing that States shall not detain a person for the sole reason that he or she is an asylum-seeker.<sup>88</sup> As regards the transposition of the Reception Conditions Directive, the Maltese Regulations do not contain the aforementioned provision of Article 7 of the Directive, foreseeing that “asylum-seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State” and that

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<sup>85</sup> Refugees Act, Chapter 420 of the Laws of Malta, 2000, as amended by Act VII of 2008, Art. 5, 6, 7.

<sup>86</sup> *Ivi*, Art. 7 (2).

<sup>87</sup> *Ivi*, Art. 7 (3).

<sup>88</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, Art. 18 (1).

“the assigned area shall not affect the unalienable sphere of private life (...)”.<sup>89</sup> In fact, the Regulations only establish that an applicant may be confined to a particular place for legal reasons or reasons of public order,<sup>90</sup> without providing for specific legal reasons that justify the limitation of freedom of movement.

The following paragraph will examine the Maltese system of detention of asylum-seekers in depth and evaluate how it infringes the legal framework just exposed.

## **1.2. The Maltese detention system of asylum-seekers in practice**

As the analysis of the Maltese laws has shown, no provision is in place to regulate the administrative detention of asylum-seekers. As a matter of fact, detention is the automatic consequence of the refusal to grant admission in the Maltese territory or of the issue of a removal order.<sup>91</sup> In the vast majority of cases, the Maltese authorities issue removal orders against persons entering Malta irregularly by boat. In accordance with the provisions contained in Article 5 of the Immigration Act, these persons will be considered prohibited immigrants either for having entered the country without a visa or for not having sufficient means to sustain themselves.<sup>92</sup>

In practice, immediately upon disembarkation irregular migrants are given the necessary medical assistance and if not in need of being hospitalised, they are brought to the Police Headquarters. Here they are tagged with an immigration police number, indicating the year of arrival, the boat’s sequence of that year and an individual number and they are interviewed by the police to gather basic information. Once the interview at the Police Headquarters is completed, all the individuals who arrived irregularly by boat are brought

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<sup>89</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art. 7 (1).

<sup>90</sup> Reception of Asylum-seekers (Minimum Standards) Regulations, Subsidiary Legislation 420.06, as amended by Legal Notice 320 of 2005, Art. 6 (2).

<sup>91</sup> Immigration Act, Chapter 217 of the laws of Malta, as amended by Legal Notice 20 of 2013, Art. 10 and 14(2).

<sup>92</sup> *Ivi*, Art. 5 (1), (2a).

to one of the two existing immigration detention centres, as a consequence of a removal order that has been issued against them. According to Article 14 of the Immigration Act, they shall be detained until they are removed from Malta.<sup>93</sup>

After a few days in detention, the Refugee Commissioner, as empowered by Article 4 of the Refugees Act,<sup>94</sup> generally visits the new detainees in the detention facilities and informs them on their right to file a claim for asylum and on the procedures to be followed.<sup>95</sup> Nevertheless, once a claim for international protection is filed, detainees are not released from detention, thus making this practice clash with the fundamental obligations provided for by refugee and international law.

The next two paragraphs will highlight the main points of the Maltese system which create concern as to their respect of fundamental human rights.

#### 1.2.1. Detention of asylum-seekers versus principle of non-refoulement and right to seek asylum

The Maltese authorities systematically issue removal orders to all persons arriving in Malta irregularly by boat, for the Immigration Act does not contain any specific provision regulating the exercise of discretion to issue removal orders against asylum-seekers or persons with *prima facie* or clear and manifest international protection needs.<sup>96</sup> As a matter of fact, anyone is detained, regardless to the special assistance that some vulnerable persons would require or to the country of origin of some people, which may, in case of widespread and indiscriminate violence, already constitute *per se* a good cause for seeking international

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<sup>93</sup> *Ivi*, Art. 14(2).

<sup>94</sup> Refugees Act, Chapter 420 of the Laws of Malta, 2000, as amended by Act VII of 2008, Art. 4.

<sup>95</sup> For a description of the procedures undertaken upon disembarkation, cf. Case of Suso Musa v. Malta, Application No. 42337/12, European Court of Human Rights, 9 December 2013, Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013 and Case of Louled Massoud v. Malta, Application No. 24340/08, European Court of Human Rights, 27 July 2010.

<sup>96</sup> Cf. UNHCR, *UNHCR's position on the detention of asylum-seekers in Malta*, 18 September 2013, p. 13.

protection.<sup>97</sup> However, detention should only be applied as a measure of last resort if no other sufficient and less coercive measures are available<sup>98</sup> and it should only be imposed following a careful and specific examination of the facts and of the necessity to detain in each individual case.<sup>99</sup> As a matter of fact, detention is the highest possible deprivation of liberty<sup>100</sup> and, unless strictly necessary, it should be replaced by other less restrictive alternatives.

Article 5 of the Convention for the protection of Human Rights and Fundamental Freedoms provides for an exhaustive list of grounds which may justify the deprivation of liberty of a person. When someone is detained, the purpose of detention must be identified among one of those reasons, otherwise the practice of detention has to be considered unlawful. Apart from particular cases related to having committed a criminal offence, the reasons which can justify restrictions on freedom of movement of a third-country national may regard the prevention of the spreading of infectious diseases,<sup>101</sup> reasons of national security,<sup>102</sup> public interest or public order,<sup>103</sup> the irregular crossing of the borders,<sup>104</sup> the prevention of

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<sup>97</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L337/9, Art. 15.

<sup>98</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 15.

<sup>99</sup> N. Mole, C. Meredith, *Asylum and the European Convention on Human Rights*, Human Rights Files No. 9, Council of Europe Publishing Editions, Strasbourg, 2010, p. 133.

<sup>100</sup> UNHCR, *Detention Guidelines. Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, p. 9, available at: <http://www.unhcr.org/505b10ee9.html> (Last accessed 13/6/14).

<sup>101</sup> Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Art. 5 (1e), in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 258.

<sup>102</sup> UNGA, *International Covenant on Civil and Political Rights*, Art. 12, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 36.

<sup>103</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art. 7.

<sup>104</sup> Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Art. 5 (1c), in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 258 and Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 2(2).

unauthorised entry or the preparation of a return or of a removal process.<sup>105</sup> Additionally, Article 9(1) of the International Covenant on Civil and Political Rights and Article 5 of the European Convention establish that the grounds for deprivation of liberty must be provided for by law.<sup>106</sup>

Interestingly, the Maltese legislation is one of the few in the European Union (together with the Spanish and the Portuguese ones), which does not foresee a punishment for the offence of irregular entry.<sup>107</sup> In fact, the Immigration Act, which is the primary legal source in Malta as regards migration, only contains provisions foreseeing the application of a policy of detention as a consequence of the issuance of a removal order or of the refusal to grant admission into the national territory.

The deprivation of liberty of migrants for the purpose of removal is generally not an issue at the European level, as all the countries, including Malta, contain provisions in their national laws which regulate it.<sup>108</sup> Additionally, all the European countries have had to transpose the Returns Directive in their legislation, thus laying down grounds allowing for detention for removal purposes. Nevertheless, although the Maltese laws legitimately provide for means for returning third-country nationals who have entered the country without prior authorisation, the Maltese practice of detention becomes very questionable when applied to asylum-seekers. As a matter of fact, no specific provision of the Immigration Act regulates and justifies their deprivation of liberty or restriction of freedom of movement.

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<sup>105</sup> Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Art. 5 (1f), in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 258 and Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 15(1).

<sup>106</sup> UNGA, *International Covenant on Civil and Political Rights*, Art. 9(1), in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 35, Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Art. 5, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 258.

<sup>107</sup> FRA, *Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them*, Publications Office of the European Union, Luxembourg, 2014, pp. 3-4.

<sup>108</sup> FRA, *Detention of Third-Country Nationals in Return Procedures*, Publications Office of the European Union, Luxembourg, 2010, p. 15.

A few days after arrival, migrants are given the opportunity to apply for asylum, however once the claim has been registered they are neither released from detention, nor is the removal order pending on them withdrawn. Issues arise mainly because of two fundamental shortcomings in the Immigration Act. The first one is related to the absence of a clear distinction between irregular immigrants and asylum-seekers, which leads to a situation in which asylum-seekers are treated in the same way as any other migrant, without taking into consideration their fundamentally different position for the impossibility they may face to comply with the legal formalities to enter a country.

Secondly, the Immigration Act never explicitly mentions the principle of non-refoulement. It is interesting to notice that Article 14(5) of the Immigration Act establishes that no provision of that same Article shall preclude the respect of the obligations relating to the right to asylum and the rights of refugees.<sup>109</sup> The question which emerges is whether the “rights of refugees” shall include the principle of non-refoulement. Clearly, according to a number of well established international and regional treaties and national regulations,<sup>110</sup> the right to not being returned to a territory where life or freedom would be threatened is

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<sup>109</sup> Immigration Act, Chapter 217 of the Laws of Malta, as amended by Legal Notice 20 of 2013, Art. 14(5).

<sup>110</sup> UNGA, *Convention Relating to the Status of Refugees*, Art. 33, in Sandy Ghandhi (ed.), *Blackstone’s International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 20; Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Art. 3, in Sandy Ghandhi (ed.), *Blackstone’s International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 258, UNGA, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 3, in Sandy Ghandhi (ed.), *Blackstone’s International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 76, European Union, *Charter of Fundamental Rights of the European Union* (2000), OJ C364/1, Art. 19, in Sandy Ghandhi (ed.), *Blackstone’s International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 354, and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, Art. 27, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L337/9, Art. 21, Regulation EC 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L105/1, Art. 3, Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 5 and Art. 9.

one of the core human rights and a cornerstone of refugee law.<sup>111</sup> Therefore, in order to be in compliance with the 1951 Convention, Article 14 of the Immigration Act should implicitly include in the “rights of refugees” also the right not to be returned to a country where there would be a risk of torture or inhuman and degrading treatment.

However, since the only ground for detaining migrants according to national legislation is to avoid irregular entry or to initiate a removal process, if the law is interpreted in such a way as to include the principle of non-refoulement, then the practice of detaining refugees is in breach of the provisions contained in the Immigration Act. As a matter of fact, according to the principle of non-refoulement, the prospect of removal can no longer exist. Additionally, according to Article 31 of the 1951 Convention, asylum-seekers shall not be punished for their irregular entry into a country, as many of them may not have another way to enter a territory. This principle is also reflected in provisions contained in EU Directives.<sup>112</sup>

On the contrary, if the law is to be interpreted in a way where no reference is made to the principle of non-refoulement and removal orders against asylum-seekers are to be considered legitimate, then the law itself fails to be in compliance with international and regional standards on the rights of asylum-seekers.

As the European Court of Human Rights has held, a rigorous scrutiny must necessarily be conducted of an individual’s claim to evaluate whether his or her deportation to a third country will expose that individual to treatment prohibited by Article 3.<sup>113</sup> To guarantee that such a procedure is effectively followed, it is necessary for the national law to include transparent provisions regulating the application of the principle of non refoulement. Article 5 of the Maltese Immigration Act should include clear reservations making explicit

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<sup>111</sup> UNHCR, *UNHCR Note on the principle of non-refoulement, November 1997*, para. A, available at: <http://www.refworld.org/docid/438c6d972.html> (last accessed 27 June 2014).

<sup>112</sup> UNGA, *Convention Relating to the Status of Refugees*, Art. 31, in Sandy Ghandhi (ed.), *Blackstone’s International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 20 and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, Art. 18.

<sup>113</sup> Case of Jabari v. Turkey, Application No. 40035/98, European Court of Human Rights, 11 July 2000, para. 39.

reference to the principle, in order to make exceptions to the application of a detention policy to asylum-seekers and in order to be in compliance, in law and in practice, with European Union law.

In practice, deprivation of liberty of migrants reaching the country irregularly and of asylum-seekers would be acceptable if it were justified by a clear purpose. As a matter of fact, it is perfectly understandable that a country may feel the need to conduct medical and security screenings before letting someone enter the territory and a number of international documents<sup>114</sup> provide for the legitimacy of this practice. However, screenings aiming at preventing diseases or at conducting security controls only need a few days to be implemented and the lengthy of detention in the Maltese context<sup>115</sup> cannot be justified by those purposes.

Therefore no other plausible grounds justify the deprivation of liberty of asylum-seekers and the only reason remaining is in fact the one provided for in the Maltese Immigration Act: detention with a purpose of removal. Although the returns of asylum-seekers are generally not enforced before the asylum procedures have been closed, the Maltese practice of detaining asylum-seekers, clearly overlooks the existence of fundamental obligations prohibiting the refoulement of persons to territories where they may risk their life or freedom, thus rendering detention ungrounded and unlawful, both according to national and international law.<sup>116</sup>

Furthermore, the deprivation of liberty of persons in need of international protection risks to compromise the fundamental safeguard guarantees that the right to seek asylum entails.

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<sup>114</sup> Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Art. 5, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 258, UNGA, *International Covenant on Civil and Political Rights*, Art. 12, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 36, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art. 7, UNHCR, *Detention Guidelines. Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Guideline 4.1, p. 16, available at: <http://www.unhcr.org/505b10ee9.html> (Last accessed 13/6/14).

<sup>115</sup> The duration of detention will be analysed more in depth in the next paragraph when discussing arbitrary detention and right to liberty and security of the person and freedom of movement.

<sup>116</sup> UNHCR, *Detention Guidelines. Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Guideline 3, par. 15, p. 14, available at: <http://www.unhcr.org/505b10ee9.html> (Last accessed 13/6/14).

Although persons reaching Malta in an irregular manner are granted the right to apply for international protection, detention may hinder the enjoyment of some basic rights which come together with it. State Parties to the 1951 Convention, must comply with the obligations contained in it and must therefore put in place fair and efficient procedures to determine who qualifies as a refugee and guarantee that access to those procedures be unimpeded.<sup>117</sup>

As previously mentioned, migrants who entered Malta in an irregular manner are visited in detention by the Office of the Refugee Commissioner a few days after their arrival. The purpose of the visit is to provide information to migrants on the way they can file an asylum claim and to inform them about their rights and obligations connected to the asylum procedure. After the explanation session, detainees are asked to fill in a Preliminary Questionnaire, which shall contain an initial description of the grounds for asking asylum and has the function to register the individual's desire to seek international protection.<sup>118</sup>

When the Refugee Commissioner receives the Preliminary Questionnaire, the person is formally recognised as an asylum-seeker and an appointment will be scheduled to interview the applicant. The time lapse between the moment the claim is registered and the interview generally varies according to the number of persons who claim for asylum and it can range between a few weeks and some months. Once the interview has been undertaken, months can pass before a decision on the claim is taken, although the Office of the Refugee Commissioner generally respects the time frame of six months<sup>119</sup> suggested in Article 23 of the Asylum Procedure Directive.<sup>120</sup> If a negative decision is taken, the applicant has 15

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<sup>117</sup> FRA, *Detention of Third-Country Nationals in Return Procedures*, Publications Office of the European Union, Luxembourg, 2010, p. 47.

<sup>118</sup> Information available on the website of AIDA, Asylum Information Database, at: <http://www.asylumineurope.org/reports/country/malta/asylum-procedure/procedures/registration-asylum-application> (last accessed 07/06/14).

<sup>119</sup> Council of Europe Commissioner for Human Rights, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe*, following his visit to Malta from 23 to 25 March 2011, 9 June 2011, CommDH(2011)17, p. 12.

<sup>120</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, Art. 23(2).

days to appeal the decision to the Refugee Appeals Board, as established in the Refugees Act,<sup>121</sup> and shall wait until a second instance decision is taken.

Although in principle the general functioning of the asylum procedure does in fact respect the right to asylum, many issues emerge because of the particular context of detention. The obstacles to the asylum procedure mainly regard information and legal counselling, communication with the outside world and the time frame of the procedure.<sup>122</sup>

Although in accordance with Article 10(a) of the Asylum Procedure Directive,<sup>123</sup> persons desiring to apply for asylum are provided with an information session in detention, which is held in different languages according to their nationality, it has to be pointed out that the services of an interpreter to submit the claim are often not available, contrary to Article 10(b) of the Directive.<sup>124</sup> There are cases in which the Preliminary Questionnaire is only provided for in the English version and applicants are not able to understand the content of the form and have to rely on the help of other detainees who speak English in order to file their claim.<sup>125</sup> This has an impact on the reliability of the information that the applicant is given and on the kind of information he or she is suggested to provide, as the creation of false beliefs on the asylum procedure among detainees is very widespread due to the particular context that detention creates.

The difficulty of filling in the form is exacerbated by the fact that applicants are required to submit their Preliminary Questionnaire only a few days after disembarkation, without any due consideration to psychological difficulties individuals may be facing and obstacles detainees may encounter to access legal counselling from detention in such a short period of time. Persons reaching Malta irregularly generally depart from Libya where they arrived after long trips through the desert and where they often have faced life threats and

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<sup>121</sup> Refugees Act, Chapter 420 of the Laws of Malta, 2000, as amended by Act VII of 2008, Art. 5, 6, 7.

<sup>122</sup> FRA, *Detention of Third-Country Nationals in Return Procedures*, Publications Office of the European Union, Luxembourg, 2010, pp. 47-48.

<sup>123</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, Art. 10(a).

<sup>124</sup> *Ivi*, Art. 10 (b).

<sup>125</sup> Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013.

deprivation of liberty. They reach Malta after a long and hazardous journey through the Mediterranean Sea and upon disembarkation they are sent straight to a detention centre. It is very unlikely that a few days in a detention context are sufficient for them to both recover and understand what the best way to face the asylum procedure is. In fact, apart from the short introduction provided for by the Refugee Commissioner, detainees mainly have to count on the counselling of UNHCR and of the non-governmental sector. Although Article 15 of the Asylum Procedures Directive establishes that detainees shall be granted the opportunity to consult in an effective manner a legal adviser,<sup>126</sup> very practical obstacles hinder this possibility. Even though some NGOs provide for free legal counselling, the capacity of those organisations is generally very limited and the opportunity for asylum-seekers to get in touch with legal experts out of detention is practically impossible due to the restrictions in the communications with the outside world and to the lack of information on who they should be addressing. Asylum-seekers and their legal representatives have no access to the case file, and decisions are not sufficiently reasoned, which makes challenging them on appeal particularly difficult.<sup>127</sup> Furthermore, it is important to take into consideration the fact that the detention policy hinders asylum-seekers from communicating with authorities or friends and relatives outside the country, thus compromising their attempt to obtain any documentation which could be useful to support their protection claim.<sup>128</sup>

It has also to be noted that in the event of a negative decision by the Refugee Commissioner, applicants are given the chance to appeal the decision within 15 days from the day they receive the letter with the first instance decision. Even though free legal aid is provided, no effective counselling is actually available. As a matter of fact, applicants are not informed about the name or any contact of the lawyer who is following their case, thus also having no chance to clarify anything they may have said during the interview with the

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<sup>126</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, Art. 15.

<sup>127</sup> Council of Europe Commissioner for Human Rights, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe*, following his visit to Malta from 23 to 25 March 2011, 9 June 2011, CommDH(2011)17, p. 13.

<sup>128</sup> *Ibidem*.

Refugee Commissioner. Furthermore, asylum-seekers are not heard by the Board, which only works through written proceedings.<sup>129</sup> Finally, it is important to highlight that the decision at second instance very often takes much longer than 6 months to be issued and that during that period of time, asylum-seekers often stay in detention without receiving any information about their asylum procedure.<sup>130</sup>

Even though the Maltese authorities do not prohibit or refrain anyone from requesting international protection, detention of asylum-seekers has a very strong negative impact on the full enjoyment of the right to asylum. The very practical obstacles that persons face in detention when applying for international protection do in fact compromise the outcome of the asylum procedure and thus the future protection of the individual. If one considers that the reasons for detaining asylum-seekers fail to persist due to the principle of non-refoulement and the impossibility of removing asylum-seekers from Malta, the effects of the detention system become even less justifiable, especially if balanced with the rather small (if not inexistent) benefits of this practice.

The next paragraph will analyse more in details the unlawfulness of the deprivation of liberty of asylum-seekers, especially by examining the unreasonable duration of detention, the lack of practical grounds justifying it and the absence of procedural guarantees.

#### 1.2.2. Arbitrary detention versus right to liberty and security of the person and freedom of movement

As already extensively discussed, the Maltese Immigration Act only contains provisions regarding the detention of “prohibited immigrants” with a purpose of preventing irregular entry or processing a return procedure or a removal order<sup>131</sup> and doesn’t include any provision justifying the detention of asylum-seekers. The law mandates that once issued

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<sup>129</sup> *Ibidem*.

<sup>130</sup> This issue shall be dealt with closer in the next paragraph.

<sup>131</sup> Immigration Act, Chapter 217 of the laws of Malta, as amended by Legal Notice 20 of 2013, Art. 14.

with a removal order, a person shall be held in detention until he or she is removed from Malta.<sup>132</sup> However, the principle of non-refoulement foresees that no one shall be deported to a country where he or she may be facing torture or inhuman and degrading treatment and the Immigration Act prescribes that the provisions it contains shall not compromise the “rights of refugees”.<sup>133</sup> Additionally, Article 31 of the Geneva Convention states that penalties should not be imposed on refugees for their unauthorised entry.<sup>134</sup> For those reasons, the purpose of removal which is the ground justifying detention according to the Immigration Act and detention as a punishment for irregular entry cannot be applied to asylum-seekers.

To evaluate whether the policy of detention in Malta is arbitrary, many factors have to be taken into consideration. In fact, the right to liberty and security of the person and freedom of movement are not absolute and immigration detention is not prohibited *per se*. However, for detention to be lawful and not arbitrary, it has to be authorised by law and to respect the principles of reasonableness, necessity, proportionality and non-discrimination.<sup>135</sup>

Firstly, as already discussed in the previous paragraph, immigration detention in Malta is only justified on the basis of a prospect of removal and no other provisions in the Immigration Act establish grounds to authorise the detention of asylum-seekers. Due to the inapplicability of removal orders to asylum-seekers, in practice no other reason justifies their deprivation of liberty. Article 5 of the European Convention only authorises the deprivation of liberty of third-country nationals for reasons related to medical security, irregular entry and deportation and other grounds related to any offence the person may have committed. Thus, the question arises as to which grounds justify the application of a detention policy to asylum-seekers and whether they are provided for in the national

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<sup>132</sup> *Ivi*, Art. 14(2).

<sup>133</sup> *Ivi*, Art. 14(5).

<sup>134</sup> UNGA, *Convention Relating to the Status of Refugees*, Art. 31, in Sandy Ghandhi (ed.), *Blackstone’s International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 20.

<sup>135</sup> A. Edwards, *Back to Basics, The Right to Liberty and Security of Person and “Alternatives to Detention” of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR Legal and Protection Policy Research Series, United Nations High Commissioner for Refugees, Geneva, April 2011, p. 20.

legislation, as prescribed by Article 9(1) of the International Covenant on Civil and Political Rights and Article 5 of the European Convention.<sup>136</sup>

Article 18 of the Asylum Procedures Directive foresees that Member States shall not detain a person for the sole reason that he or she is an applicant for asylum and it has been held that mandatory detention of asylum-seekers is unlawful *per se* as a matter of international law, regardless of the existence of national legislation authorising the practice.<sup>137</sup>

However, Maltese primary law does not provide for other reasons justifying detention of persons applying for international protection, thus rendering it unlawful from the very moment in which migrants reaching Malta apply for asylum. As a matter of fact, detention for the purpose of removal should only occur after the asylum claim has been finally determined and rejected, in accordance with Article 6 of the Returns Regulations foreseeing that removal shall be postponed where it would violate the principle of non-refoulement. The detention of asylum-seekers in Malta is unlawful and not proportionate because there can be no prospect of removal<sup>138</sup> and no other aim is stated in the law to authorise such detention.

A second criterion to evaluate if the detention of asylum-seekers is arbitrary has to be based on the principles of reasonableness, necessity, proportionality and non-discrimination. So far, the unlawfulness of the Maltese practice of detention has been discussed and it has emerged that deprivation of liberty of asylum-seekers is unlawful for the absence of *legitimate* grounds provided for by national law. In fact, although authorities could legitimately argue in favour of detention of irregular migrants and thus of any person entering Malta by boat, this justification ceases to exist in the moment a person applies for

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<sup>136</sup> Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Art. 5, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 258 and UNGA, *International Covenant on Civil and Political Rights*, Art. 9, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 35.

<sup>137</sup> A. Edwards, *Back to Basics, The Right to Liberty and Security of Person and "Alternatives to Detention" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR Legal and Protection Policy Research Series, United Nations High Commissioner for Refugees, Geneva, April 2011, p. 19

<sup>138</sup> Working Group on Arbitrary Detention, *Report of Working Group on Arbitrary Detention*, 13th Session of the UN Human Rights Council, UN Doc. A/HRC/13/30, 15 January 2010, para. 64.

asylum, that is a few days after arrival. The arbitrariness of detention refers to a broader concept, involving elements of inappropriateness, injustice and lack of predictability which do not necessarily equate to “against the law”.

UNHCR maintains that detention of asylum-seekers must be a measure of last resort which may exceptionally be permissible only in order to protect public order, public health or national security. Additionally, incarcerating an individual must be deemed necessary on the basis of an individual assessment and the necessity must exist over the whole time period of detention. An asylum-seeker may be detained to prevent absconding or in case of likelihood of non-cooperation with the authorities, in case of manifestly unfounded or abusive claims, for initial identity or security verification, in order to record the initial claim for international protection if not obtainable without detention, to carry out health checks or to avoid threats to national security.<sup>139</sup> Nevertheless, the lengthy period of detention to which asylum-seekers are subjected to in Malta does not fit with cases in which this kind of controls have to be conducted.<sup>140</sup>

The principle of proportionality foresees that the action taken against an individual should not exceed what is necessary to obtain the pursued objective. Specifically, the interests of the State must be balanced with the individual’s right to liberty and security of the person and freedom of movement. As shall be analysed in a moment, the duration of detention in Malta clearly exceeds any objective related to medical or security controls or prospects of removal and it is therefore not proportionate.

Maltese law sets no maximum limits on the duration of detention of asylum-seekers and, in practice, persons are released once they are granted some form of protection by the Office of the Refugee Commissioner. Prior to December 2003, Malta employed a policy of indefinite detention of migrants and asylum-seekers who had entered the country

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<sup>139</sup> UNHCR, *Detention Guidelines. Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Guideline 4.1, p. 16, available at: <http://www.unhcr.org/505b10ee9.html> (Last accessed 13/6/14).

<sup>140</sup> Human Rights Watch, *Boat Ride to Detention, Adult and Child Migrants in Malta*, Human Rights Watch, United States, 2012, p. 35.

irregularly, in accordance with the Immigration Act.<sup>141</sup> In 2003 the European Union issued the Directive on the Reception Conditions of asylum-seekers, establishing in Article 11 that if after one year from the application for international protection, a decision on the claim has not yet been taken, the asylum-seeker should be granted access to the labour market.<sup>142</sup>

Given the fact that it is not possible to work while in detention, the provision contained in the 2003 Directive has been interpreted as to mean that asylum-seekers have to be released after one year if their application for international protection is still pending.<sup>143</sup>

As regards the duration of detention of irregular migrants, only in 2005 a policy document containing relevant guidelines was jointly published by the Ministry for Justice and Home Affairs and the Ministry for the Family and Social Solidarity. The 2005 Policy Document provides that “irregular immigrants will remain in closed reception centres until their identity is established and their application for asylum processed. No immigrant shall, however, be kept in detention for longer than eighteen months”.<sup>144</sup>

The lack of provisions in the Maltese Immigration Act regulating the maximum duration of detention of asylum-seekers and irregular immigrants and the provisions contained in the policy document and in the 2003 Reception Conditions Directive, have led to a practice whereby asylum-seekers are detained for a maximum time period of one year if their claim is still pending or less if they are granted some form of protection, whereas rejected asylum-seekers are detained for a maximum duration of 18 months.

An asylum-seeker thus stays in detention either until his or her asylum procedure is concluded positively or for a minimum period of one year if the decision is still pending.

It must be highlighted that the reasons for detaining asylum-seekers should be provided for by law together with a precise time period and that it is not appropriate to base the duration of detention of persons claiming for international protection on Article 11 of the EU Reception Conditions Directive, which regulates access of asylum-seekers to the labour

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<sup>141</sup> Immigration Act, Chapter 217 of the laws of Malta, as amended by Legal Notice 20 of 2013, Art. 5 and 14.

<sup>142</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art 11(2).

<sup>143</sup> Cf. UNHCR, *UNHCR's position on the detention of asylum-seekers in Malta*, 18 September 2013, p. 15.

<sup>144</sup> Ministry for Justice and Home Affairs and Ministry for the Family and Social Solidarity, *Malta: Irregular Immigrants, Refugees and Integration Policy Document*, 2005, para. 5, p. 11.

market. The provisions contained in this Article foresee that Member States shall determine a period of time during which applicants for asylum shall not have access to the labour market and that if after one year no decision has yet been taken regarding their protection claim, they should be given the possibility to work.<sup>145</sup> The fact that access to labour market can be prohibited for a period of time shall not mean that Member States are justified to detain asylum-seekers during that period.

The grounds for detaining asylum-seekers are clearly listed in European and international law and detention should never last longer than the existing purpose justifying it, otherwise it would become disproportionate. Duration of detention should therefore be clearly regulated by national primary law, and be based on clear purposes regulated by legal provisions. Since no plausible reason is provided in the legislation and in practice for the detention of asylum-seekers as such, the same shortcoming is reflected in the duration of detention which fails to be justified by any plausible and solid ground. In fact, to determine whether one of the reasons for detaining an applicant for international protection holds, each single case should be assessed on an individual basis and the lengthy time period of detention determined accordingly. Additionally, any decision to prolong the established period of detention shall also be carefully examined. If the grounds justifying the prolonging of detention are not proportionate to the deprivation of liberty of an individual and detention is not deemed to be strictly necessary, States should resort to alternative means to achieve their objectives. However, the Maltese system and law only provide for mandatory detention of asylum-seekers without assessing individually the necessity and the duration of such a measure and without foreseeing any less coercive alternative.

Furthermore, due to the practice according to which asylum-seekers are either released when they receive some form of protection or if one year time period has elapsed, there is a serious risk for the processing time of the application for asylum to become a ground for detention in practice. As a matter of fact, any bureaucratic delay in the asylum procedure becomes the reason for prolonging the detention of the asylum-seeker. Although the Office

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<sup>145</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art. 11 (1), (2).

of the Refugee Commissioner concludes the processing of a claim in an average time of less than 6 months, it has to be highlighted that the deprivation of liberty of an asylum-seeker for purposes which are not clearly stated in the law, is not justifiable for any time period, as it is disproportionate due to the lack of a real prospect of removal. The duration of detention becomes therefore unreasonable, as the only reason for which detention gets prolonged resides in the delays in the asylum determination procedure.

Additionally, in the event of an asylum-seeker being rejected at first instance, he or she can appeal the decision to the Refugee Appeals Board within 15 days from the date of notification of the Refugee Commissioner. However, the appeals to the Refugee Appeals Board generally take a much longer time period to be processed and meanwhile, the asylum-seeker stays in detention. In those cases, even more than during the processing of first instance applications, the duration of detention is supposed to be justified by the delays in the processing of the appeal, rendering the deprivation of individuals even more arbitrary and unreasonable.

Another factor having an impact on the reasonableness and proportionality of detention and duration of detention regards some considerations that can be made not only for asylum-seekers but also for irregular migrants. In fact, most of the migrants and asylum-seekers who are in detention cannot be deported back to their country of origin, even in the event that their asylum claim has been rejected and that the prospect of removal would be applicable. This is due to many different reasons concerning the lack of cooperation by the third country, logistical difficulties to enforce the deportation or the existence of advisories of non-return to countries which may be facing situations of serious violence. For instance, the majority of asylum-seekers reaching Malta come from Somalia<sup>146</sup> and even though a quite high number of applicants does not get granted any form of protection, in practice no deportations to Somalia have ever been effected, partly because of UNHCR Recommendation on return to Somalia and partly because of the very logistical difficulties

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<sup>146</sup> Cf. UNHCR Malta Asylum Trends Fact Sheets 2002-2010, 2011, 2012, 2013, available at: <http://www.unhcr.org.mt/mobile/statistics> (Last accessed: 6/6/2014).

related to it.<sup>147</sup> There are thus cases in which detention with a view of deportation is unreasonable from the very beginning, as the removal will never be enforceable, even in the event of a rejection of the asylum claim.<sup>148</sup>

Another important aspect which has to be taken into consideration when examining the legitimacy of detention regards non-discrimination. Article 2 of the International Covenant on Civil and Political Rights establishes that the rights contained in the Treaty shall be respected and ensured to all individuals without distinction of any kind. This principle thus also applies to Articles 9 and 12 of the Covenant regulating the right to liberty and security of the person and the right to freedom of movement. However, contrary to this principle, persons managing to enter Malta irregularly without being detected who apply for international protection at the Office of the Refugee Commissioner, may avoid being detained. As a matter of fact, those persons will be provided with an asylum-seekers document proving that they have filed a claim for asylum and subsequently issued an immigration certificate allowing them to stay in Malta.<sup>149</sup> In these circumstances, persons are allowed to move freely until their asylum procedure is concluded. Clearly, serious issues of discrimination arise from this practice, as no real reason is provided for such differential treatment of the two kinds of persons concerned, rendering the application of the law rather arbitrary.

The whole situation is exacerbated by the lack of procedural guarantees that should be granted to asylum-seekers in detention.<sup>150</sup> For instance, individuals are not properly informed about the reasons which led to their detention and to the issuance of a removal order against them and are not explained why their detention is prolonged for such a lengthy period of time. Of course, the more detention is prolonged, the more there is a risk

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<sup>147</sup> Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013, para. 18.

<sup>148</sup> The third chapter will examine the issue more in depth with regards to rejected asylum-seekers, to evaluate whether and how their detention can also be questioned.

<sup>149</sup> Cf. UNHCR, *UNHCR's position on the detention of asylum-seekers in Malta*, 18 September 2013, p. 13

<sup>150</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 12.

for it to become arbitrary and, clearly, the more it is arbitrary, the more it is difficult to provide detainees with solid grounds for understanding their deprivation of liberty, especially where no prospect of removal exists.<sup>151, 152</sup> One of the few sources of information on which they must rely is UNHCR or other organisations working in the detention context. Additionally, the notification of the reasons leading to detention should be accompanied by information on the procedures available to challenge the detention order.<sup>153</sup> Maltese law provides for a number of legal avenues to challenge detention, however those are not considered to be effective in practice and, as already highlighted, the possibility to access those remedies for persons who are in detention is very limited due to the difficulty to have contacts with any legal adviser and to the lack of information regarding the procedures to follow. The European Court of Human Rights has found in different decisions that Malta imposes prolonged periods of detention for asylum-seekers without providing adequate avenues to challenge their detention and without taking into consideration alternative and less coercive measures.<sup>154</sup>

The remedies available include procedures under the Criminal Code and appeals under the Immigration Act. According to Article 409A of the Criminal Code a detained person may appear before the Court of Magistrates and request it to examine the lawfulness of detention and order release from custody.<sup>155</sup> However, in the case of *Karim Barboush v. Commissioner of Police*, the Court of Magistrates held that it is not in its competence to establish whether some particular circumstances may render continued detention illegal, even though the Immigration Act clearly authorises it. Furthermore, according to the Court,

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<sup>151</sup> 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, International Commission of Jurists, Geneva, May 2012 p. 25.

<sup>152</sup> Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013, para. 18.

<sup>153</sup> A. Edwards, *Back to Basics, The Right to Liberty and Security of Person and "Alternatives to Detention" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR Legal and Protection Policy Research Series, United Nations High Commissioner for Refugees, Geneva, April 2011, p. 38.

<sup>154</sup> Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013, Case of Suso Musa v. Malta, Application No. 42337/12, European Court of Human Rights, 9 December 2013, Case of Louled Massoud v. Malta, Application No. 24340/08, European Court of Human Rights, 27 July 2010.

<sup>155</sup> Criminal Code, Chapter 9 of the Laws of Malta, 1854, as amended by ordinances V and IX of 2014, Art. 409A.

Article 14(2) of the Immigration Act allows for the detention of asylum-seekers as well as any other migrant.<sup>156</sup> The Court then ordered the re-arrest of the appellant. The judgement of the Court shows quite evidently the intention of dismissing any case concerning the detention of asylum-seekers and the prolonged detention of persons on whom a removal order is pending, thus rendering the remedy under the Criminal Code rather ineffective.

Another possible avenue is provided for by Article 25A of the Immigration Act which attributes jurisdiction to the Immigration Appeals Board to hear and determine a number of different appeals.<sup>157</sup> Under Article 14(1) and Article 25A of the Immigration Act, a person may appeal against the issuance of a removal order, within three working days from the decision subject to appeal.<sup>158</sup> Since the removal order is issued on the day of arrival, the time frame within which the appeal has to be filed is way too restricted for asylum-seekers to manage to seek the necessary legal assistance and thus to file an appeal.

Article 29A of the Immigration Act also establishes that the Immigration Appeals Board has the competence to decide on the reasonableness of the duration of detention pending determination of an asylum claim or of a deportation.<sup>159</sup> However, the Article only gives the power to the Immigration Appeals Board to decide on the *reasonableness* of the duration of detention and not on the legality of detention itself and foresees anyway that release shall not be granted where the determination of some elements of the asylum claim cannot be determined in the absence of detention.<sup>160</sup> As the European Court of Human Rights has held, it follows that such a remedy is not applicable to a person in the initial stages of detention, pending a decision on asylum application.<sup>161</sup> As a matter of fact, detention is mandatory for any asylum-seeker and the clause of the Article justifying

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<sup>156</sup> Case of Karim Barboush v. Commissioner of Police, Malta Criminal Court, Case No. 2/2004, Chief Justice Vincent De Gaetano, 5 November 2004, as cited in the Case of Louled Massoud v. Malta, Application No. 24340/08, European Court of Human Rights, 27 July 2010, para. 21.

<sup>157</sup> Immigration Act, Chapter 217 of the laws of Malta, as amended by Legal Notice 20 of 2013, Art. 25A.

<sup>158</sup> *Ivi*, Art 14(1) and 25A(7).

<sup>159</sup> *Ivi*, Art. 25A(9), (10).

<sup>160</sup> *Ivi*, Art. 25A(11).

<sup>161</sup> Case of Suso Musa v. Malta, Application No. 42337/12, European Court of Human Rights, 9 December 2013, para. 56.

detention exceptionally for the examination of elements of the asylum claim, has driven detention in a matter of course rather than last resort for necessity.

Finally, Article 25A(6) provides that the Immigration Appeals Board may grant release under terms and conditions regulated by the provisions on bail of the Criminal Code.<sup>162</sup> However, the bail is usually set at around 1000 euros and a third-party must guarantee that the individual would be provided with accommodation and subsistence.<sup>163</sup> Individuals arriving by boat are generally not able to fulfil those conditions, thus making this avenue unaffordable. Additionally, it has to be noted in connection to all the competences and jurisdictions of the Immigration Appeals Board that the judicial review of administrative detention of asylum-seekers is ineffective as the Board does not address the lawfulness of detention in individual cases and takes very long to decide on cases challenging detention. As a matter of fact, in many cases individuals have been released from detention before the Immigration Appeals Board issued a decision.<sup>164</sup>

The same difficulty can be attributed to the last avenue to challenge detention, namely applications before the Civil Court in its Constitutional Jurisdiction and the appeals to the Constitutional Court. In fact, the European Court of Human Rights has held that the procedure is rather cumbersome and therefore does not ensure a speedy judicial review of the lawfulness of detention.<sup>165</sup>

Procedural guarantees are an important factor to be weighted when evaluating the reasonableness and proportionality of detention and, as has been shown, the Maltese system fails to grant them. Detainees are barely informed about reasons leading to their deprivation of liberty, no periodic review of the detention order is in place and the enjoyment of the

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<sup>162</sup> Malta Criminal Code, Chapter 9 of the Laws of Malta, 1854, as amended by ordinances V and IX of 2014, Art. 409A, Title IV of part II of Book Second.

<sup>163</sup> Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013, para. 110.

<sup>164</sup> *Ivi*, para. 108.

<sup>165</sup> *Ivi*, para. 62, Case of Suso Musa v. Malta, Application No. 42337/12, European Court of Human Rights, 9 December 2013, para. 52, Case of Louled Massoud v. Malta, Application No. 24340/08, European Court of Human Rights, 27 July 2010, para. 45.

right to challenge detention is hampered by the inefficiency of the judicial system in this regards.

Detention of asylum-seekers in Malta is thus not only unlawful for the lack of clear grounds in the law justifying it and regulating its duration, but it is also arbitrary due to the absence of real prospects of removal which make detention and duration of detention solely based on delays in the asylum procedure. Additionally, contrary to relevant provisions contained in international and regional instruments and in the UNHCR Guidelines on detention, Maltese laws do not provide for alternatives to detention, thus resorting to it indiscriminately without prior evaluation of the necessity of detaining a person. Discriminations in the application of this policy and the lack of procedural guarantees for detainees worsen this questionable system. The Maltese system of detention is thus in breach both of the right to liberty and security of the person and freedom of movement. As a matter of fact, although those rights are not absolute, serious and solid grounds must be provided to hinder an individual's enjoyment of those rights. The arbitrariness and unlawfulness of the Maltese practice of detention make it be perceived, both by migrants and asylum-seekers themselves and by persons who are external to the system, as a punishment for the irregular entry or, much worse, for being asylum-seekers, rather than a procedure to be followed in order to process the removal.<sup>166</sup>

Asylum-seekers shall not be detained, unless real and solid grounds justify their deprivation of liberty for the shortest possible duration. Seeking asylum is not an unlawful act and any decision to detain persons exercising this right must be provided for by law and must be carefully circumscribed and subject to speedy and effective judicial review.

Detention as a punishment or as a form of deterrent against irregular migration are not grounds for depriving asylum-seekers of their liberty. Refugees shall not be punished for their irregular entry<sup>167</sup> or for the sole reason that they are seeking asylum.<sup>168</sup> Additionally,

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<sup>166</sup> Human Rights Watch, *Boat Ride to Detention, Adult and Child Migrants in Malta*, Human Rights Watch, United States, 2012, p. 31.

<sup>167</sup> UNGA, *Convention Relating to the Status of Refugees*, Art. 31, in Sandy Gandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 20.

there exist no evidence that the threat of being detained disincentives persons from fleeing their country and from entering irregularly another territory, as global migration statistics have been rising regardless of harsher governmental policies on detention.<sup>169</sup>

Detention as a mandatory measure applied to anyone entering the country irregularly is in breach of numerous international and regional legal provisions and Malta should provide for in law and in practice alternatives to detention, such as reporting requirements or structured community supervision.<sup>170</sup>

It has already been argued that asylum-seekers shall as a general principle not be detained unless serious reasons justify their deprivation of liberty. As shall be shown in the next chapter, other subgroups shall even less undergo such a policy. Alternatives to detention represent a great urgency also for the treatment of particular vulnerable subgroups, such as children or persons in special circumstances, who are currently being subjected to a policy of detention as any other asylum-seeker or irregular entrant, raising other as serious issues.

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<sup>168</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, Art. 18.

<sup>169</sup> A. Edwards, *Back to Basics, The Right to Liberty and Security of Person and “Alternatives to Detention” of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR Legal and Protection Policy Research Series, United Nations High Commissioner for Refugees, Geneva, April 2011, p. iii.

<sup>170</sup> UNHCR, *Detention Guidelines. Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Guideline 4.3, pp. 22-23, available at: <http://www.unhcr.org/505b10ee9.html> (Last accessed 13/6/14).

## **2. Vulnerable persons in the Maltese immigration and asylum-seekers detention context**

The previous chapter has dealt with the specific rights of refugees that are infringed by the mandatory system of detention applied in Malta and it has highlighted the arbitrariness of the deprivation of liberty of asylum-seekers. In accordance with various international and regional instruments, it has been argued that asylum-seekers shall not be detained, unless very serious grounds justify their deprivation of liberty and it was examined whether the Maltese detention policy is respectful of this general rule. It was shown that the Maltese practice doesn't respect this principle and concluded that the detention of asylum-seekers in Malta is unlawful and in breach of several fundamental rights.

The present chapter will examine other serious issues that emerge from the fact that vulnerable persons are detained without an assessment of their needs and without any consideration of the impact that detention may have on their wellbeing. It has already been argued that asylum-seekers shall not be deprived of their liberty, however this chapter shall highlight how the deprivation of liberty of vulnerable subgroups of asylum-seekers makes this practice even less justifiable. In fact, a general principle taken from the International Covenant on Civil and Political Rights and from The EU Charter of Fundamental Rights and Freedoms should be applied in general and should work as a guidance especially in the treatment of vulnerable persons: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".<sup>171</sup> "Human dignity is inviolable. It must be respected and protected."<sup>172</sup> The inherent dignity of vulnerable persons clearly requires particular analysis and attention as the needs of vulnerable persons have to be assessed in order for their dignity to be respected.

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<sup>171</sup> UNGA, *International Covenant on Civil and Political Rights*, Art. 10, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 36.

<sup>172</sup> European Union, *Charter of Fundamental Rights of the European Union* (2000), OJ C364/1, Art. 1, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 352.

Additionally, detention raises serious issues as it risks to create new vulnerable persons because of the particular context it creates, risking to clash with the fundamental right to respect for physical and mental health of persons.<sup>173</sup>

As has been done previously, the chapter will be divided in two parts. The first one will analyse the existing international, regional and national laws and standards which lay down the rights and regulate the treatment of children and other vulnerable persons. The second part will examine the Maltese system of detention of vulnerable subgroups of asylum-seekers and evaluate if and how their rights are infringed, in light of the legal framework exposed in the first part of the chapter.

## **2.1. Legal framework**

### **2.1.1. International and regional legal framework**

From the international point of view, there are no provisions specifically mentioning “vulnerable persons” as a group. “Vulnerable” is a generic term under which a number of different categories are considered to fall. UNHCR Guidelines on the detention of asylum-seekers equally refer to vulnerable persons with the term “persons in special circumstances and with particular needs” and indicate with it victims of trauma or torture, children, women, victims or potential victims of trafficking, persons with disabilities and persons belonging to the LGBTI group.<sup>174</sup> Very similarly, the EU Qualifications Directive, the Reception Conditions Directive and the Reception Conditions Directive Recast include among vulnerable groups minors, unaccompanied minors, disabled persons, elderly people, pregnant women, single parents with minor children and persons who have been subjected

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<sup>173</sup> European Union, *Charter of Fundamental Rights of the European Union* (2000), OJ C364/1, Art. 3, in Sandy Ghandhi (ed.), *Blackstone’s International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 353.

<sup>174</sup> UNHCR, *Detention Guidelines. Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Guideline 9, pp. 33-39, available at: <http://www.unhcr.org/505b10ee9.html> (Last accessed 21/6/14).

to torture, rape or other serious forms of psychological, physical or sexual violence,<sup>175</sup> while the Asylum Procedures Directive specifically focuses on unaccompanied minors.<sup>176</sup> In order to examine the available existing legislation regulating the rights of vulnerable persons, the chapter will slightly simplify the categories just mentioned and divide them into four subgroups, namely children, families and pregnant women, people with disabilities or psychological problems and elderly persons. The reason for reducing the number of subgroups is related to the fact that international and regional legislation is not always very specific in dividing those categories and rights attributed to certain groups apply to various persons belonging to the subgroups mentioned above. Additionally, in accordance with the Qualifications Directive, the Reception Conditions Directive and the Reception Conditions Directive Recast,<sup>177</sup> the chapter will not include persons belonging to the LGBTI group among vulnerable persons. This is partly due to the fact that no legislation specifically exists yet to regulate the rights of those groups and partly to the fact that they cannot be considered vulnerable *per se*, as their vulnerability rather stems from the particular cultural and social factors of the environment in which they live. The analysis of the legal framework will hereinafter be divided in accordance with the four subgroups listed above.

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<sup>175</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L337/9, Art. 20, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art 17, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down minimum standards for the reception of asylum-seekers (recast), OJ L180/96, Art. 21.

<sup>176</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, Art. 17.

<sup>177</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L337/9, Art. 20, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art 17, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down minimum standards for the reception of asylum-seekers (recast), OJ L180/96, Art. 21

#### 2.1.1.1. Children

This category will subsume both children coming with their families and unaccompanied minors, namely “persons who are under the age of eighteen, unless, under the law applicable to the child, majority is attained earlier and who are separated from both parents and are not being cared for by an adult who by law or custom has responsibility to do so”.<sup>178</sup> At international level, the main document specifically dealing with children’s rights is the United Nations Convention on the Rights of the Child, which defines a child as any human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier.<sup>179</sup>

When dealing with children detention, many if not most of the rights contained in the Articles of the Convention on the Rights of the Child are closely concerned and need to be taken into consideration. However, the ones that primarily have to be taken into consideration when analysing the Maltese detention context regard the principle of the best interests of the child, the right to protection, education and to an adequate environment.

Article 3 of the Convention on the Rights of the Child establishes that in all actions concerning children, authorities shall take into consideration the best interests of the child.<sup>180</sup> This is a general and fundamental principle which should guide any procedure which involves a child and should aim at guaranteeing the safeguard of the well-being of the child. This rule is clearly reflected in all the other Articles of the Convention and is also explicitly mentioned, at the regional level, in Article 24 of the EU Charter of Fundamental Rights<sup>181</sup> and as a core principle in a number of Directives of the asylum *Acquis*.<sup>182</sup>

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<sup>178</sup> UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, February 1997, available at: <http://www.refworld.org/docid/3ae6b3360.html> (last accessed 27 June 2014).

<sup>179</sup> UNGA, *Convention on the Rights of the Child*, Art. 1, in Sandy Ghandhi (ed.), *Blackstone’s International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 96.

<sup>180</sup> *Ibidem*.

<sup>181</sup> European Union, *Charter of Fundamental Rights of the European Union* (2000), OJ C364/1, Art. 24, in Sandy Ghandhi (ed.), *Blackstone’s International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 355.

Article 22 of the Convention on the Rights of the Child specifically refers to the rights of children seeking asylum and foresees that States shall take appropriate measures to ensure that such a child receives appropriate protection and humanitarian assistance in the enjoyment of the rights contained in the Convention itself and in other fundamental human rights documents. To this end, States shall cooperate with the United Nations and with other organisations to protect and assist the child.<sup>183</sup> The right to protection for the child is also mentioned, as a broader concept which shall be applied without any discrimination to all children, in Article 24 of the International Covenant on Civil and Political Rights<sup>184</sup> and regionally in Article 7 of the European Social Charter.<sup>185</sup>

Articles 19 and 39 of the Convention on the Rights of the Child oblige States to take appropriate measures to protect the child from physical or mental violence, injury or abuse, negligent treatment, maltreatment or exploitation<sup>186</sup> and to promote physical and psychological recovery and social reintegration of a child victim of any of the abovementioned treatments.<sup>187</sup> Additionally, Article 18(2) of the Reception Conditions Directive also requires States to ensure that appropriate mental health care is developed for those children.<sup>188</sup> Particularly interesting for the analysis of the Maltese system is also Article 8 of the Optional Protocol to the Convention on the Rights of the Child, which foresees that children victims of violence, injury or abuse, negligent treatment,

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<sup>182</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art. 18(1), Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L337/9, Art. 20(5), Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 5(a).

<sup>183</sup> UNGA, *Convention on the Rights of the Child*, Art. 22, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 100.

<sup>184</sup> UNGA, *International Covenant on Civil and Political Rights*, Art. 24, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 39.

<sup>185</sup> Council of Europe, *European Social Charter*, Art. 7, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 314.

<sup>186</sup> UNGA, *Convention on the Rights of the Child*, Art. 19, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 99.

<sup>187</sup> *Ivi*, Art. 39, p. 104.

<sup>188</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art. 18(2).

maltreatment or exploitation, shall have their rights and interests protected. In particular, States shall recognise their vulnerability and assess their special needs, provide support services and protect their privacy and identity.<sup>189</sup> This is fundamental when dealing with children seeking asylum, as they may have in fact faced situations of violence and abuse which may require special assistance which is hardly available in detention.

Additionally, there are a number of Articles in the Convention on the Rights of the Child which need to be taken into consideration as the particular detention context risks to endanger the respect of the rights they contain. In particular, the deprivation of liberty and the placement in closed reception centres, have an impact on Article 16 foreseeing that no child should be subjected to arbitrary or unlawful interference with his or her privacy, family or correspondence and on Articles 31 and 37 which establish that children shall have the right to rest and leisure, engage in play and recreational activities appropriate to their age and, accordingly, that any deprivation of liberty shall respect their human dignity and take into account the needs of a person of their age. Furthermore, in case of detention, children shall be separated from adults unless the child's best interests lay in the opposite.<sup>190</sup> Article 10 of the International Covenant on Civil and Political Rights speaks about accused juvenile persons deprived of their liberty. Although minors seeking asylum are not detained for any offence, the principle enshrined in the Article establishing that minors should not be detained with adults<sup>191</sup> is applicable to any underage person who is detained.

The deprivation of liberty of children also raises issues as to the respect of the right to education, which is enshrined specifically in Article 28 of the Convention on the Rights of the Child which foresees that primary and secondary education shall be accessible and free

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<sup>189</sup> UNGA, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, Art. 8, in Sandy Gandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 114.

<sup>190</sup> UNGA, *Convention on the Rights of the Child*, Art. 31 and 37, in Sandy Gandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, pp. 103-104.

<sup>191</sup> UNGA, *International Covenant on Civil and Political Rights*, Art. 10, in Sandy Gandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 36.

to all children.<sup>192</sup> Transversally this right is also contained in Article 17 which aims at guaranteeing access to information to the child.<sup>193</sup> The right to education is also contained in a large number of other international and regional human rights instruments, namely: Article 26 of the Universal Declaration of Human Rights,<sup>194</sup> Article 22 of the 1951 Convention<sup>195</sup> and Article 13 of the International Covenant on Economic Social and Cultural Rights,<sup>196</sup> Article 2 of the first Protocol to the European Convention on Human Rights<sup>197</sup> and Article 14 of the EU Charter of Fundamental Rights.<sup>198</sup>

Other issues which may emerge within the detention context further regard the right to health as enshrined in Article 24 of the Convention on the Rights of the Child and the right to an adequate standard of living, in accordance with Article 27.<sup>199</sup>

Particular provisions regulating the treatment of asylum-seeking children are contained in various Directives of the asylum *Acquis*. In particular, Article 19 of the Reception Conditions Directive and Article 17 of the Asylum Procedures Directive provide for special guidance in case of unaccompanied asylum-seeking minors. They specifically establish that States shall take measures to ensure that unaccompanied minors receive necessary representation by legal guardianship or other appropriate representation, in particular in

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<sup>192</sup> UNGA, *Convention on the Rights of the Child*, Art. 28, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 102.

<sup>193</sup> *Ivi*, Art. 17, p. 99.

<sup>194</sup> UNGA, *Universal Declaration of Human Rights*, Art. 26, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 12.

<sup>195</sup> UNGA, *Convention Relating to the Status of Refugees*, Art. 22, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 18.

<sup>196</sup> UNGA, *International Covenant on Economic Social and Cultural Rights*, Art. 13, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 52.

<sup>197</sup> Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Protocol 1, Art. 2, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 267.

<sup>198</sup> European Union, *Charter of Fundamental Rights of the European Union* (2000), OJ C364/1, Art. 14, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 354.

<sup>199</sup> UNGA, *Convention on the Rights of the Child*, Art. 24 and 27, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 101.

order to assist the minor with respect to the application for asylum.<sup>200</sup> Additionally, those working with minors shall have received appropriate training concerning minors' needs. Article 17 of the Asylum Procedures Directive also lays down the possibility of resorting to medical tests to assess the age of the minor within the framework of the asylum procedure and provides for the minimum guarantees to be respected when applying such a procedure, namely information about the examination, consent and right to refuse to undergo the medical test.<sup>201</sup>

Most important and directly connected to the purpose of the present chapter are, however, the provisions contained in the Returns Directive, which specifically regulate the treatment of asylum-seeking children pending return and the ones contained in the Reception Conditions Directive Recast which will have to be implemented by July 2015 and which provide for specific treatment to be accorded to children in detention. Interestingly, Article 10 of the Returns Directive foresees that before issuing a return decision in respect to an unaccompanied minor, assistance by appropriate bodies shall be granted<sup>202</sup> and Article 17 specifically states that unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.<sup>203</sup> Furthermore, minors in detention shall have the possibility to engage in leisure activities and shall have access to education. Additionally children shall be accommodated in institutions which take into account the needs of persons of their age. The Reception Conditions Directive Recast, contains provisions on children in detention specifically in Article 11 and on the general reception of minors in Articles 14, 23 and 24. First of all, minors should only be detained as a measure of last resort and the minor's best interests shall be a primary consideration for States. Children in detention shall have the possibility

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<sup>200</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art. 19, Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, Art. 17.

<sup>201</sup> *Ibidem*.

<sup>202</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 10.

<sup>203</sup> *Ivi*, Art. 17.

to engage in leisure activities and the personnel and facilities shall take into account the needs of persons of their age.<sup>204</sup> Additionally, Article 14 establishes that children shall have access to schooling and education, as long as an expulsion measure against them or their parents is not actually enforced. Specifically, access to education shall not be postponed for more than three months from the date from the date on which the application for asylum was lodged. Interestingly, the Article also foresees that preparatory classes, including language classes, shall be provided where necessary to facilitate the access of minors to the education system.<sup>205</sup> Article 23 foresees that States shall ensure a standard of living adequate for minors' physical, mental, spiritual, moral and social development. Access to leisure activities and to rehabilitation services for victims of any form of abuse, torture or cruel inhuman and degrading treatment and who have suffered situations of violence shall be provided.<sup>206</sup> Finally, Article 24 specifically focuses on unaccompanied minors and foresees that as soon as possible measures shall be taken to ensure that a representative represents and assists the unaccompanied minor. Unaccompanied minors shall be placed in accommodations which are appropriate for minors and States shall take appropriate measures to start tracing the family members of the child.<sup>207</sup>

It is not difficult to imagine that the detention of minors in the Maltese context is far from respecting the provisions just mentioned, as will be analysed when examining the detention of vulnerable persons in practice.

#### 2.1.1.2. Families and pregnant women

Regarding families and family life no international legal document exists which gathers together provisions regulating their treatment. However, a number of rights concerning this

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<sup>204</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down minimum standards for the reception of asylum-seekers (recast), OJ L180/96, Art. 11.

<sup>205</sup> *Ivi*, Art. 14.

<sup>206</sup> *Ivi*, Art. 23

<sup>207</sup> *Ivi*, Art. 24.

group can be found in several international and regional documents. It is worth laying down some of those provisions to examine them later on in light of the Maltese detention policy. Article 16 of the Universal Declaration of Human Rights and Article 23 of the International Covenant on Civil and Political Rights set forth family as the natural and fundamental group unit of society and specify it is entitled to protection by society and the State.<sup>208</sup> Additionally, Article 25 of the Declaration specifically entitles motherhood and childhood to special care and assistance.<sup>209</sup> Article 10 of the International Covenant on Economic, Social and Cultural Rights further elaborates on this point, by clearly stating that society should guarantee that the family is able to fulfil its responsibilities concerning care and education of dependent children and by establishing that special protection should be accorded to mothers during a reasonable period before and after childbirth.<sup>210</sup> Protection towards pregnant women is further protected by the Convention on the Elimination of All Forms of Discrimination against Women which in Article 12 obliges States to take appropriate measures to ensure access to health care service including those related to family planning and to provide women with appropriate services in connection with pregnancy and post-natal period.<sup>211</sup>

At the regional level, Article 8 of the European Convention on Human Rights and Article 7 of the EU Charter of Fundamental Rights lay down the respect for private and family life, prohibiting the interference by public authorities with the exception of special

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<sup>208</sup> UNGA, *Universal Declaration of Human Rights*, Art. 16(3), in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 11, UNGA, *International Covenant on Civil and Political Rights*, Art. 23, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 38.

<sup>209</sup> UNGA, *Universal Declaration of Human Rights*, Art. 25, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 12.

<sup>210</sup> UNGA, *International Covenant on Economic, Social and Cultural Rights*, Art. 10 (1), (2), in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 51-52.

<sup>211</sup> UNGA, *Convention on the Elimination of All Forms of Discrimination against Women*, Art. 12, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 65.

circumstances provided for by law.<sup>212</sup> Article 17 of the European Social Charter then also guarantees the right of mothers and children to social and economic protection.<sup>213</sup>

Specific provisions regarding the reception of families seeking asylum are contained in the EU Returns Directive and Reception Conditions Directive. In particular, Article 17 of the Returns Directive clearly states that detention of families should only be used as a measure of last resort<sup>214</sup> and the Returns Directive, the Reception Conditions Directive and the Qualification Directive Recast all prescribe that States shall take appropriate measures to protect the family unit and respect family life.<sup>215</sup>

### 2.1.1.3. Persons with disabilities or psychological problems

The major document regulating the rights of this group is the Convention on the Rights of Persons with Disabilities, which includes in its scope persons who have long term physical, mental intellectual or sensory impairments which may hamper their full enjoyment of the same rights as any other person.<sup>216</sup>

As the definition just reported clearly shows, the Convention on the Rights of Persons with Disabilities does not apply to persons who may be facing temporary mental disorders due

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<sup>212</sup> Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Art. 8, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 259, European Union, *Charter of Fundamental Rights of the European Union* (2000), OJ C364/1, Art. 7, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 353.

<sup>213</sup> Council of Europe, *European Social Charter*, Art. 17, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 317.

<sup>214</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 17, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L337/9, Art. 23.

<sup>215</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 5(b) and Art. 14(a), Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art. 14(2a).

<sup>216</sup> UNGA, *Convention on the Rights of Persons with Disabilities*, Art. 1, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 198.

to events such as torture or violence which may have traumatised them. However, psychological troubles following traumatic events can also be considered as a form of impairment in the possibility of enjoying equal rights. For this reason, although the rights contained in the Convention on the Rights of Persons with Disabilities will not explicitly be referred to victims of trauma or violence, a single category including both persons with disabilities and persons with temporary psychological problems will be presented.

The fundamental principle enshrined in Article 3 of the Convention on the Rights of Persons with Disabilities which applies to all the subgroups analysed in this chapter concerns the respect of inherent dignity of the persons. In the case of persons with disabilities this right is reflected specifically in the respect of individual autonomy and independence.<sup>217</sup> Article 3 additionally states other fundamental principles which should be at the core of the society's treatment of persons with disabilities and which are interesting when analysing a context of immigration detention, namely non-discrimination, participation and inclusion in society, respect for difference and acceptance, equal opportunities and accessibility.<sup>218</sup> To achieve those principles, States should, in accordance with Article 4, take all the necessary measures to ensure and promote the full realisation of all human rights and freedoms of persons with disabilities.<sup>219</sup>

Particularly relevant in relation to detention is Article 5 of the Convention on the Rights of Persons with Disabilities which establishes that States shall recognise that persons with disabilities are entitled to equal protection and equal benefit of the law. In particular, a fundamental step that States have to undertake for the promotion of equality and non-discrimination is the provision of a reasonable accommodation.<sup>220</sup> Practical measures to be taken by States to guarantee independence and participation to persons with disabilities are further listed in Article 9 of the Convention on the Rights of Persons with Disabilities and Article 15 of the European Social Charter Revised, which establish that physical

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<sup>217</sup> *Ivi*, Art. 3, p. 198.

<sup>218</sup> *Ibidem*.

<sup>219</sup> *Ivi*, Art. 4, p. 199.

<sup>220</sup> *Ivi*, Art. 5, p. 199.

environment, transportation, information and communications and other services shall be shaped in a way as to guarantee full enjoyment of equality for persons with disabilities.<sup>221</sup>

Very interesting in the detention context is the principle of protection of the physical and mental integrity of the person, as mentioned in Article 17 of the Convention on the Rights of Persons with Disabilities.<sup>222</sup> In fact, the detention not only of persons with disabilities but also of asylum-seekers as persons who may be suffering from trauma or who may have particular psychological assistance due to past experiences, raises particular issues concerning the prevention and the respect of the persons detained.

Finally, the Convention on the Rights of Persons with Disabilities contains a number of Articles enshrining rights which are contained in many other international and regional standards, namely freedom from torture, the right to liberty and security of the person, the respect for privacy, the right to education, to health and to an adequate standard of living.<sup>223</sup>

Although persons with disabilities are listed among vulnerable persons in the Directives of the asylum *Acquis*, no specific provision deals with their rights. However, Article 5 of the Returns Directive requires that in implementing the provisions it contains, States take in due account the state of health of the third-country national concerned.<sup>224</sup> Additionally, Article 9 of the same Directive specifies that a removal may be postponed for reasons related to the person's physical state or mental capacity.<sup>225</sup> This shall clearly also include persons with disabilities and is most relevant in a country like Malta, where the issuance of a removal order automatically entails the detention of the person concerned. Furthermore, Article 14 of the Returns Directive also provides that the special needs of vulnerable persons shall be taken into account.<sup>226</sup> Although this does not explicitly refer to the rights

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<sup>221</sup> *Ivi*, Art. 9, p. 199, Council of Europe, *European Social Charter (Revised)*, Art. 15, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 339.

<sup>222</sup> UNGA, *Convention on the Rights of Persons with Disabilities*, Art. 1, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 203.

<sup>223</sup> *Ivi*, Art. 14, 15, 22, 24, 25, 28, pp. 202, 204, 205, 207.

<sup>224</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 5(c).

<sup>225</sup> *Ivi*, Art. 9(2a).

<sup>226</sup> *Ivi*, Art. 14(1d).

listed above, special needs is a very broad concept which should be interpreted as to mean that States shall take all the necessary measures to provide vulnerable persons with the same possibility of accessing their rights as any other person.

Article 16 of the Returns Directive further states that particular attention shall be given to vulnerable persons in detention and that they should be provided with emergency health care and essential treatment of illness.<sup>227</sup> Article 20 of the Reception Conditions Directive provides for specific provisions concerning medical assistance to traumatised persons, establishing that States shall ensure that persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment.<sup>228</sup> On the same line, although not specific for third-country nationals, is the provision contained in Article 12 of the International Covenant on Social, Economic and Cultural Rights and in Articles 11 and 13 of the European Social Charter which foresee that States should recognise the right to enjoy the highest attainable standard of physical and mental health and also create all the conditions which assure to all medical service and medical attention in the event of sickness.<sup>229</sup> Although this provision is being listed under the rights of persons with psychological problems, it is obviously applicable to all the groups which are being examined here. Additionally, it will be shown later on that detention tends to compromise the health of persons, rendering all of them psychologically less resilient and thus risking to infringe the fundamental right to health and the right to integrity of the person enshrined in Article 3 of the EU Charter of Fundamental Rights.<sup>230</sup> Finally, Article 15 of the European

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<sup>227</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 16.

<sup>228</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art. 20.

<sup>229</sup> UNGA, *International Covenant on Economic, Social and Cultural Rights*, Art. 12, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 52, Council of Europe, *European Social Charter*, Art. 11 and 13, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, pp. 315-316.

<sup>230</sup> European Union, *Charter of Fundamental Rights of the European Union* (2000), OJ C364/1, Art. 3, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 353.

Social Charter also contains the right to rehabilitation of persons with physical or mental disabilities,<sup>231</sup> which may be extended to persons suffering trauma.

#### 2.1.1.4. Elderly persons

Once again, no specific document regulates the rights of elderly persons. However, although very few in numbers, some provisions contained in international and regional instruments establish some of their rights and will be used to analyse how the detention system impacts on the life of persons belonging to this group.

Article 4 of the Additional Protocol to the European Social Charter guarantees to elderly persons the right to social protection. In particular, adequate resources should be provided for them to lead a decent life. Additionally, the Article foresees that suited housing for their needs and for their state of health should be provided and health care services should be made available.<sup>232</sup> Although asylum-seeking elderly persons reaching Malta do not have access to housing upon arrival, the provision can clearly be extended to the guarantee of an adequate accommodation and be interesting for the analysis of detention. The right of elderly to lead a life in dignity and independence is additionally enshrined in Article 25 of the EU Charter of Fundamental Rights.<sup>233</sup>

No other instrument makes explicit reference to the rights of elderly persons, however, as has already been mentioned, the EU Directives of the asylum *Acquis* include elderly persons among vulnerable people and contain provisions stating that States shall take into

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<sup>231</sup> Council of Europe, *European Social Charter*, Art. 15, in Sandy Gandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 316.

<sup>232</sup> Council of Europe, *Additional Protocol to the European Social Charter*, Art. 4, in Sandy Gandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 325.

<sup>233</sup> European Union, *Charter of Fundamental Rights of the European Union* (2000), OJ C364/1, Art. 25, in Sandy Gandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 355.

account the special needs and the state of health of the persons, in particular where a return procedure is being enforced<sup>234</sup> or in the general reception conditions of persons.

The next paragraph will briefly examine if and how some of the provisions listed above are contained in the national legislation.

### **2.1.2. National legislation**

The Maltese Immigration Act does not provide for any specific regulation with regard to the treatment of vulnerable persons. As previously seen, Article 5 defines the concept of “prohibited migrant” and Article 14 foresees that a prohibited immigrant against whom a removal order is issued shall be detained until he or she is removed from Malta.<sup>235</sup> None of the two Articles makes any mention of the particular circumstances of vulnerable persons, as the Directives of the European Union would require and no other part of the Immigration Act establishes a particular procedure to apply when dealing with vulnerable persons. Furthermore, interestingly, Article 5 of the Immigration Act goes as far as to say that “a person shall be a prohibited immigrant also if he is suffering from mental disorder or is a mental defective”.<sup>236</sup> It goes without saying that this provision is on its own already in total breach of the very basic principle of equality and non-discrimination of persons with disabilities contained in Article 5 of the Convention on the Rights of Persons with Disabilities and, as will be shown later on, it clashes with principles contained in the same Maltese legislation.<sup>237</sup> As the International Commission of Jurists has pointed out in its submission to the Universal Periodic Review of Malta in 2009, “while Malta has the

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<sup>234</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 5(c) and Art. 14(1d).

<sup>235</sup> Immigration Act, Chapter 217 of the laws of Malta, as amended by Legal Notice 20 of 2013, Art. 5 and Art. 14.

<sup>236</sup> *Ivi*, Art. 5(2b).

<sup>237</sup> Cf. Equal Opportunities (Persons with Disabilities) Act, Chapter 413 of the Laws of Malta, 2000, as amended by Acts II and XXIV of 2012.

authority to decide generally its immigration policy it must be recalled that such a policy must respect the international obligations of Malta, and in particular those arising from international human rights law”. The International Commission of Jurists has expressed particular concern regarding the legislation on administrative detention and expulsion of “prohibited immigrants”, as it risks to be in breach of Malta’s international human rights obligations. In particular it is of concern that the term “prohibited immigrants” automatically refers, among others, to persons with mental disabilities.<sup>238</sup> This provision is in breach of well-established standards of non-discrimination enshrined in international human rights law. Therefore, Malta should absolutely revise the provision and avoid any regulation providing for coercive measure towards a person for the sole reason that he or she is mentally disabled.

Those reasons, once again, make the Maltese Immigration Act fail to be in compliance with well-established international standards and, most importantly, with the EU Directives of the asylum *Acquis*.<sup>239</sup> However, a number of other sources of national legislation provide for the required regulations, as will be shown in the next paragraphs.

#### 2.1.2.1. Children

According to Article 13(c) of the Refugees Act, minors falling within its scope shall be allowed to apply for asylum and be assisted in terms of the Children and Young Persons

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<sup>238</sup> International Commission of Jurists, *ICJ Submission to the Universal Periodic Review of Malta*, United Nations Human Rights Council, 5th Session of the Working Group on Universal Periodic Review, 4 - 15 May 2009, available at: [http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/MT/ICJ\\_MLT\\_UPR\\_S5\\_2009\\_InternationalCommissionofJurists.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/MT/ICJ_MLT_UPR_S5_2009_InternationalCommissionofJurists.pdf) (last accessed 10 July 2014).

<sup>239</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 5 and Art. 9, Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, Art. 17, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art. 17, 18, 19, 20.

(Care Orders) Act.<sup>240</sup> The care order places the child in the care of the Minister responsible for Social Welfare, when the Minister believes that a child or young person is in need of care, protection or control,<sup>241</sup> according to the criteria established in Article 7.<sup>242</sup> The Minister has the duty to work for the best interests of the child, in accordance with Article 9.<sup>243</sup>

Article 15 of the Regulations transposing the Asylum Procedures Directive allows for medical examination to determine the age of the unaccompanied minor, provided that it is the least invasive, it respects the individual's dignity and it is carried on by medical professionals. In case of doubt persisting after the examination, the benefit of the doubt shall be applied and the person shall be considered a minor. Additionally, alleged minors shall be informed about the medical examination process, they shall give their consent and be allowed to refuse to undergo the examination.<sup>244</sup>

The Asylum Procedures Regulations foresees in Article 15A that the appointed representative of the unaccompanied minor shall inform him or her about the procedure and the consequences of the personal interview for the asylum application and that unaccompanied minors shall be accommodated in centres specialised in accommodation for minors.<sup>245</sup> Accordingly, the Returns Regulations foresee in Article 10 that unaccompanied minors shall only be detained as a measure of last resort and for the shortest period of time possible.<sup>246</sup> Additionally, Article 8 establishes that a minor in need of care shall be allowed to apply for asylum prior to the issuance of a removal order in his or her regard.<sup>247</sup> In fact, in case of a removal order the minor would be placed in detention.

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<sup>240</sup> Children and Young Persons (Care Orders) Act, Chapter 285 of the Laws of Malta, 1980, as amended by Legal Notice 423 of 2007, Art. 5.

<sup>241</sup> *Ibidem*.

<sup>242</sup> *Ivi*, Art. 7.

<sup>243</sup> *Ivi*, Art. 9.

<sup>244</sup> Procedural Standards in Examining Applications for International Protection Regulations, Subsidiary Legislation 420.07, legal notice 243 of 2008, as amended by Legal Notice 161 of 2014, Art. 15.

<sup>245</sup> *Ivi*, Art. 15A.

<sup>246</sup> Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Chapter 217 of the laws of Malta, as amended by Legal Notice 81 of 2011, Art. 10.

<sup>247</sup> *Ivi*, Art. 8.

Article 15 of the Reception Regulations establishes in a quite problematic way that an unaccompanied minor aged sixteen or over may be placed in accommodation centre for adult asylum-seekers,<sup>248</sup> whereas Article 12(3) of the Reception Conditions Regulation foresees that minors shall be detained together with their families. Article 10 of the Returns Regulations foresees that unaccompanied minors be accommodated in institutions provided with personnel and facilities adequate to fulfil the needs of their age and, in case of detention, they should be granted access to leisure activities and education depending on the duration of their stay.<sup>249</sup> In any case, an assessment of the special needs of children should be undertaken when implementing provisions on the material reception conditions<sup>250</sup> and any procedure involving the detention of a minor should be driven by the fundamental principle of the best interests of the child.<sup>251</sup>

#### 2.1.2.2. Persons with disabilities

The national legislation regulating the rights of people belonging to this group is the Equal Opportunities (Persons with Disability) Act, which apart from the Children and Young Persons Act is the only specific legal provision addressing the particular needs of vulnerable groups.

Discrimination against persons with disabilities is defined in Article 5 of the Equal Opportunities Act, which states that a situation is discriminatory if a person with disabilities is faced with particular disadvantage through an apparently neutral provision, criterion or practice.<sup>252</sup> In particular, Article 13 establishes that persons with disabilities

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<sup>248</sup> Reception of Asylum-seekers (Minimum Standards) Regulations, Subsidiary Legislation 420.06, as amended by Legal Notice 320 of 2005, Art. 15.

<sup>249</sup> Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Chapter 217 of the laws of Malta, as amended by Legal Notice 81 of 2011, Art. 10 (3), (4)

<sup>250</sup> Reception of Asylum-seekers (Minimum Standards) Regulations, Subsidiary Legislation 420.06, as amended by Legal Notice 320 of 2005, Art. 14.

<sup>251</sup> Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Chapter 217 of the laws of Malta, as amended by Legal Notice 81 of 2011, Art. 10(5).

<sup>252</sup> Equal Opportunities (Persons with Disabilities) Act, Chapter 413 of the Laws of Malta, 2000, as amended by Acts II and XXIV of 2012, art. 5(4).

should not be disadvantaged in their access to goods, facilities and services, especially when they are addressed to members of the public sector. A specific provision regarding accommodation is further contained in Article 14, where paragraph (d) foresees that no discrimination should take place by denying access to benefits associated to a particular accommodation.<sup>253</sup> Most importantly, Article 22 establishes that the specific National Commission on Persons with Disabilities, as empowered by the Minister for Social Policy and its Development, shall take all appropriate measures to ensure that society provides for all the necessary needs and interests of persons with disabilities.<sup>254</sup>

Other less specific measures regarding persons with disabilities are contained in the Regulations transposing the EU Directives of the Asylum *Acquis*. In fact, both the Return Regulations and the Asylum Procedure Regulations include persons with disabilities among vulnerable persons. Although none of the Regulations contains provisions on the treatment of persons with disabilities seeking asylum, Article 6(b) of the Returns Regulations foresees that a removal may be postponed on account of a particular physical State or mental capacity of the third-country national<sup>255</sup> and Article 11(7c) requires that special needs of vulnerable persons be taken into account during detention.<sup>256</sup> Those last Articles clearly refer both to persons with disabilities and persons who may be suffering from trauma. Persons with psychological problems because of past violence or abuses are also entitled to emergency health care and treatment of illness in accordance with Article 9(3) of the Returns Regulations.<sup>257</sup> Interestingly, the transposition of the Reception Conditions Directive does not make any mention of persons with disabilities or psychological problems in its provisions relating to vulnerable groups. Article 14 establishing that

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<sup>253</sup> *Ivi*, Art 14(d).

<sup>254</sup> *Ivi*, Art. 22.

<sup>255</sup> Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Chapter 217 of the laws of Malta, as amended by Legal Notice 81 of 2011, Art. 6(b).

<sup>256</sup> *Ivi*, Art. 11(7c).

<sup>257</sup> *Ivi*, Art. 9(3).

vulnerable persons shall be taken in special account when implementing the material reception conditions thus does not seem to apply to this group.<sup>258</sup>

### 2.1.2.3. Other vulnerable persons

Concerning families, pregnant women and elderly persons no specific rights are provided for in any national regulation.

Article 32(c) of the Maltese constitution enshrines the right to respect for private and family life<sup>259</sup> and the same principle is contained in Article 7 of the Reception Regulations establishing that the accommodation provided to asylum-seekers shall respect family unit.<sup>260</sup> Additionally, Article 10(1) of the Returns Regulation establishes that families with minors shall only be detained as a measure of last resort and for the shortest time period possible. In the same way Article 14(1) of the Reception Conditions Regulations establishes that the implementation of the material reception conditions and health care shall take into account the special needs of minors and pregnant women.<sup>261</sup>

No other provisions in the regulations make mention of families, pregnant women and elderly people, however all the regulations providing for special treatment of vulnerable persons can apply to those categories. In particular, the Returns Regulations foresee emergency health care and essential treatment of illness shall be provided to vulnerable persons in detention and that special needs should be taken into account.<sup>262</sup>

The next paragraph will analyse in depth how the detention of persons belonging to vulnerable groups infringes the rights described above. Additionally, it will be highlighted

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<sup>258</sup> Reception of asylum-seekers (Minimum Standards) Regulations, Subsidiary Legislation 420.06, as amended by Legal Notice 320 of 2005, Art. 14.

<sup>259</sup> Constitution of Malta, 1964, as Amended by Acts VII and X of 2014, Art. 32(c).

<sup>260</sup> Reception of asylum-seekers (Minimum Standards) Regulations, Subsidiary Legislation 420.06, as amended by Legal Notice 320 of 2005, Art. 7.

<sup>261</sup> *Ivi*, Art. 14(1).

<sup>262</sup> Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Chapter 217 of the laws of Malta, as amended by Legal Notice 81 of 2011, Art. 9(3) and 11(7d).

how a detention policy can render vulnerable persons who previously did not belong to one of those groups.

## **2.2. The detention of migrant and asylum-seeking vulnerable persons in practice**

As was shown in the previous section, Maltese law does not provide for explicit exemptions from detention for vulnerable persons on grounds of the particular difficulties they may be facing in detention or of the special needs that cannot be fulfilled in that context. However, it is important to have a close look at the 2005 Policy Document on Irregular Immigrants, Refugees and Integration, which was already mentioned in the previous chapter as the only national document providing guidelines on the maximum duration of detention allowed. The 2005 Policy Document states that “particular attention is to be given to irregular immigrants who are considered to be more vulnerable, namely unaccompanied minors, persons with disability, families and pregnant women”.<sup>263</sup> In case deemed necessary, the authorities will require the individual concerned to undergo an age verification test. Unaccompanied children would then have to be placed under State custody and not be detained for longer than what is absolutely necessary to identify them and conduct health checks.<sup>264</sup> It is already very interesting to notice that, contrary to what is provided for in Article 10 of the Returns Regulation,<sup>265</sup> detention of children is not foreseen as a measure of last resort but rather as a measure that only has to be applied for the shortest time period possible.

On the opposite, the 2005 Policy Document explicitly states that vulnerable persons such as lactating mothers and pregnant women, elderly persons and persons with disabilities shall, where appropriate, not be kept in detention. Nevertheless, a vulnerability assessment has to

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<sup>263</sup> Ministry for Justice and Home Affairs and Ministry for the Family and Social Solidarity, *Malta: Irregular Immigrants, Refugees and Integration Policy Document*, 2005, p. 13.

<sup>264</sup> *Ibidem*.

<sup>265</sup> Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Chapter 217 of the laws of Malta, as amended by Legal Notice 81 of 2011, Art. 10.

be conducted in order to establish whether detention remains admissible.<sup>266</sup> Finally, the 2005 Policy Document establishes that family unit shall be respected throughout the detention period and families with small children shall not be detained for longer than what is strictly necessary. Once again, it is interesting to notice that no exception to the detention policy is foreseen for this group of persons. The 2005 Policy Document additionally foresees that families with children, pregnant women and unaccompanied minors should be provided with special treatments that allow them to fulfil their needs. As will be shown in what follows, the 2005 policy document, which already provides for more restrictive measures towards vulnerable persons than the ones contained in EU legislation, is not properly applied in practice.

#### 2.2.1. Unaccompanied minors

Upon disembarkation, like any other person, unaccompanied minors are brought to the police headquarter and interviewed to gather their personal information. It is at this first stage that an individual can claim to be a minor and be registered as such and referred to AWAS, the Agency for the Welfare of Asylum-Seekers, which will later on assess the age of the person concerned. During this initial procedure, alleged children are not assisted by any legal guardian or other forms of representation and very often have to count on the help of other migrants who speak English to understand what the police officer is telling them and to answer to the questions they are being asked.<sup>267</sup> Already this procedure raises issues on the legitimacy of the way it is conducted with respect to the rights of the child. In fact, Article 19 of the Reception Conditions Directive and Article 17 of the Asylum Procedures Directive foresee that particular guidance shall be provided to children seeking asylum and various Articles of the Convention on the Rights of the Child protect the best interests of

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<sup>266</sup> Ministry for Justice and Home Affairs and Ministry for the Family and Social Solidarity, *Malta: Irregular Immigrants, Refugees and Integration Policy Document*, 2005, p. 13.

<sup>267</sup> European Migration Network National Contact Point for Malta, *Unaccompanied Minors in Malta, Their Numbers and the Policies and Arrangements for their Reception, Return and Integration*, Valletta, 2009, p. 15.

the child especially if he or she was subjected to any form of violence, maltreatment or abuse, which is the case for many asylum-seeking minors reaching the Maltese coasts.<sup>268</sup>

Once the first interview is completed everyone, including alleged minors, is brought to a detention centre and has to stay there until an assessment either of the age of the person or of his or her vulnerability is carried out. The practice of detaining children until an assessment is made is *per se* already in breach of several provisions contained both in international and in regional legal documents which establish that the detention of minors shall be a measure of last resort<sup>269</sup> and it is contrary to Article 10 of the Returns Directive which clearly states that before issuing a return decision to a minor, specific assistance shall be provided.<sup>270</sup> On the contrary, since a removal order is issued against them, they are detained with a view of deportation as any other migrant. After a few days in detention, detainees will receive the visit of the Refugee Commissioner and be asked to fill in the Preliminary Questionnaire, which will allow persons to change any information they may have given during their first interview with the Immigration Police. It is not rare that during this phase persons who had claimed to be adults, declare to be under age.

The time lapse between the detention of alleged minors and the age verification test, depends on the number of arrivals by boat and on the number of alleged minors who are awaiting to undergo the assessment. As a matter of fact, there are no prescribed time limits for early release of vulnerable persons prescribed by law and AWAS has limited capacity and at times struggles with the number of persons reaching Malta by boat, with the risk of arbitrarily prolonging the time that a minor spends in detention.<sup>271</sup>

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<sup>268</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art. 19, Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, Art. 17, UNGA, *Convention on the Rights of the Child*, Art. 3, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 96.

<sup>269</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 17.

<sup>270</sup> Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Chapter 217 of the laws of Malta, as amended by Legal Notice 81 of 2011, Art. 10.

<sup>271</sup> UNHCR, *UNHCR's position on the detention of asylum-seekers in Malta*, 18 September 2013, p. 18.

The procedures used to assess the age of the child are not regulated by any publicly available written rules and the law does not contain any provision regulating the way the age assessment procedure should be carried out. However, the Jesuit Refugee Service has observed that the assessment is made of three steps. During the first one, alleged minors who have provided conflicting information during the first interview with the Immigration Police and in the Preliminary Questionnaire are asked to provide an explanation about the discrepancies and are very often rejected as minors solely on the basis of this interview.<sup>272</sup> Rejections on the basis of inconsistencies do not take into due consideration the fact that minors may not be aware of their real age or that they may initially think that claiming to be adults may facilitate their access to the asylum procedure. Additionally, psychological factors related to the impact of a hazardous journey through the Mediterranean should be taken into account, as they may influence the capacity of the individual, especially if he or she is a child, to provide the right information and to be able to discern what are the right information to be given. The ones who pass this first stage of the assessment are further interviewed by a panel of three members of AWAS staff known as the Age Assessment Team, who may take a decision on the individual's claim or, in case of doubt, refer the individual for further age verification. It is not clear in what the interview by the Age Assessment Team consists but contrary to what experts of UNICEF have suggested, the age assessment is only undertaken by members of a body which is not independent from the authorities and which does not include appropriately skilled practitioners<sup>273</sup> and, since no legal guardian has been appointed yet, no psychological and legal support is provided to the child, contrary to what would be required.<sup>274</sup>

Additionally, the further age verification consists of an X-Ray of the bones of the wrist which is carried out following the issuance of an interim care order by which the Minister for Social Policy becomes formally responsible for the individual concerned and for authorising the medical test. If a person is found to be a minor, an application is made for

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<sup>272</sup> Jesuite Refugee Service, *Becoming Vulnerable in Detention. National Report Malta*, 2010, p. 12.

<sup>273</sup> T. Smith, L. Brownlees, *Age Assessment: A Technical Note*, Programme Division UNICEF, January 2013, Standard 11.

<sup>274</sup> *Ivi*, Standard 5.

the issue of a care order in respect of the minor and once it is issued the child is released from detention. The said medical procedure raises serious issues regarding the invasiveness of the medical test, as it exposes the child to ionising radiation which constitute a risk for the long-term health of the child<sup>275</sup> and is against the provisions contained in Article 15 of the Asylum Procedure Directive establishing that the medical examination shall be the least invasive possible and shall respect the dignity of the person.<sup>276</sup> It has to be taken into account that the medical examination procedures do not provide with an exact information about the age of the person and are subject to a margin of error<sup>277</sup> which is rarely taken into consideration due to the particular attractiveness and convincement engendered by scientific tests and which may nonetheless compromise the access to special rights that a child is entitled to, thus having implications for his or her protection, care and development. Furthermore, it is important to notice that the lengthy of the whole assessment procedure is already subjected to the limited capacity of AWAS and that the request of a Further Age Verification which consists of medical examinations risks to prolong arbitrarily the time that the minor has to spend in detention. As a matter of fact, this medical process usually takes around three to six weeks<sup>278</sup> which are to be added to the time spent in detention during the first phase for the assessment. Overall, especially during summer months where the number of arrivals increases, minors end up spending months in detention.<sup>279</sup>

The age assessment procedure should only be carried out where serious doubts about the age of the child exist and it should be conducted in a child friendly manner. In fact, research has shown that the age assessment per se already can have implications on the mental health of the child who does not understand why his or her identity and history are

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<sup>275</sup> *Ivi*, Standard 4.

<sup>276</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, Art. 15.

<sup>277</sup> European Asylum Support Office, *Age Assessment practice in Europe*, Publications Office of the European Union, 2014, p. 15.

<sup>278</sup> European Migration Network National Contact Point for Malta, *Unaccompanied Minors in Malta, Their Numbers and the Policies and Arrangements for their Reception, Return and Integration*, Valletta, 2009, p. 20.

<sup>279</sup> Jesuite Refugee Service, *Becoming Vulneable in Detention. National Report Malta*, 2010, p. 11.

being put into question.<sup>280</sup> Therefore, those procedures taken together with a period of detention are against the principle of the best interests of the child and indiscriminately risk to jeopardise his or her mental integrity.

The period spent in detention for a minor can vary from a couple of weeks, if AWAS believes the person is a minor without the need of further assessments to some months, if the procedure takes longer, AWAS has not the capacity to reach a decision within a short period of time or if, once the assessment concluded the person is considered a minor, the open centres where he or she should be accommodated are too crowded to allow for another minor to enter. Of course, those are all very random reasons which are far from respecting the well-established principle of international and regional law that minors should not be detained and if they are detained it should be for very serious and necessary reasons and for the shortest period of time.<sup>281</sup> Indiscriminate detention of children, even in the cases in which it only lasts for a short period of time is arbitrary and in breach of Article 16 of the Convention on the Rights of the Child foreseeing that no child should be subjected to arbitrary or unlawful interference with his or her privacy, family or correspondence.<sup>282</sup> In general, a detention context is not an appropriate environment to protect the best interests and the dignity of the child<sup>283</sup> which is based on a number of particular needs that minors have in addition to those of any other person and which cannot be fulfilled in such a context. Many factors hinder the full enjoyment of rights for children in detention, some of which are connected deprivation of liberty in itself and some of which

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<sup>280</sup> J. Bhabha, N. Finch, *Seeking asylum alone, Unaccompanied and Separated Children and Refugee Protection in the U.K.*, John D. and Catherine T. Macarthur Foundation, 2006, pp. 55-64.

<sup>281</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 17.

<sup>282</sup> UNGA, *Convention on the Rights of the Child*, Art. 16, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 98.

<sup>283</sup> *Ivi*, Art. 3, p. 96, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art. 18(1), Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L337/9, Art. 20(5), Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 5(a).

are related to the particular conditions of the detention system in Malta, as will be examined in what follows.

Some general key considerations can be made about any kind of detention of asylum-seeking children, independently of the way it is implemented. As soon as a separated asylum-seeking child is identified, it is necessary to conduct an individualised needs assessment, in order to provide him or her with suitable accommodation and support.<sup>284</sup> It is fundamental to provide the child with an environment which will support him or her to recover from physical and psychological trauma, in accordance with Article 39 of the Convention on the Rights of the Child which requires States to promote physical and psychological recovery and social reintegration of a child victim.<sup>285</sup> However, any detention context is far from being in line with this requirement as the detention environment has a very negative impact on the well-being of the child. Separated, asylum-seeking children are likely to suffer from post-traumatic stress disorders, depression or other psychological problems due to their experiences in their country of origin and to the journey that brought them to the country of asylum and have additionally to face difficulties and stress related on the one hand to the adaptation to the new situation and on the other hand to the very long and not always understandable asylum procedure.<sup>286</sup> In addition to those very serious issues which represent a very high level of stress for a child and which make him or her already extremely vulnerable, deprivation of liberty tends to destabilise even more asylum-seeking minors who do not understand why they are being detained, as they have not committed any crime. As was held by specialised practitioners, detained children suffer injury to their mental and physical health as a result of their detention and many children experience the actual process of being detained as a new traumatising

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<sup>284</sup> FRA, *Separated, asylum-seeking children in European Union Member States, Comparative Report*, Publications Office of the European Union, Luxembourg, 2011, p. 25.

<sup>285</sup> UNGA, *Convention on the Rights of the Child*, Art. 39, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 104.

<sup>286</sup> FRA, *Separated, asylum-seeking children in European Union Member States, Comparative Report*, Publications Office of the European Union, Luxembourg, 2011, pp. 33 and 63.

experience and develop more serious form of emotional and psychological regression, post-traumatic stress disorder, clinical depression and suicidal behaviour.<sup>287</sup>

Very serious aspects specific of the way detention centres are run in Malta render the situation even more serious and aggravate the impact of detention on the mental health of detained children. The most serious issue which further affects the well-being of children is connected to the fact that no specific zone in detention centres is reserved for children, who are thus detained together with adults. Minors accompanied by their family are generally placed in specific areas for families, but not the same treatment is accorded to unaccompanied minors, except for those who are clearly under the age of 16, in accordance with the very problematic Article 15 of the Reception Regulations establishing that an unaccompanied minor aged sixteen or over may be placed in accommodation centre for adult asylum-seekers.<sup>288</sup> The regulation raises serious protection issues mostly because there are often cases in which it is very difficult to establish the age of the minor, who could appear as being older than his or her actual age and thus be placed in detention with adults and with persons who do not belong to the same ethnicity. Children are vulnerable to physical injury both from staff members and from other detainees who are abusive<sup>289</sup> because of their young age and their incapacity to react to any abuse or maltreatment adults may subject them to. Additionally, their already more fragile mental equilibrium gets threatened by physical and verbal aggression they may witness or experience due either to daily disputes between adults or to discriminations based on different ethnicity or country of origin. This kind of situation is clearly in breach of Article 37 of the Convention on the Rights of the Child, establishing that children shall as a general rule not be detained with

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<sup>287</sup> Royal College of Paediatrics and Child Health, Royal College of General Practitioners, Royal College of Psychiatrists, UK Faculty of Public Health, *Intercollegiate Briefing Paper: Significant Harm. The effects of administrative detention on the health of children, young people and their families*, 2009, p. 2.

<sup>288</sup> Reception of asylum-seekers (Minimum Standards) Regulations, Subsidiary Legislation 420.06, as amended by Legal Notice 320 of 2005, Art. 15.

<sup>289</sup> Jesuite Refugee Service, *Becoming Vulnerable in Detention*, 2010, p. 98.

adults and of Article 19 foreseeing that children shall be prevented from any kind of violence, injury, abuse, maltreatment or negligent treatment.<sup>290</sup>

The harsh situations that children have to face in detention are exacerbated by the conditions of the detentions centres in Malta which, apart from presenting very poor hygienic conditions and inadequate food,<sup>291</sup> do not respect some fundamental needs of children. In particular, the fundamental right of children to rest and leisure, to engage in play and recreational activities appropriate to their age as enshrined in Article 31 of the Convention on the Rights of the Child<sup>292</sup> is clearly not respected in the Maltese detention centres, where lack of freedom, boredom and the absence of activities other than eating and sleeping<sup>293</sup> due to the absence of adequate leisure facilities<sup>294</sup> make the detention environment totally inappropriate for children. Leisure activities are an essential element in the life of a child, especially in the case of separated asylum-seeking children who need recreational activities which help them to achieve a social, spiritual and moral well-being and to improve their physical and mental health through distracting entertainments.

In addition to the lack of leisure activities, no education of any kind is provided in detention<sup>295</sup> and detainees have no access to the internet<sup>296</sup> or to any information other than the one gathered from a single television in the common room of the zone in which they are detained, thus limiting their access to information, contrary to Article 17 of the Convention

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<sup>290</sup> UNGA, *Convention on the Rights of the Child*, Art. 19 and Art. 37, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, pp. 99, 103.

<sup>291</sup> This aspect of the Maltese detention system will be analysed more in depth in the third chapter.

<sup>292</sup> UNGA, *Convention on the Rights of the Child*, Art. 31, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 103.

<sup>293</sup> FRA, *Separated, asylum-seeking children in European Union Member States, Comparative Report*, Publications Office of the European Union, Luxembourg, 2011, p. 70.

<sup>294</sup> 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*, International Commission of Jurists, Geneva, May 2012, p. 30 and Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013, para. 42 and 77.

<sup>295</sup> FRA, *Separated, asylum-seeking children in European Union Member States, Comparative Report*, Publications Office of the European Union, Luxembourg, 2011, p. 37.

<sup>296</sup> Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013, para. 77.

on the Rights of the Child.<sup>297</sup> Although Article 10 of the Reception Conditions Directive foresees that access to education shall not be postponed for more than three months, the fact that no educational activity is organised in detention has an impact on the accessibility to the education system once the child is out of detention. This is partly due to the fact that he or she will need special assistance because of the lack of the necessary language skills required by schools or because of the necessity to wait until the following beginning of the school year to enrol the child to school. Additionally, it needs to be pointed out that a system which detains asylum-seeking children without serious grounds justifying it, can in no way be an acceptable reason for postponing, even if only of a three months period, the access to education of a child, who according to several international and regional human rights instruments has the fundamental right to have free access to primary and secondary education and access to information.<sup>298</sup>

Finally, it has to be highlighted that the fact that children are only appointed a legal guardian once they are recognised as minors and released from detention, has a major impact on their understanding of the overall detention system, of the asylum procedure that they will have to undergo and on their capacity to overcome psychological difficulties due to the absence of an adult well-disposed to listen to them and it is against Article 22 of the Convention on the Rights of the Child, foreseeing that children seeking asylum shall be given appropriate protection and assistance.<sup>299</sup>

In general, children should in principle not be detained at all and interactions with asylum-seeking children would need to be governed by an ethic of care rather than enforcement and the best interests of the child should take precedence over the status of “illegal alien”. For

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<sup>297</sup> UNGA, *Convention on the Rights of the Child*, Art. 17, in Sandy Ghandhi (ed.), Blackstone’s International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 99.

<sup>298</sup> *Ivi*, Art. 17 and 28, pp. 99, 102, UNGA, *Universal Declaration of Human Rights*, Art. 26, in Sandy Ghandhi (ed.), Blackstone’s International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 12.

<sup>299</sup> UNGA, *Convention on the Rights of the Child*, Art. 22, in Sandy Ghandhi (ed.), Blackstone’s International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 100.

this reason, appropriate alternative care arrangements should be considered both for unaccompanied minors and for children accompanying their parents.<sup>300</sup>

The next paragraph will highlight how similar problems are encountered by other vulnerable persons, whose special needs often remain unfulfilled because of the detention system.

### 2.2.2. Other vulnerable persons

Other vulnerable persons, like families, pregnant women, persons with disabilities or psychological problems and elderly people can be released earlier from detention if, like minors, they undergo an assessment by AWAS. If a person appears to be vulnerable upon arrival, the Immigration Police will make a referral to AWAS, whereas if the person shows signs of vulnerability once in detention, he or she will be referred to AWAS by the detention service, by medical staff or NGOs working in detention. Individuals referred for a vulnerability assessment, are first met by a social worker who conducts an interview and writes a report recommending release or continuation of detention if the person is not considered to be vulnerable. The report is then passed to the Vulnerable Adults Assessment Team, a panel of 3 members of AWAS, which takes a final decision regarding whether or not the individual concerned should be recommended for release. In case of a positive recommendation the case is referred to the Principal Immigration Officer who takes a final decision.<sup>301</sup> It has to be pointed out that the procedures undertaken to assess the vulnerability of a person are generally quite standard and based on fixed parameters, thus practically only allowing to identify cases where the individual's mental or psychological health has deteriorated to a significant extent or where vulnerability is evident, as it may be in case of heavily pregnant women or families with children. As it happens with children

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<sup>300</sup> UNHCR, *Detention Guidelines. Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Guideline 9.2, pp. 34-36, available at: <http://www.unhcr.org/505b10ee9.html> (Last accessed 21/6/14).

<sup>301</sup> Jesuite Refugee Service, *Becoming Vulnerable in Detention. National Report Malta*, 2010, pp. 12-13.

waiting the assessment to be over, alleged vulnerable persons have to spend the time of the assessment procedure in detention and are not separated from other detainees.<sup>302</sup>

The next paragraphs will examine if and how the vulnerability assessment is effective and the conditions in detention for each of the remaining vulnerable groups.

#### 2.2.2.1. Families and pregnant women

Families arriving in Malta by boat generally constitute the vulnerable group which gets released from detention prompter,<sup>303</sup> due to the fact that it is not necessary to go through an assessment procedure to establish whether or not they are vulnerable. Nevertheless, families are subjected to mandatory detention as any other migrant, contrary to Article 17 of the Returns Directive, which explicitly establishes that families should only be detained as a measure of last resort. The period they have to spend in detention centres is closely connected to the availability of space in open accommodation centres, which may be very scarce during summer months due to the high numbers of arrivals. Additionally, even though families are detained in zones which are separated from single migrants and in a way which respects the family unit, as required by several provisions of the EU Asylum *Acquis*,<sup>304</sup> the time spent in detention is reported to be very difficult.<sup>305</sup> The absence of serious and reasonable grounds for detaining family generates arbitrary deprivation of liberty, against the right to liberty and security of the person enshrined in Article 5 of the

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<sup>302</sup> *Ibidem*.

<sup>303</sup> Council of Europe Commissioner for Human Rights, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe*, following his visit to Malta from 23 to 25 March 2011, 9 June 2011, CommDH(2011)17, p. 9.

<sup>304</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 5(b) and Art. 14(a), Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art. 14(2a).

<sup>305</sup> Human Rights Watch, *Boat Ride to Detention, Adult and Child Migrants in Malta*, Human Rights Watch, United States, 2012, p. 33.

European Convention on Human Rights,<sup>306</sup> but also arbitrary interference by the authority with the private life of the family, which, against Article 8 of the European Convention on Human Rights and Article 7 of the EU Charter of Fundamental Rights is not provided for by law.<sup>307</sup> Additionally, any action taken with regard to families which puts at risk their physical and mental well-being, especially when past experiences are already likely to have made them psychologically more vulnerable, is a clear incapacity of the State to fulfil its duty to grant protection to families and to provide them with special care and assistance, as established in several international provisions.<sup>308</sup>

Additionally, it needs to be highlighted that children, even though accompanied by their parents, are entitled to the same rights as unaccompanied minors and therefore, many of the issues emerging in the detention context for separated children, are also applicable to children who are members of a family. Although generally for a shorter period of time, minors accompanied by their family are subjected to the impact of detention on their mental well-being and to the shortcomings of detention regarding education, healthcare and leisure activities, as any other child.

According to various international instruments,<sup>309</sup> the concept of protection of the family shall be interpreted as including in its scope also the protection of motherhood and pregnancy. In particular, pregnant women and women who just gave birth are entitled to special protection and assistance, including access to healthcare and appropriate services in

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<sup>306</sup> Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Art. 5, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 258.

<sup>307</sup> *Ivi*, Art. 8, p. 259, European Union, *Charter of Fundamental Rights of the European Union* (2000), OJ C364/1, Art. 7, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 353.

<sup>308</sup> UNGA, *Universal Declaration of Human Rights*, Art. 16(3), in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 11, UNGA, *International Covenant on Civil and Political Rights*, Art. 23, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 38.

<sup>309</sup> UNGA, *Universal Declaration of Human Rights*, Art. 25, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 12, UNGA, *International Covenant on Economic, Social and Cultural Rights*, Art. 10 (1), (2), in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 51-52.

connection with pregnancy and post-natal period.<sup>310</sup> The generally speed release from detention and the accommodation in a specific zone of the centre accorded to families is often not extended to pregnant women, who may be facing serious difficulties within the facilities, going from access to healthcare to the living conditions which are not appropriate to their physical and mental status. In fact, women who are not heavily pregnant, are not necessarily immediately recognised as vulnerable or are considered healthy enough to be accommodated in detention. Some general issues have an impact on the psychological and physical well-being of those women. Firstly, it has to be highlighted that, although single women are accommodated in a separate zone, the detention service staff is mainly composed of male officers,<sup>311</sup> an aspect which has an impact on the right to privacy of women and on their willingness of addressing the officers for any special need they may have. Additionally, it is important to notice that the majority of women reaching the Maltese coasts come from countries where Muslim faith<sup>312</sup> is practiced and risk to encounter even more serious difficulties in approaching male staff.

A second issue which seriously hinders the protection of physical and mental health of pregnant women is the lack of adequate medical assistance, due on the one hand to the scarce capacity of the medical staff working in detention and partly to the impossibility of providing specialised services in the detention context.<sup>313</sup> In 2013, the European Court of Human Rights stated in the case of Aden Ahmed, a women who was pregnant at the moment of her detention, that the treatment she had received amounted to inhuman and degrading treatment.<sup>314</sup> After a short period in detention, the woman had been hospitalised

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<sup>310</sup> UNGA, *Convention on the Elimination of All Forms of Discrimination against Women*, Art. 12, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 65.

<sup>311</sup> Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013, para. 19.

<sup>312</sup> Cf. UNHCR Malta Asylum Trends Fact Sheets 2002-2010, 2011, 2012, 2013, available at: <http://www.unhcr.org.mt/mobile/statistics> (Last accessed: 23/6/2014).

<sup>313</sup> Council of Europe, *Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 to 30 September 2011*, Strasbourg, 4 July 2013, CPT/Inf (2013) 12, pp. 25-26.

<sup>314</sup> Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013, paras. 85-99.

in Mont Carmel Psychiatric Hospital, in a specific ward dedicated to migrants. There, she miscarried and the staff failed to assist her adequately. Following the incident the woman was brought back to detention, where she started suffering of severe depression and despite being referred by a local NGO to AWAS with a view of being released on grounds of vulnerability, she had to wait for months following her interview with AWAS to receive a negative decision on her vulnerability assessment.<sup>315</sup> The case shows very clearly that the vulnerability assessment can in some cases be quite ineffective, even though persons may objectively be in a serious vulnerable condition. Additionally, it is evident that the conditions to which pregnant women may be subjected to in detention are far from fulfilling the necessary care and assistance prescribed by international law.<sup>316</sup> As a matter of fact, detention puts at risk their physical health due to the lack of adequate healthcare and jeopardises their mental well-being through a detention scheme, which arbitrarily deprives persons of their liberty. Clearly, in the case of pregnant women, psychological impact of detention is worsened by the general medical conditions to which they are sometimes subjected to.

It will now be shown how healthcare shortcomings represent, among others, a major issue also for other groups of vulnerable persons.

#### 2.2.2.2. Persons with disabilities or psychological problems and elderly persons

This paragraph will examine the difficulties of various vulnerable persons, namely the ones with physical or mental disabilities, persons with psychological problems deriving from trauma and elderly persons. The reason for analysing those groups in a single paragraph are related to the fact that no public reports exist on cases of persons with physical disabilities or elderly persons in detention. Nevertheless, some features of detention can be evaluated

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<sup>315</sup> *Ivi*, Paras. 18-28.

<sup>316</sup> UNGA, *Universal Declaration of Human Rights*, Art. 25, in Sandy Gandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 12, UNGA, *International Covenant on Economic, Social and Cultural Rights*, Art. 10 (1), (2), in Sandy Gandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 51-52.

to establish whether or not the rights of those persons are respected. Additionally, as already shown, no specific provisions really regulate the rights of elderly persons but it can be reasonably assumed that their needs may in some respects resemble the ones of persons with physical disabilities or the ones of persons with particular psychological conditions.

Although no reports exist on the detention of persons with physical disabilities, it is important to highlight the fact that the architectural structure of the detention centres and of the facilities within the centres already impede persons with physical disabilities to move freely and to live independently.<sup>317</sup> It is clear that the absence of the necessary conditions allowing people with disabilities or elderly persons with physical problems to access freely to the facilities of the centres infringes many of the rights to which they are entitled according to various international and regional instruments.<sup>318</sup> Additionally, the general lack of privacy and the lack of sanitation facilities, which are generally in very poor conditions,<sup>319</sup> may be worse in the event of persons with reduced mobility and would amount to an infringement of the right to dignity.

Much more visible and well-documented issues emerge regarding persons with mental disabilities or with psychological problems. The lack of serious medical screenings upon admission to detention<sup>320</sup> and the lengthy procedures to establish the vulnerability of those persons tend to prolong much more and arbitrarily their detention period. Clearly, the scarcity of medical assistance in detention and the lack of psychological support, make it much more difficult to establish whether a person is to be released on grounds of

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<sup>317</sup> Human Rights Watch, *Boat Ride to Detention, Adult and Child Migrants in Malta*, Human Rights Watch, United States, 2012, p. 34.

<sup>318</sup> UNGA, *Convention on the Rights of Persons with Disabilities*, Art. 9, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 199, Council of Europe, *Additional Protocol to the European Social Charter*, Art. 4, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 325, European Union, *Charter of Fundamental Rights of the European Union* (2000), OJ C364/1, Art. 25, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 355.

<sup>319</sup> 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*, International Commission of Jurists, Geneva, May 2012, pp. 30, 47.

<sup>320</sup> Council of Europe, *Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 to 30 September 2011*, Strasbourg, 4 July 2013, CPT/Inf (2013) 12, p. 26.

vulnerability related to mental disability or psychological issues. Additionally, persons who are found to belong to those groups are generally not immediately released but rather brought to a special ward for migrants at the Mount Carmel Psychiatric Hospital, with a view of returning them to detention once their mental well-being improves. Although this practice may seem to be in line with the provisions requiring States to provide with necessary support persons who have been subjected to torture, rape or other serious acts of violence<sup>321</sup> and to provide adequate treatment of illness,<sup>322</sup> it is actually not the case. As a matter of fact, in the hospital concerned, which is simply another place of detention, the living conditions of the ward were found to be far below any acceptable standard and were considered as anti-therapeutic.<sup>323</sup> Paradoxically, this way of providing treatment to patients in need of mental or psychological support therefore amounts to a breach of the principle of protection of the physical and mental integrity of the person, enshrined in Article 17 of the Convention on Persons with Disabilities<sup>324</sup> and of Article 12 of the International Covenant on Social, Economic and Cultural Rights and Articles 11 and 13 of the European Social Charter foreseeing that States should recognise the right to enjoy the highest attainable standard of physical and mental health and also create all the conditions which assure to all medical service and medical attention in the event of sickness.<sup>325</sup>

Furthermore, what was said in the case of children and the impact of detention on their mental health and well-being can be extended to persons with mental disabilities and to persons with psychological problems. Detention tends to deteriorate the overall mental state

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<sup>321</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art. 20.

<sup>322</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 16.

<sup>323</sup> Council of Europe, *Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 to 30 September 2011*, Strasbourg, 4 July 2013, CPT/Inf (2013) 12, p. 32.

<sup>324</sup> UNGA, *Convention on the Rights of Persons with Disabilities*, Art. 17, Council of Europe, *European Social Charter (Revised)*, Art. 15, in Sandy Gandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 203.

<sup>325</sup> UNGA, *International Covenant on Economic, Social and Cultural Rights*, Art. 12, in Sandy Gandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 52, Council of Europe, *European Social Charter*, Art. 11 and 13, in Sandy Gandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, pp. 315-316.

of persons and taking into consideration the fact that many of the migrants and asylum-seekers arriving in Malta experienced trauma before fleeing their home countries and others experienced traumatic events during their often months-long migration across the Sahara, through Libya, and over the Mediterranean in addition to having its own negative effects on mental health, prolonged detention can exacerbate that prior trauma<sup>326</sup> and worsen the mental health of persons who suffer of some form of mental disability. Once again, this constitutes a deliberate jeopardy to the mental integrity of persons with disabilities and psychological problem and infringes the right to rehabilitation of persons with physical or mental disabilities and persons suffering from disorders deriving from trauma.<sup>327</sup>

### 2.2.3. Vulnerable persons-to-be

In general, research and interviews of detainees have proven that detention has a marked deteriorating impact on their physical and mental health and well-being. In particular, increased stress, frustration, loss of appetite, sleeping problems and feelings of powerlessness have been observed in all the detainees, be they vulnerable or not. Many factors are to be held responsible for this, namely deprivation of liberty, the lack of information about detention and asylum procedure, inability to react to the situation, the poor conditions of detention and the lack of possibilities to engage in purposeful activities. All of this is exacerbated by past traumas that many if not most of the asylum-seekers experienced in their country of origin or on the journey to Malta.<sup>328</sup> Vulnerable persons should not be detained, as established by many Directives of the EU Asylum *Acquis*, but as the analysis of the impact of detention on mental health has shown, even persons who would not *prima facie* appear to belong to a vulnerable group risk to become vulnerable in

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<sup>326</sup> Human Rights Watch, *Boat Ride to Detention, Adult and Child Migrants in Malta*, Human Rights Watch, United States, 2012, p. 36.

<sup>327</sup> Council of Europe, *European Social Charter*, Art. 15, in Sandy Gandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 316.

<sup>328</sup> Jesuite Refugee Service, *Becoming Vulnerable in Detention. National Report Malta*, 2010, pp.13-14.

detention, thus bringing the whole argument to the initial point: asylum-seekers, as a whole group, should not be detained.

The following chapter will have a closer look at the impact of detention on detainees, through the specific analysis of material detention conditions and the examination of the rights of prisoners. Although the present chapter has already established that detention risks to render anyone vulnerable, it will be interesting to analyse if and how the discussion about the legitimacy of detention can be extended also to irregular migrants.

### **3. Conditions in detention: adequate standard of living and other detainees' rights**

The previous chapter has taken a step further with respect to the rights of asylum-seekers and has analysed what the consequences of detention may be on vulnerable groups, be they asylum-seekers or irregular migrants. The conclusion was that vulnerable persons should not be detained and that, since detention renders vulnerable also persons who *prima facie* are not, it was argued that the risk of vulnerability is another good reason for not depriving asylum-seekers of liberty. In light of those premises and of the rights to an adequate standard of living and of prisoner's rights which will be presented in a few lines, the present chapter will evaluate how a system of detention like the Maltese one is not only unlawful and arbitrary for asylum-seekers and deteriorating for vulnerable persons. In addition, it is unacceptable also as regards detention conditions, thus extending the inappropriateness of the practice also to irregular migrants. In fact, although in accordance with the law,<sup>329</sup> countries have the right to detain irregular migrants with a purpose of removal, they are also prohibited from attempting on the human dignity and integrity of those persons, who are entitled to fundamental rights as any other human being. The present chapter will examine the conditions in detention, in light of the right to adequate standards of living and of the rights of prisoners and will show that the situation that detainees have to face in Maltese detention are far from being in line with the required standard. This will lead to the conclusion that this particular system of detention doesn't respect the rights of human beings as a whole, without any particular distinction between asylum-seekers, vulnerable persons and irregular migrants.

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<sup>329</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 15.

As usual, the first part of the chapter will provide an analysis of the legal framework, looking closely at the right to an adequate standard of living and the rights of detainees. The second part will evaluate if and how the Maltese system is in line with those rights.

### **3.1. Legal framework**

#### **3.1.1. International and regional legal framework**

The right to an adequate standard of living and other detainees' rights are to be taken into account when analysing the conditions in detention for asylum-seekers and irregular migrants. The right to an adequate standard of living is mainly enshrined in a number of international and regional documents which do not specifically concern the rights of asylum-seekers and migrants but rather refer to every human being. Detainees' rights on the contrary clearly refer to a particular group, namely persons deprived of their liberty, which in the present case will refer both to asylum-seekers and migrants who are detained. The right to an adequate standard of living is one of the detainees' rights. However the present paragraph will be divided into two parts, the first one dealing with the right to an adequate standard of living and the second one dealing with prisoners' rights.

##### **3.1.1.1. Right to an adequate standard of living**

The right to an adequate standard of living is one of the most important economic, social and cultural rights and it includes several rights and standards that delineate what living in dignity means. It comprises the right to food, to clothing and to housing.<sup>330</sup>

The right to an adequate standard of living is explicitly mentioned in Article 25 of the Universal Declaration of Human Rights, which establishes that everyone has the right to a

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<sup>330</sup> K. Lukas, *Right to an Adequate Standard of Living*, in M. Nowak, K. M. Januszewski, T. Hofstätter (ed.), *All Human Rights for All*, Neuer Wissenschaftlicher Verlag, Graz, 2012, p. 317.

standard of living adequate for his or her health and well-being,<sup>331</sup> and in Article 11 of the International Covenant on Economic, Social and Cultural Rights, which additionally specifies that States shall take appropriate measures to ensure the realisation of this right.<sup>332</sup> The same right is also enshrined in Article 4 of the European Social Charter. This provision rather speaks about the right to a fair remuneration that gives workers access to full enjoyment of an adequate standard of living, which is clearly not applicable to asylum-seekers and migrants who are detained and have no access to the labour market.<sup>333</sup> However it can implicitly be deduced that the right to an adequate standard of living is a fundamental right that States have to respect and it is thus extendable also to persons who are not entitled to work. Additionally, Article 31 of the European Social Charter also provides that States shall promote access to housing of an adequate standard.<sup>334</sup> Finally, the right to an adequate standard of living related to particular groups is also contained in Article 27 of the Convention on the Rights of the Child and Article 28 of the Convention on the Rights of Persons with Disabilities.<sup>335</sup>

To understand deeper what has to be meant by an adequate standard of living it will be useful to refer to some General Comments of the UN Committee on Economic Social and Cultural Rights. The right to housing should not be interpreted in a narrow sense, identifying it with the simple fact of having a roof over one's head. In fact, the right to housing protects the inherent dignity of the human person and it should be guaranteed to all persons irrespective of their income or access to economic resources. Additionally, this right rather has to be interpreted as a right to *adequate* housing, that is a right to live somewhere in security, peace and dignity. To this aim, "adequate privacy, adequate space,

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<sup>331</sup> UNGA, *Universal Declaration of Human Rights*, Art. 25, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 12.

UNGA, *International Covenant on Economic Social and Cultural Rights*, Art. 11, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 52.

<sup>333</sup> Council of Europe, *European Social Charter*, Art. 4(1), in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 313.

<sup>334</sup> *Ivi*, Art. 31, p. 343.

<sup>335</sup> UNGA, *Convention on the Rights of the Child*, Art. 27, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 101 and UNGA, *Convention on the Rights of Persons with Disabilities*, Art. 28, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 207.

adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location” should be granted<sup>336</sup> and persons “should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal (...)” and should be provided with “adequate space and protection from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors”.<sup>337</sup> The right to adequate housing also brings with it the respect for one’s freedom of thought and religion and the right not to be subjected to arbitrary interference with one’s privacy, family, home or correspondence.<sup>338</sup>

The right to adequate food once again plays a crucial role in the respect of the dignity of the person and it should not be interpreted as to mean solely that a minimum package of calories, proteins and other specific nutrients have to be guaranteed.<sup>339</sup> Rather it should mean that food is available in a quantity and quality sufficient to satisfy the dietary needs of individuals, that it is free from adverse substances, and acceptable within a given culture.<sup>340</sup> The diet as a whole should contain a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs. Measures may need to be taken to maintain dietary diversity and adapt to the particular needs of the person, such as breast-feeding.<sup>341</sup> Additionally, cultural values attached to food should also be taken into consideration.<sup>342</sup>

The right to food also includes the right to safe drinking water, as it is one of the most fundamental conditions for survival. The water supply for each person must be sufficient

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<sup>336</sup> UN Committee on Economic, Social and Cultural Rights, General Comment 4 on the right to adequate housing, sixth session, 1991, U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003)Para 7.

<sup>337</sup> *Ivi*, para 8

<sup>338</sup> *Ivi*, para 9.

<sup>339</sup> UN Committee on Economic, Social and Cultural Rights, General Comment 12 on the right to adequate food, twentieth session, 1999, U.N. Doc. E/C.12/1999/5 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 62 (2003), para. 6.

<sup>340</sup> *Ivi*, para. 8.

<sup>341</sup> *Ivi*, para. 9.

<sup>342</sup> *Ivi*, para. 11.

and continuous for personal and domestic uses and the water must be safe, free from substances that constitute a threat to a person's health and it should be of an acceptable colour, odour and taste for each personal or domestic use.<sup>343</sup>

Finally, the right to adequate clothing has not been analysed by the Committee on Economic, Social and Cultural Rights in a specific General Comment, however, access to sufficient clothing has been declared as a part of an adequate means of subsistence by the Committee in its concluding Recommendations to States.<sup>344</sup>

The Directives of the *Asylum Acquis* contain some provisions on the conditions of reception and detention. Concerning asylum-seekers, Article 13 of Reception Conditions Directive foresees that States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants. This principle is applicable also to the situation of persons who are in detention.<sup>345</sup> Article 14 further reiterates that accommodation centres for asylum-seekers should guarantee an adequate standard of living.<sup>346</sup>

It is worth mentioning that the Reception Conditions Directive Recast that will enter into force in 2015 contains even clearer provisions. It establishes that asylum-seekers should only be detained in specialised detention facilities and, interestingly, that they should be detained separately from irregular migrants. Furthermore, applicants shall have access to open air and be allowed to receive visits.<sup>347</sup> The rights to an adequate standard of living and in particular to housing are contained in Articles 17 and 18 of the same Directive, while the right to health care is enshrined in Articles 17 and 19.<sup>348</sup>

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<sup>343</sup> UN Committee on Economic, Social and Cultural Rights, General Comment 15 on the right to water, twenty-ninth session, 2003, U.N. Doc. E/C.12/2002/11 (2002), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 105 (2003), para. 12(a, b).

<sup>344</sup> K. Lukas, *Right to an Adequate Standard of Living*, in M. Nowak, K. M. Januszewski, T. Hofstätter (ed.), *All Human Rights for All*, Neuer Wissenschaftlicher Verlag, Graz, 2012, p. 318.

<sup>345</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L31/18, Art. 13(2).

<sup>346</sup> *Ivi*, Art. 14(1b).

<sup>347</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down minimum standards for the reception of asylum-seekers (recast), OJ L180/96, Art. 10(1),(2), (4).

<sup>348</sup> *Ivi*, Arts. 17, 18, 19.

Regarding irregular migrants, reference has to be made separately to the Returns Directive, which lays down minimum standards for returning third-country nationals and, among others, also conditions in detention. Although the right to an adequate standard of living is never explicitly mentioned, introductory paragraph 17 establishes as one of the core principles of the whole Directive that third-country nationals who are in detention should be treated in a humane and dignified manner with respect to their fundamental rights and in compliance with international and national law.<sup>349</sup> As said before, an adequate standard of living has a major impact on the respect of the dignity of the person and can thus be considered as a constitutive feature in the provision of the Returns Directive just mentioned. Additionally, it is worth noticing that asylum-seekers and irregular migrants in Malta are anyway detained in the same facilities and therefore the same detention conditions apply to both of them.

#### 3.1.1.2. Prisoners' rights

General prisoners' rights can be found in some of the most important international and regional human rights instruments. However, they are also laid down in very precise regulations contained in specific international and regional documents providing for rules on the detention of prisoners. Clearly, detention of persons is primarily regulated by some fundamental principles that have already been discussed in the previous chapters, namely, the prohibition of arbitrary detention, the right to judicial review and fair trial and all the safeguards that are to be guaranteed during detention. Those aspects won't be examined further in this part of the chapter, as everything that has been said previously regarding asylum-seekers can be extended to all migrants. However, those issues will be briefly discussed again later on.

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<sup>349</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, para. 17.

What will further be analysed in this chapter rather concerns specific criteria that have to be met in the detention context. The aim of examining detention conditions is mainly to evaluate whether two fundamental principles are respected, that is the prohibition of cruel or inhuman and degrading treatment and the respect of the dignity of the person. The first one is enshrined in Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, Article 16 of the Convention against Torture and Other Inhuman and Degrading Treatment, Article 37 of the Convention on the Rights of the Child, Article 15 of the Convention on the Rights of Persons with Disabilities, Article 3 of the European Convention on Human Rights and Article 4 of the EU Charter of Fundamental Rights.<sup>350</sup> The second principle is also contained in the most important human rights documents, namely in Article 1 of the Universal Declaration of Human Rights, Article 3 of the Convention on the Rights of Persons with Disabilities and Article 1 of the EU Charter of Fundamental Rights.<sup>351</sup> Very interesting for the purpose of the present chapter is the fact that Article 10 of the International Covenant on Civil and Political Rights explicitly states that all persons deprived of their liberty shall be treated with humanity and

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<sup>350</sup> UNGA, *Universal Declaration of Human Rights*, Art. 5, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 10, UNGA, *International Covenant on Civil and Political Rights*, Art. 7, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 35, UNGA, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 16, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 78, UNGA, *Convention on the Rights of the Child*, Art. 37, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 103, UNGA, *Convention on the Rights of Persons with Disabilities*, Art. 15, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 202, Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Art. 3, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 258, European Union, *Charter of Fundamental Rights of the European Union* (2000), OJ C364/1, Art. 4, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 353.

<sup>351</sup> UNGA, *Universal Declaration of Human Rights*, Art. 1, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 10, UNGA, *Convention on the Rights of Persons with Disabilities*, Art. 3, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 198, European Union, *Charter of Fundamental Rights of the European Union* (2000), OJ C364/1, Art. 1, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 352.

respect for the inherent dignity of the human person, thus showing the importance of granting fundamental rights also to detained persons.

The most important documents specifically regulating prisoners' rights are the UN Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules adopted by the Council of Europe. Although those provisions are not formally binding on States, the UN General Assembly has stated that these rules shall be taken into account when interpreting Article 10 of the International Covenant on Civil and Political Rights,<sup>352</sup> thus asserting the practical importance of prisoners' rights. This also allows to extend the application of the rules to immigration detention, as Article 10 of the Covenant clearly speaks of persons deprived of their liberty as a general group. The applicability of those rules to anyone held in a detention facility, regardless of the reasons justifying detention is also explicitly provided for by Article 10.4 of the European Prison Rules, stating that "all persons who are detained in a prison or who may, for any reason, be detained elsewhere are regarded as prisoners for the purpose of these rules".<sup>353</sup> Since the rules also provide guidance in interpreting the general prohibition of cruel, inhuman and degrading treatment, they constitute a threshold indicating how serious non-compliance with them may result in a level of ill-treatment sufficient to amount to a violation of the general rule against inhuman and degrading treatment.<sup>354</sup> The rules contained in those two documents thus represent important guidelines on the practical steps to take in order to prevent ill treatment and to respect the dignity of the persons.

The UN Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules which are modelled upon them regulate several aspects of life in detention, in particular the number of persons that can be accommodated in the detention centre, access to sanitary facilities, hygienic conditions, access to health care, relations with the detention staff and relevant aspects closely related to the right to an adequate standard of living.

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<sup>352</sup> S. Easton, *Prisoners' Rights. Principles and Practice*, Routledge, New York, 2011, p. 52.

<sup>353</sup> Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Art. 10.4.

<sup>354</sup> N. S. Rodley, M. Pollard, *The Treatment of Prisoners under International Law*, Oxford University Press, New York, 2009, p. 384.

First of all, it needs to be pointed out that Article 1 of the European Prison Rules explicitly states that all persons deprived of their liberty shall be treated with respect for their human rights<sup>355</sup> and both the UN Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules establish that the differences between prison life and life in liberty should be minimised, in order to avoid lessening the responsibility of the prisoners or the respect due to their dignity as human beings.<sup>356</sup>

The previously mentioned right to adequate housing is enshrined in various provisions regulating the conditions of accommodation of prisoners. Article 9 and 86 of the UN Standard Minimum Rules for the Treatment of Prisoners foresee that prisoners and specifically untried prisoners should be accommodated in single cells at night and that where dormitories are used, prisoners sleeping in the same dormitory should be carefully selected.<sup>357</sup> The same provision is contained generally in Articles 18.1, 18.5 and 96 of the European Prison Rules stating further that accommodation should respect the dignity and privacy of the detainees.<sup>358</sup> Those provisions are actually an elaboration of the right to privacy and the prohibition of interfering with it arbitrarily, well-established in various documents such as the Universal Declaration of Human Rights,<sup>359</sup> the International Covenant on Civil and Political Rights,<sup>360</sup> the Convention on the Rights of the Child,<sup>361</sup> the Convention on the Rights of Persons with Disabilities,<sup>362</sup> the European Convention on

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<sup>355</sup> Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Art. 1.

<sup>356</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Art. 60(1), Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Art. 5.

<sup>357</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Art. 9(1), (2).

<sup>358</sup> Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Arts. 18.1, 18.5.

<sup>359</sup> UNGA, *Universal Declaration of Human Rights*, Art. 12, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 11.

<sup>360</sup> UNGA, *International Covenant on Civil and Political Rights*, Art. 17, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 37.

<sup>361</sup> UNGA, *Convention on the Rights of the Child*, Art. 16, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 98.

<sup>362</sup> UNGA, *Convention on the Rights of Persons with Disabilities*, Art. 22, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 204.

Human Rights<sup>363</sup> and the EU Charter of Fundamental Rights.<sup>364</sup> Connected to the right to privacy are also the provisions of the UN Standard Minimum Rules for the Treatment of Prisoners and of the European Prison Rules regulating the conditions of the sanitary installations which should be available and accessible, respect detainees' privacy and be clean and in line with the necessary hygienic conditions.<sup>365</sup> Additionally, the detention facilities should provide the necessary means to detainees to maintain a high level of personal hygiene.<sup>366</sup> Overall, the two documents also establish that all parts of the institution should be appropriately maintained and be kept clean.<sup>367</sup>

The right to health is enshrined in many major human rights instruments<sup>368</sup> and represents a central issue of the protection of human rights in general.<sup>369</sup> Provisions contained both in the UN Standard Minimum Rules for the Treatment of Prisoners and on the European Prison Rules provide for clear practical means to guarantee the respect of this right within the detention context. In particular, medical checks to identify persons in need of particular medical assistance should be carried out before accommodating a person in detention and qualified medical staff should guarantee access to health care within the detention facility.

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<sup>363</sup> Council of Europe, *Convention for the protection of Human Rights and Fundamental Freedoms*, Art. 8, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 259.

<sup>364</sup> European Union, *Charter of Fundamental Rights of the European Union* (2000), OJ C364/1, Art. 7, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 353.

<sup>365</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Arts. 12-13, Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Arts. 19(3), (4).

<sup>366</sup> *Ivi*, Arts. 15-16 and Arts. 19(4, 5, 6), UN and Council of Europe, respectively.

<sup>367</sup> *Ivi*, Art. 14, Arts. 19(1, 2), UN and Council of Europe, respectively.

<sup>368</sup> UNGA, *Universal Declaration of Human Rights*, Art. 25, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 12, UNGA, *International Covenant on Economic, Social and Cultural Rights*, Art. 7(b) and Art. 12, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, pp. 51-52, UNGA, *International Convention on the Elimination of All Forms of Racial Discrimination*, Art. 5(e), in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 28, UNGA, *Convention on the Elimination of All Forms of Discrimination against Women*, Art. 12, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 65, UNGA, *Convention on the Rights of the Child*, Art. 24, in Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p. 101.

<sup>369</sup> T. Wenzel, E. Ecevit, A. Wenzel, W. Zitterl, *Right to Health*, in M. Nowak, K. M. Januszewski, T. Hofstätter (ed.), *All Human Rights for All*, Neuer Wissenschaftlicher Verlag, Graz, 2012, p. 323.

Sick prisoners requiring specialist treatment should be transferred to specialised institutions and women should be provided with all the necessary pre-natal and post-natal care and treatment.<sup>370</sup>

Related to health is the right to food, as previously mentioned while examining the right to an adequate standard of living. According to both the UN Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules, detainees shall be provided with drinking water whenever it is needed and with quality food of nutritional value adequate for health and strength and in line with cultural values that detainees may attach to it. Additionally, quantity, quality, preparation and service of food shall be regularly inspected by medical practitioners working in detention.<sup>371</sup>

Another right guaranteeing an adequate standard of living is the right to adequate clothing, which is enshrined in Article 17 of the UN Standard Minimum Rules for the Treatment of Prisoners and in Articles 20 and 21 of the European Prison Rules, which establish in particular that clothing should be adapted to the climate, be in line with hygienic requirements and adequate to safeguard the health of the detainee.<sup>372</sup>

Another fundamental aspect of the life in prison regards the availability of educational or recreational activities, as has already been highlighted in the previous chapter when

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<sup>370</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Arts. 22-24 and 62, Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Arts. 39-43 and 46-47.

<sup>371</sup> *Ivi*, Arts. 20, 26 and Arts. 22, 44, UN and Council of Europe, respectively.

<sup>372</sup> Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Arts. 25, 27, 28.

<sup>372</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Arts. 37-39, 92, Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Art. 24.

<sup>372</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Art. 27.

<sup>372</sup> Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Art. 18(10).

<sup>372</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Art. 33, Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Art. 68.

<sup>372</sup> *Ivi*, Art. 54 and Art. 17, 20, 21 UN and Council of Europe, respectively.

speaking about the well-being of children. Specifically, detainees shall be allowed to practice physical activity in open air at least one hour a day and shall have access to various kinds of educational, recreational or cultural activities aiming at improving their physical or mental well-being.<sup>373</sup> Additionally, detainees shall be allowed to maintain contacts with the outside world, be they aiming at communicating with family or friends or at gathering information of any kind, and should be given the opportunity to receive visits from outside.<sup>374</sup>

The quality of life in detention is also extremely influenced by the way discipline and order are maintained within the institution. Although the use of firmness is justified, no more restriction should be applied than what is necessary for safe custody and well-ordered community life.<sup>375</sup> In the same way, security arrangements shall be as least restrictive as possible, compatibly with the risk of detainees escaping or harming themselves or others.<sup>376</sup> Furthermore, instrument of restraint such as handcuffs, chains, irons or others shall only be applied in very special circumstances, in particular to prevent escaping, in special medical situations or if other methods of control are failing.<sup>377</sup> As a general rule, both the Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules establish that detention staff shall not use force, unless strictly necessary.<sup>378</sup> To this aim, some clauses define some characteristics that the detention staff should ideally have. In particular, it should be made of public authorities separate from military, police or criminal investigation services and should be trained to treat all prisoners with humanity and with respect for the inherent dignity of the human person and to facilitate the reintegration of

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<sup>373</sup> *Ivi*, Arts.21, 77, 78 and Arts. 25, 27, 28, UN and Council of Europe, respectively.

<sup>374</sup> *Ivi*, Arts. 37-39, 92 and Art. 24, UN and Council of Europe, respectively.

<sup>375</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Art. 27.

<sup>376</sup> Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Art. 18(10).

<sup>377</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Art. 33, Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Art. 68.

<sup>378</sup> *Ivi*, Art. 54 and Arts. 64-67, UN and Council of Europe, respectively.

prisoners into society.<sup>379</sup> Another important feature concerning staff regards the necessary balance of men and women officers, to guarantee that parts of the detention facility dedicated to women and men are respectively controlled by female and male officers.<sup>380</sup> Overall, the treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it<sup>381</sup> and detention facilities shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.<sup>382</sup> For this purpose it is fundamental not only to provide the necessary services to detainees within the facilities and to cooperate with outside social services but also to involve civil society and members of the public in prison life<sup>383</sup> and most importantly, to inform the public about the purpose of the prison system and the work carried out by prison staff in order to encourage better public understanding of the role of the prison in society.<sup>384</sup> The EU Asylum *Acquis* does not contain many provisions regulating the rights of irregular migrants kept in detention, as was already the case when analysing specifically the right to an adequate standard of living. However, there are a couple of relevant provisions that randomly cover some of the issues that have been touched upon in this section. As already mentioned, introductory paragraph 17 of the Returns Directive establishes that migrants in detention should be treated in a humane and dignified manner, with respect for their fundamental rights and introductory paragraph 13 foresees that coercive measures should be subject to the principle of proportionality with regard to the means used and objectives pursued.<sup>385</sup> Additionally, a generic provision is contained in Article 5 establishing that the Returns Directive shall be applied taking into due account the state of health of the third-

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<sup>379</sup> *Ivi*, Arts. 46-47 and Arts. 71, 72(1, 3), UN and Council of Europe, respectively.

<sup>380</sup> *Ivi*, Art. 53 and Art. 85, UN and Council of Europe, respectively.

<sup>381</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Art. 61.

<sup>382</sup> Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Art. 6.

<sup>383</sup> *Ivi*, Art. 7 and 90(2).

<sup>384</sup> *Ivi*, Art. 90(1) and 91.

<sup>385</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, paras. 13 and 17.

country national concerned.<sup>386</sup> Article 14 of the same Directive also provides for some procedural safeguards that have to be granted pending return, establishing in particular that emergency health care and essential treatment of illness are to be provided.<sup>387</sup> Article 16 requires States to allow third-country nationals to establish in due time contact with legal representatives, family members and competent consular authorities.<sup>388</sup> Finally, it worth mentioning the fact that also the Reception Conditions Directive Recast contain a number of provisions regulating the treatment of migrants and asylum-seekers in detention. In particular, Article 10 foresees that detention of applicants for asylum shall take place in specialised detention facility, separately from ordinary prisoners and possibly also separately from third-country nationals who are not asylum-seekers. The same Article also lays down some general guarantees that should be granted in detention: access to open air, possibility to communicate with family or legal advisers and information about rights and obligations within the facility.<sup>389</sup> Article 17 establishes that applicants for asylum shall be provided with an adequate standard of living that guarantees their subsistence and protects their physical and mental health<sup>390</sup> and Article 18 also specifies further that applicants shall have their family life protected, measures should be taken to prevent assault and gender-based violence, persons working in accommodation centres shall be trained adequately.<sup>391</sup> Finally, Article 19 regulates access to health care and medical assistance, which shall be guaranteed to asylum-seekers.<sup>392</sup>

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<sup>386</sup> *Ivi*, Art. 5(c).

<sup>387</sup> *Ivi*, Art. 14(1b).

<sup>388</sup> *Ivi*, Art. 16(2).

<sup>389</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down minimum standards for the reception of asylum-seekers (recast), OJ L180/96, Art. 10.

<sup>390</sup> *Ivi*, Art. 17.

<sup>391</sup> *Ivi*, Art. 18.

<sup>392</sup> *Ivi*, Art. 19.

### 3.1.2. National legal framework

Although the Immigration Act does not provide for any rule on the treatment of migrants who are in detention, most of the provisions contained in the UN Standard Minimum Rules for the Treatment of Prisoners and in the European Prison Rules are contained in specific chapters of the Maltese legislation, regulating the treatment of prisoners.

Article 4 of the Prisons Act explicitly states that it shall be lawful to confine in a prison any person detained in custody under the provisions of the Immigration Act<sup>393</sup> and it establishes that the Minister may appoint any suitable place outside the precincts of a prison for the custody of any prisoner.<sup>394</sup> Those provisions allow to extend the definition of “prisoners” and of “prisons” respectively to migrants and asylum-seekers detained in custody under the Immigration Act and to immigration detention facilities. The Prisons Regulations on the treatment of prisoners, which specify what is required to be followed in order to obtain compliance with the prisons Act, thus also applies to migrants and asylum-seekers held in detention.

In line with the UN Standard Minimum Rules for the Treatment of Prisoners and with the European Prison Rules, the Maltese Prisons Regulation establish in Article 12 that prisoners shall be treated in a way which takes into account their judicial situation,<sup>395</sup> which in the case of migrants shall clearly mean that they shall be treated as unconvicted prisoners.

Regarding accommodation, Article 19 foresees that prisoners shall have a private cell, unless due to specific circumstances the number of cells should not be sufficient. In this case, prisoners suitable to be placed in the same cell shall be accommodated together. In any case, sleeping accommodation, health and hygiene shall be appropriate and particular

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<sup>393</sup> Prisons Act, Chapter 260 of the Laws of Malta, 1976, as amended by Legal Notice 423 of 2007, Art. 4(2d).

<sup>394</sup> *Ivi*, Art. 3(2).

<sup>395</sup> Prisons Regulations, Subsidiary Legislation 260.03, as amended by Legal Notices 127 of 1997, 14 and 225 of 2000, 58 of 2001, 265, 341 and 423 of 2007, and 426 and 435 of 2012, Art. 12.

attention shall be given to climatic conditions, space, lighting and ventilation.<sup>396</sup> Further emphasis on hygiene is provided for in Article 23, establishing that detainees shall be provided with the necessary means to allow them to keep themselves clean and healthy and that the prison shall in general be kept in appropriate hygienic conditions.<sup>397</sup> Strictly related to this point are other provisions regarding an adequate standard of living, namely, the right to adequate clothing and the right to food are enshrined in Articles 22 and 25 of the Prisons Regulations.<sup>398</sup> As usual, food shall satisfy in quality and quantity modern standards of diet and hygiene and, as far as possible, respect cultural and religious needs.<sup>399</sup>

Article 31 enshrines the right to health and establishes that appropriate medical care shall be granted within the detention facility and that prisoners in need of specific health treatment shall be transferred to specialised institutions.<sup>400</sup> Additionally, Article 34 foresees that an appointed medical officer shall regularly verify the adequacy of the quantity, quality, preparation and serving of food and water, the hygiene and cleanliness of the prison and prisoners, the sanitation, heating, lighting and ventilation of the prison and the suitability and cleanliness of the prisoners' clothing and bedding.<sup>401</sup>

In correspondence with the UN Standard Minimum Rules for the Treatment of Prisoners and with the European Prison Rules, concerning the daily activities in prison, the Prisons Regulations also contain the right to sport and exercise,<sup>402</sup> the right to have access to information taken from the press and other media,<sup>403</sup> the right to education or trainings<sup>404</sup> and the right to access religious services.<sup>405</sup> Furthermore, as regards the contacts with the

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<sup>396</sup> *Ivi*, Arts. 19(1), (3), (4).

<sup>397</sup> *Ivi*, Art. 23.

<sup>398</sup> *Ivi*, Arts. 22 and 25.

<sup>399</sup> *Ivi*, Art. 25.

<sup>400</sup> *Ivi*, Art. 31.

<sup>401</sup> *Ivi*, Art. 34.

<sup>402</sup> *Ivi*, Art. 28.

<sup>403</sup> *Ivi*, Art. 48.

<sup>404</sup> *Ivi*, Art. 46.

<sup>405</sup> *Ivi*, Art. 43.

outside world, Articles 51 and 52 of the Prisons Regulations foresee for detainees the possibility of receiving letters and visits from outside.<sup>406</sup>

Finally, various provisions regulate the use of force and body restraints and the role of the staff. Article 69 foresees the use of handcuffs, restrain-jackets and other body restraints only in the event of a risk of escape, specific medical reasons or the inefficiency of other methods of control.<sup>407</sup> In general, use of force should be avoided, unless particular circumstances require it<sup>408</sup> and to this aim, prison officers shall be trained in a way as to aspire to humane standards, higher efficiency and a committed approach to their duties.<sup>409</sup>

In addition to this fundamental document of the Maltese legislation, the Returns Regulations specifically establish that detained third-country nationals shall be treated as persons awaiting trial,<sup>410</sup> which according to the UN Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules shall mean that the person is entitled to additional safeguards regarding in particular the right to an adequate standard of living and communications with the outside world.<sup>411</sup> Article 9 and 11 of the Returns Regulations specify that the third-country national shall be allowed to establish contact with his or her family members and competent consular authorities. Article 11 also foresees that the third-country national shall be provided with emergency health care and essential treatment of illness.<sup>412</sup>

Furthermore, it is worth mentioning once again that migrants awaiting deportation are detained in the same facilities as asylum-seekers. For this reason it can be useful to mention some provisions that are contained in the Reception Conditions Regulations, as they can be

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<sup>406</sup> *Ivi*, Arts. 51, 52.

<sup>407</sup> *Ivi*, Art. 69.

<sup>408</sup> *Ivi*, Art. 71.

<sup>409</sup> *Ivi*, Art. 89.

<sup>410</sup> Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Chapter 217 of the laws of Malta, as amended by Legal Notice 81 of 2011, Art. 9(1).

<sup>411</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Arts. 84-93, Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Arts. 95-99.

<sup>412</sup> Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Chapter 217 of the laws of Malta, as amended by Legal Notice 81 of 2011, Art. 9(2) and 11(7a, b).

used to examine critically the detention conditions in the Maltese immigration centres. Article 12 of the Reception Conditions Regulation explicitly states that accommodation centres shall guarantee an adequate standard of living and the possibility of communicating with family relatives or legal advisers and representatives from relevant organisations.<sup>413</sup>

### **3.2. The Maltese migrants' and asylum-seekers' detention conditions in practice**

In Malta persons detained in terms of the Immigration Act<sup>414</sup> are held in specific facilities for migrants. Currently two centres are in place for this purpose: Safi Barracks and Lyster Barracks, located in the south-eastern part of the island. The two centres are situated inside army or police barracks and are administered by a specific civilian force known as the Detention Service, run by army officers and whose members are recruited mostly from retired members of the security forces.<sup>415</sup> This aspect of the detention centres already constitutes a problematic issue, on the one hand because it does not take into due account the particular psychological situation that asylum-seekers may be facing and on the other because it is in contrast with prisoners' rights. Asylum-seekers are often coming from territories of war where violence is widespread and where they may have faced life-threatening situations that would require specific treatment and accommodation to guarantee recovery from trauma. Military compounds run by military officers are not suitable for the purpose as they rather risk to recall situations of war and violence and to traumatise further the persons concerned. Additionally, both the UN Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules establish that in general the detention staff should be made of public authorities separate from military or

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<sup>413</sup> Reception of asylum-seekers (Minimum Standards) Regulations, Subsidiary Legislation 420.06, as amended by Legal Notice 320 of 2005, Art. 12(1b), (2b).

<sup>414</sup> Immigration Act, Chapter 217 of the laws of Malta, as amended by Legal Notice 20 of 2013, Arts. 5 and 14.

<sup>415</sup> Jesuite Refugee Service, *Becoming Vulneable in Detention*, 2010, p. 98, p. 3.

police and should be trained to treat all prisoners with humanity and with respect for the inherent dignity of the human person,<sup>416</sup> thus extending the inappropriateness of military staff, specifically if not adequately trained, to the management of detention of any other category of persons, including irregular migrants. Additionally, when migrants and asylum-seekers are concerned, detention should take place in specifically designed centres, in conditions adequate to their legal status and to their particular needs.<sup>417</sup> Already the simple accommodation of migrants and asylum-seekers in unsuitable locations can contribute to the breach of the prohibition of inhuman and degrading treatment, as it violates Article 10 of the International Covenant on Civil and Political rights establishing that unconvicted persons shall be subject to separate treatment appropriate to their status, in respect of their inherent dignity.<sup>418</sup> On the contrary, detention in military barracks is not in line with the purpose of detention of migrants itself which is only to prevent irregular entry or to enforce a deportation order.

The inadequacy of those military compounds becomes more striking when taking a closer look at the buildings and at the facilities which serve the purpose of immigration detention. Safi Barracks is made up of two warehouses, each of which containing around 200-300 beds in bunks in an open space divided only by partition and by another zone divided into some rooms each of which contains 16-30 beds, also in bunks. Lyster Barracks is structured in several different blocks where each floor contains 3-4 rooms, each of which contains again 16-30 beds in bunks.<sup>419</sup> It is quite clear that this kind of accommodation raises serious issues concerning the right to an adequate standard of living, in particular as regards the right to an adequate housing, which is also reflected in many rules on the treatment of

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<sup>416</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Arts. 46-47, Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Arts. 71, 72(1, 3).

<sup>417</sup> 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*, International Commission of Jurists, Geneva, May 2012, p. 28

<sup>418</sup> UNGA, *International Covenant on Civil and Political Rights*, Art. 10(1), (2a), in Sandy Gandhi (ed.), *Blackstone's International Human Rights Documents* (8 edition), Oxford University Press, 2012, p.36.

<sup>419</sup> Human Rights Watch, *Boat Ride to Detention, Adult and Child Migrants in Malta*, Human Rights Watch, United States, 2012, p. 34.

prisoners. As was previously shown, this right entails adequate privacy, space, security, lighting, ventilation, basic infrastructure and adequate location, as well as protection from cold and other threats to health and sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal.<sup>420</sup> However, the International Commission of Jurists has reported that both of the centres were extremely overcrowded during summer months. In particular the warehouses in Safi presents serious problems as regards privacy due to the fact that the distance between the lines of bunk beds is just enough for one person to stand in.<sup>421</sup> Of course, being a single open space, no cells or bedrooms are available, very far from the standard rule establishing that each prisoner should be provided with a single cell at night.<sup>422</sup> The International Commission of Jurists reported that the situation is not much better in the other detention zones in Safi and Lyster. Although the spaces are divided into various rooms, no privacy is guaranteed due to the high number of beds placed in the rooms<sup>423</sup> and to the total absence of any lockers or cupboards for personal belongings.<sup>424</sup> A report by Médecins Sans Frontières found that several immigration detention areas in Malta were exceeding the maximum allowed density for a refugee camp during an emergency, which amounts to 3,5m<sup>2</sup> per person<sup>425</sup> and the European Court of Human Rights has condemned the overcrowding of the facilities

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<sup>420</sup> UN Committee on Economic, Social and Cultural Rights, General Comment 4 on the right to adequate housing, sixth session, 1991, U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003) Paras. 7, 8.

<sup>421</sup> 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*, International Commission of Jurists, Geneva, May 2012, p. 29.

<sup>422</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Art. 33, Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Art. 9(1, 2).

<sup>423</sup> 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*, International Commission of Jurists, Geneva, May 2012, p. 29.

<sup>424</sup> Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013, para. 76.

<sup>425</sup> Médecins sans Frontières, *Not Criminals, Médecins sans Frontières exposes conditions for undocumented migrants and asylum-seekers in Maltese detention centres*, April, 2009, p. 8.

establishing that the surface of a cell should at least allow the detainees to move freely between the furniture items.<sup>426</sup>

Clearly, overcrowding then has a very strong impact on the general conditions of the accommodations which are already *per se* below the standards. In particular, the International Commission of Jurists, Médecins sans Frontières and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment all noted that hygienic conditions, especially in Safi, were very low, particularly regarding the sanitary facilities and the kitchens, which were also insufficient and not functional, due to their extremely deteriorated conditions. Additionally, they all reported that the number of toilets and showers were far insufficient for the hygienic needs of detainees and did not guarantee the respect of the minimum hygienic standards.<sup>427</sup> Apart from being in breach of several human rights provisions regarding the right to privacy and the right to adequate housing,<sup>428</sup> those conditions clearly breach the specific rules establishing that prisoners should be granted appropriate hygienic conditions, means to maintain their personal hygiene and in general clean detention spaces.<sup>429</sup>

Poor hygienic conditions also have an impact on the fundamental rights to food and water. As a matter of fact, as has been shown, bathrooms and kitchen facilities are in very deteriorated conditions which cannot guarantee the level of hygiene required for storing

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<sup>426</sup> Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013, para. 87.

<sup>427</sup> 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*, International Commission of Jurists, Geneva, May 2012, p. 29, Médecins sans Frontières, *Not Criminals, Médecins sans Frontières exposes conditions for undocumented migrants and asylum-seekers in Maltese detention centres*, April, 2009, p. 10, Council of Europe, *Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 to 30 September 2011*, Strasbourg, 4 July 2013, CPT/Inf (2013) 12, p. 24.

<sup>428</sup> UN Committee on Economic, Social and Cultural Rights, General Comment 4 on the right to adequate housing, sixth session, 1991, U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003) Para 7, 8.

<sup>429</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Art. 33, Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Art. 19.

food and cooking. Nonetheless, detainees have to use water from the tap as the main source to clean, wash items and, most importantly, to drink.<sup>430</sup> Additionally, food is generally brought from outside,<sup>431</sup> thus often not satisfying both the cultural needs and preferences of detainees and their hunger. Interviews conducted by Human Rights Watch have shown that detainees complain both about the quality and the quantity of the food<sup>432</sup> and the inadequacy of the nutritional value of food has also been highlighted by the European Court of Human Rights<sup>433</sup> and by the report of Médecins sans Frontières, which has noted that, against many provisions contained in international human rights instruments and in prisoners' rights documents,<sup>434</sup> food does not include sufficient vegetables and fruit required for a healthy diet and there is no special food available for children and babies or for special medical reasons.<sup>435</sup>

The situation created by overcrowding and poor hygienic conditions and by the lack of appropriate access to healthy water and food is exacerbated by other serious factors which hinder the enjoyment of some fundamental rights. One of them is related in various ways to the health of detainees. Apart from the fact that migrants are generally provided through charity with only worn out clothes,<sup>436</sup> the continuous exposure to cold during winter months due to the absence of any heating system in any of the detention facilities and to the

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<sup>430</sup> Council of Europe, *Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 to 30 September 2011*, Strasbourg, 4 July 2013, CPT/Inf (2013) 12, p. 24, Hammar, p. 8

<sup>431</sup> 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*, International Commission of Jurists, Geneva, May 2012, p. 30.

<sup>432</sup> Human Rights Watch, *Boat Ride to Detention, Adult and Child Migrants in Malta*, Human Rights Watch, United States, 2012, p. 41.

<sup>433</sup> Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013, paras. 92, 97.

<sup>434</sup> UN Committee on Economic, Social and Cultural Rights, General Comment 12 on the right to adequate food, twentieth session, 1999, U.N. Doc. E/C.12/1999/5 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 62 (2003), para. 6, 8, 9, 11, UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Arts. 20, 26.

<sup>435</sup> Médecins sans Frontières, *Not Criminals, Médecins sans Frontières exposes conditions for undocumented migrants and asylum-seekers in Maltese detention centres*, April, 2009, p. 12.

<sup>436</sup> 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*, International Commission of Jurists, Geneva, May 2012, p. 30.

absence of appropriate blankets has a very strong impact on the health of detainees<sup>437</sup> and it is against the rights to an adequate housing, which foresees that persons should, among other things, be protected from cold.<sup>438</sup> Exposure to warmth is equally a problem during summer created by the absence of an adequate ventilation system and obviously also by the situation of overcrowding that affects the facilities during summer months. The European Court of Human Rights has expressed serious concerns in the case of Aden Ahmed v. Malta regarding this point and has stated that suffering from cold and heat cannot be underestimated as they may have a direct impact on the well-being and on the health of a person and they endanger the physical integrity of the person.<sup>439</sup> Considering further that migrants should be treated as unconvicted prisoners and thus have additional safeguards, the conditions examined until this point are strictly unacceptable, as they deliberately put at risk their already often fragile physical and moral resistance.

In addition to that, a total insufficiency of medical assistance in the centres impedes for detainees' health problems to be dealt with in a timely and effective manner, against the right to health and many provisions contained in the UN Standard Minimum Rules for the Treatment of Prisoners, in the European Prison Rules, as well as in the Maltese Prisons Regulations.<sup>440</sup> As already discussed in the previous chapter, persons in need of special medical assistance are not always granted with the necessary healthcare and are very often not released on grounds of vulnerability, thus heavily affecting both their physical and mental health.<sup>441</sup> It also has to be noted that, the UN Standard Minimum Rules for the

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<sup>437</sup> Médecins sans Frontières, *Not Criminals, Médecins sans Frontières exposes conditions for undocumented migrants and asylum-seekers in Maltese detention centres*, April, 2009, p. 16.

<sup>438</sup> UN Committee on Economic, Social and Cultural Rights, General Comment 4 on the right to adequate housing, sixth session, 1991, U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003) Para 8.

<sup>439</sup> Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013, para. 94.

<sup>440</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Arts. 22, 23, 24, 62, Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Art. 39-43, 46-47.

<sup>441</sup> 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*, International Commission of Jurists, Geneva, May 2012, p. 32,

Treatment of Prisoners, the European Prison Rules, as well as the Maltese Prisons Regulations, all prescribe that persons with special medical needs should be transferred to specialised institutions, however this does not always happen<sup>442</sup> and when it happens in case of mental issues, there is a risk for detainees to be transferred in a place where the quality of the living conditions is even lower than in the detention centre. As a matter of fact, the Committee on the Prevention of Torture and other Inhuman and Degrading Treatment reported that the living conditions at the Mont Carmel psychiatric Hospital were far below any acceptable standard and could only be considered as anti-therapeutic.<sup>443</sup> Additionally, the Committee found in the migrants' ward a patient considered to be at high risk of suicide half naked in a bare room, which was cold, devoid of any equipment and didn't even have a mattress.<sup>444</sup> Apart from being a clear discrimination against a person with a mental disability, this kind of treatment is seriously damaging the dignity and the integrity of a person and is far away from the modern standards of healthcare to the point that it only risks to worsen the mental illness of the patient.

Returning to the detention facilities, some other aspects have an important impact on the physical and mental health of detainees. Contrary to several provisions contained in the documents regulating the rights of prisoners, detainees in the immigration centres have very little to do all day.<sup>445</sup> One of the issues concerns the lack of purposeful activities within the detention facilities. Although every centre has an outside area, access to the recreation zone is time-limited and on a rota for different parts of the detention population<sup>446</sup> and is inadequate to grant some form of leisure activity, due to the absence of any means of

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Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013, paras. 17, 19, 97.

<sup>442</sup> 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*, International Commission of Jurists, Geneva, May 2012, p. 32.

<sup>443</sup> Council of Europe, *Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 to 30 September 2011*, Strasbourg, 4 July 2013, CPT/Inf (2013) 12, p. 32.

<sup>444</sup> *Ivi*, p. 31.

<sup>445</sup> Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013, para. 77.

<sup>446</sup> Human Rights Watch, *Boat Ride to Detention, Adult and Child Migrants in Malta*, Human Rights Watch, United States, 2012, p. 34.

recreation.<sup>447</sup> The International Commission of Jurists and the Committee on the Prevention of Torture and other Inhuman and Degrading Treatment both have reported a lack of leisure facilities and purposeful activities, with the exception of some courses and trainings occasionally organised by NGO's.<sup>448</sup> Furthermore, the only source of information that detainees have access to, comes from a single television placed in a common room of each zone of the detention facilities. As a matter of fact, detainees do not have access to any other media or to books, an aspect which is exacerbated by the very seldom contacts with the outside world. The only way that detainees have to get in touch with persons outside detention is through phone calls, which are by the way limited by the very small amount of credit that they are entitled to and through the occasional visits of UNHCR's or NGO's representatives. Visits from family members or friends living out of detention are not allowed.<sup>449</sup> This rule is in breach of what is prescribed both in the Maltese legislation and in the prisoners' rules foreseeing that prisoners should be allowed to receive visits<sup>450</sup> but, most importantly, it represents a very high risk for detainees to be completely cut off from the outside world. Prison is a total institution in which all aspects of life, leisure activities and sleep are conducted within the institution and everyday life is regulated by coercive measures,<sup>451</sup> therefore it is of capital importance for detainees to maintain a form of contact

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<sup>447</sup> 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*, International Commission of Jurists, Geneva, May 2012, p. 30.

<sup>448</sup> Council of Europe, *Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 to 30 September 2011*, Strasbourg, 4 July 2013, CPT/Inf (2013) 12, pp. 24-25, 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*, International Commission of Jurists, Geneva, May 2012, p. 30.

<sup>449</sup> Council of Europe, *Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 to 30 September 2011*, Strasbourg, 4 July 2013, CPT/Inf (2013) 12, pp. 24, 27, 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*, International Commission of Jurists, Geneva, May 2012, p. 30.

<sup>450</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Arts. 37, 38, 39, 92, Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Art. 24.

<sup>451</sup> S. Easton, *Prisoners' Rights. Principles and Practice*, Routledge, New York, 2011, p. 8.

with the rest of the world in order to minimize the exclusion created by imprisonment and to maintain a connection with the society they are living in.

Of course, the attitude of the detention staff and the measures it uses towards the detainees also have a major impact on the quality of life of detained migrants and asylum-seekers and it embodies the first instrument to measure the social distance between detainees and the rest of society. In the Maltese immigration detention facilities cases of disproportionate use of force by the detention staff or by police officers, as well as situations of racial discrimination have been recorded. The 18 months detention policy often creates a very high rate of frustration among the detainees, who in some occasions have shown their anger in forms of burning protests that have in some cases been repressed by firing rubber pellets, using tear gas, beating with truncheons and through other violent means.<sup>452</sup> Although, any form of violent protest has to be condemned, the use of force made to repress it has to be proportionate and necessary. On the contrary, the use of the aforementioned instruments risks to be highly inappropriate in the case of migrants and asylum-seekers that are unarmed and who do not need to be considered potentially dangerous as they are not imprisoned for having committed crimes. Additionally, it is important to mention that this form of protests is generally also incited by the everyday relation between detainees and the staff. As a matter of fact, cases of racist and xenophobic attitudes towards migrants and asylum-seekers are not uncommon. As the Commissioner for Human Rights of the Council of Europe has highlighted in his 2011 report on Malta, any durable solutions for migrants in Malta can only be successful if accompanied by resolute efforts to combat and eliminate these racist and xenophobic tendencies, which are already very widespread among the

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<sup>452</sup> 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*, International Commission of Jurists, Geneva, May 2012, pp. 20-22, Council of Europe, *Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 to 30 September 2011*, Strasbourg, 4 July 2013, CPT/Inf (2013) 12, pp. 22-23, Ivan Martin, Times of Malta, *Police rush to quell riot by migrants*, 26th February 2014, available at: <http://www.timesofmalta.com/articles/view/20140226/local/Police-rush-to-quell-riot-by-migrants.508325> (last accessed 10/07/2014).

Maltese population.<sup>453</sup> The habit of the staff of calling detainees by their immigration number instead of using their names, together with the very questionable practice of bringing sick detainees to hospital handcuffed are additional practices which detainees perceive as humiliating and degrading<sup>454</sup> and they are contrary to many provisions establishing that detention officers should be trained to act in respect of human dignity by avoiding the excessive use of force or unnecessary instruments of restraints<sup>455</sup> and most importantly by treating detainees in a way which emphasises not their exclusion from the community, but their continuing part of it.<sup>456</sup> Detention facilities shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty,<sup>457</sup> contrary to what the Maltese system is actually doing.

To all the elements analysed until this point it is important to add some of those that have been examined in the first chapter concerning the prohibition of arbitrary detention, the right to judicial review and fair trial and all the safeguards that are to be guaranteed during detention. As was thoroughly explored, prolonged and unjustified periods of detention have an impact on the mental health and well-being of any person, without any distinction concerning their legal status. Furthermore, detention of irregular migrants is lawful where there is a risk of absconding and a real prospect of removal.<sup>458</sup> However, the immigration

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<sup>453</sup> Council of Europe Commissioner for Human Rights, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe*, following his visit to Malta from 23 to 25 March 2011, 9 June 2011, CommDH(2011)17, pp. 15-16.

<sup>454</sup> Council of Europe, Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 to 30 September 2011, Strasbourg, 4 July 2013, CPT/Inf (2013) 12, p. 22.

<sup>455</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Arts. 33, 46-47, 54, Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Arts. 64-68, 71-72.

<sup>456</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Geneva, 30<sup>th</sup> August 1955, Art. 33, Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Art. 61.

<sup>457</sup> Council of Europe, *European Prison Rules*, Recommendation Rec(2006)2 of the Committee of Ministers to member states, 11 January 2006, Art. 6.

<sup>458</sup> Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, Art. 15.

detention policy of Malta is incompatible with its obligations under international human rights law, as the grounds for detention in the Maltese law are not clear enough and deportations from the island are in most of the cases very unlikely to be enforced, thus rendering the necessity of implementing alternatives to detention even more urgent. Additionally, the lack of information about the reasons of detention and the absence of judicial review and accessible legal assistance and remedies to challenge detention aggravate the impact of detention on the well-being of migrants and asylum-seekers. Irregular migrants, as much as asylum-seekers, are entitled to those safeguards<sup>459</sup> and to the fundamental rights which have been examined in the present chapter. All the elements that have been taken into account regarding the detention conditions exacerbate the difficulties connected to the incomprehension deriving from such an arbitrary system of detention and have a cumulative effect on the dignity of persons.

The Maltese policy of prolonged, ungrounded and degrading detention affects irregular migrants' mental health as much as the one of asylum-seekers. Rejected asylum-seekers have often faced traumatic experiences too, either during their often month-long journey to North Africa and during their stay in Libya or during their journey across the Mediterranean. As was shown, lengthy detention correlates with higher rates of post-traumatic stress disorder, anxiety and depression and the arbitrary nature of detention and the lack of clarity around procedures for liberty can exacerbate mental distress and pre-existing symptoms and the Jesuit Refugee Service has shown that a number of factors make people more at risk of becoming vulnerable within the detention context. Those factors are exactly the ones that have been examined so far, namely possession of information about duration of detention, reasons for detention and asylum procedure, space within the detention centre, hygienic conditions, relation with the staff, social interaction within the facility, availability of recreational and purposeful activities and communication with the outside world, level and quality of medical care.<sup>460</sup> As was argued throughout the chapter, the Maltese immigration detention centres suffer from shortcomings under each one of

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<sup>459</sup> *Ivi*, Art. 13, 15.

<sup>460</sup> Jesuite Refugee Service, *Becoming Vulnerable in Detention*, 2010, pp. 34, 39, 45, 48, 53, 57, 70, 72.

those aspects, thus rendering detention more dangerous for the well-being of any detainee. In fact, the more those factors do not respect the minimum standards established in the provisions on the right to an adequate standard of living and on prisoners' rights, the more detention deteriorates the physical and mental health of persons. It jeopardises the well-being of vulnerable persons and it deliberately renders vulnerable the persons who were physically and mentally healthy, as a consequence of detention.<sup>461</sup> Additionally and most importantly, the Jesuit Refugee Service has also shown both through data collection and interviews that the difficulties that are present within the situation of closed detention do not affect one group of detainees more than another, as they all experience very similar problems irrespective of age, sex, legal status and duration of detention.<sup>462</sup> In fact, even though, as argued earlier, the longer the period of detention, the worse the way detention affects the well-being of a person, even a short period of detention can have a deteriorating impact for the lack or reasons justifying it and for the conditions in the centres which are *per se* deteriorating persons' resistance.

Detention should only be used as a measure of last resort, or at least be used only when particular conditions require it and it should in any case reduce its harm to the individual persons, in order to respect their dignity and integrity. The Maltese detention system, as it currently is, clearly exceeds the threshold of inhuman and degrading treatment established by the rules on the treatment of prisoners, in fact the European Court of Human Rights as well as some of the bodies that have been quoted throughout the chapter have declared the conditions of the Maltese immigration detention facilities to amount to ill treatment and to degrading treatment,<sup>463</sup> as they "diminish human dignity of persons and arise their feelings

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<sup>461</sup> *Ivi*, pp. 63, 66-67.

<sup>462</sup> *Ivi*, p. 80.

<sup>463</sup> Médecins sans Frontières, *Not Criminals, Médecins sans Frontières exposes conditions for undocumented migrants and asylum-seekers in Maltese detention centres*, April, 2009, p. 3, Council of Europe, *Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 to 30 September 2011*, Strasbourg, 4 July 2013, CPT/Inf (2013) 12, pp. 24, 25, 27, 30.

of anguish and inferiority capable of humiliating and debasing them and to break their physical or moral resistance.”<sup>464</sup>

It is clear that this matter cannot be considered as one only touching upon asylum-seekers, but it rather concerns any individual undergoing such a treatment in the immigration detention facilities. The essential feature of rights is that they are available to all, even those who appear to be “less deserving” than others. As a matter of fact, rights also protect those accused of the most heinous crimes, therefore it would seem inconsistent to deprive of the benefits deriving from rights those who committed smaller offences<sup>465</sup> or, even worse, those who are innocent, like migrants.

The respect of rights emphasises the common ground of prisoners and ordinary citizens and imposes obligations on the State to provide human and constructive prison regimes. Prison life should approximate as much as possible life in the community, as the recognition of rights defines the prisoner as an individual entitled to benefits, instead of someone classified in terms of risk.<sup>466</sup>

In addition to the rights in detention that have been taken into account in this chapter, it is still extremely important to put a strong emphasis on the fact that the right to liberty and security of the person is enshrined in the major human rights instruments<sup>467</sup> and it applies to irregular migrants as well as to asylum-seekers. Therefore, other than clear removal purposes and prospects being on the agenda, Malta should only detain migrants in particular individual cases or for reasons related to security and medical checks.

The incomprehension deriving from a system which detains migrants without any serious justification does not only affect migrants and asylum-seekers but also the rest of the population, by putting a strong emphasis on the distance and the separation between

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<sup>464</sup> Case of Aden Ahmed v. Malta, Application No. 55352/12, European Court of Human Rights, 23 July 2013, para. 99.

<sup>465</sup> S. Easton, *Prisoners' Rights. Principles and Practice*, Routledge, New York, 2011, p. 7.

<sup>466</sup> *Ivi*, p 5.

<sup>467</sup> UNGA, *Universal Declaration of Human Rights*, Art. 3 and 9, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, pp. 10-11, UNGA, *International Covenant on Civil and Political Rights*, Art. 9, in Sandy Ghandhi (ed.), Blackstone's International Human Rights Documents (8 edition), Oxford University Press, 2012, p. 35.

migrant detainees and the community and by creating a feeling of fear and scepticism. This has been proven through a survey conducted by UNHCR, which reported that the public perception about migrants and asylum-seekers was much more negative in the areas where the detention centres are located than in other areas of the island.<sup>468</sup> The necessity of detaining a person solely in reason of serious and individually assessed grounds becomes important also from a sociological perspective, as it provides the population with a justification of detention other than the prevention of risks related to the fear of the unknown. A whole politics of insecurity is constructed around migrants who are portrayed as an existential threat for a community of people and against whom it is therefore legitimate to apply a policy of “securitization of immigration or refugees”,<sup>469</sup> which in the case of Malta corresponds to a detention policy. This kind of politics is aiming at creating and administering distance towards immigrants and refugees and it manages to build up a united host community against those that are perceived as existential threats.<sup>470</sup> Clearly, such attitudes end up creating a situation in which not only detention is justified by the public because of a presumed threat. A vicious circle also emerges due to the fact that on the one hand the use of coercive measures that deprive migrants of their human rights is justified as a way to punish and discourage persons from coming in the future and on the other hand, those coercive measures in turn exacerbate the idea that if migrants are treated in such a way, they probably do in fact represent a threat to society. The political and social engagement with migrants becomes thus much more difficult and it gives rise to predispositions towards violence, both from the side of migrants and from the side of the population.<sup>471</sup>

Alternatives to detention, where detention is not strictly necessary, would be easily implementable in a small country like Malta, where the risk of absconding is highly unlikely. Most importantly, they would be very fruitful to eradicate xenophobic and racist

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<sup>468</sup> UNHCR, *What do you think? A report on public perception about refugees and migrants in Malta*, 2012, available at: <http://www.unhcr.org/mt/statistics/634> (last accessed: 10/07/2014).

<sup>469</sup> J. Huysmans, *The Politics of Insecurity, fear, migration and asylum in the EU*, Routledge, New York, 2006, pp. 46-48.

<sup>470</sup> *Ivi*, 50-56.

<sup>471</sup> *Ivi*, 57.

feelings which are very widespread in the country and they would help to eliminate the idea that migrants and asylum-seekers put society at risk, thus rendering social interaction from both sides much easier.

If Malta is not ready to abandon the detention system, then it has at least the obligation to grant migrants and asylum-seekers the basic rights that have to be respected in a detention regime. It is a duty enshrined in the national laws and, of course, a rather small first step towards the deconstruction of the migrant as someone to be classified in terms of risk.

## **Conclusion**

Throughout this work, several aspects of the Maltese detention of asylum-seekers and migrants have been analysed.

The starting point of the whole argumentation has focused on the detention of asylum-seekers and has led to the conclusion that several fundamental rights, including specific refugees' rights, are infringed by the Maltese detention policy. The mandatory detention of anyone entering the country irregularly due to the issuance of a removal order and the absence of a revision system of the detention order following the filing of an application for asylum, do not take into due account the principle of non refoulement and, connectedly, the fundamental prohibition of torture and other inhuman and degrading treatment.

In fact, Maltese immigration legislation does not provide for any different ground justifying the detention of persons entering the country irregularly, thus applying indiscriminately to asylum-seekers, as much as to irregular migrants. However, the impossibility of enforcing the removal order due to the prohibition of returning a person where his or her life would be at risk is taken into consideration in the sense that asylum-seekers are never in fact removed from the country, while their application for international protection is still pending. The absence of a purposeful reason for detaining asylum-seekers thus becomes striking and renders their deprivation of liberty unlawful and in breach of the fundamental right to liberty and security of the person. As was shown, the lengthy period of detention, gratuitously due only to delays in the asylum procedures and not regulated by any provision of the Maltese legislation, exacerbates the issue by rendering the deprivation of liberty arbitrary. In addition, a number of procedural safeguards related to asylum and to detention were shown not to be respected within the detention context, thus rendering the rights of asylum-seekers almost completely disrespected.

The second chapter has extended the scope of the argument by examining the detention and the rights of vulnerable persons, independently of their being asylum-seekers or irregular migrants. Children, families and pregnant women, persons with disabilities and elderly

persons were all found to encounter serious impairments to the enjoyment of their rights in the detention context, which not only undermines the dignity of those persons by failing to take into account their special needs but it also deteriorates their mental and physical integrity. In fact, detention was found to have a general deteriorating impact, exposing persons to a higher probability of suffering from stress, frustration, sleeping problems, loss of appetite, feelings of powerlessness, depression and exacerbation of post-traumatic stress disorder. Although the risk of being exposed to those problems is particularly pronounced in the case of persons with vulnerabilities, various factors showed that persons entering detention in healthy conditions also experience a deterioration of their well-being. Detention thus arbitrarily affects the physical and mental health of anyone deprived of his or her liberty, thus rendering vulnerable persons who *prima facie* were not.

But is detention of innocent persons who have the only guilt of having entered a country irregularly legitimised to damage their integrity? Although deprivation of liberty is *per se* already a strong feature influencing the well-being of persons, the third chapter highlighted the main reasons rendering the particular Maltese system so damaging for detainees. Conditions in detention infringe some fundamental rights to which any human being, independently of his or her legal status is entitled to. The Maltese facilities do not respect the right to an adequate standard of living, due to inappropriate accommodations, inadequate food and water and insufficient clothing and are in breach of several rules regulating the treatment of prisoners within a detention institution. The Maltese detention policy thus infringes the human rights of any human being, be he or she an asylum-seeker or a migrant.

In addition, some of the considerations made for asylum-seekers play again a role for migrants. Detention is unlawful for most of the migrants, due to the absence of real prospects of removal and thus of any legal ground justifying their deprivation of liberty. Furthermore, the procedural guarantees granting judicial review of detention, provision of information about the reasons for detention and access to legal assistance should be granted to migrants as well, but as was shown, they are not.

The Maltese detention of asylum-seekers, vulnerable persons or irregular migrants infringes the rights of persons belonging to any of those groups. Although asylum-seekers and asylum-seeking vulnerable persons are entitled to remain in Malta, contrary to irregular migrants, some of the rights that the Maltese policy infringes belong to all human beings and, even though rejected asylum-seekers can lawfully be detained with a purpose of deportation, that purpose must exist and it must be enforceable and the rights and procedural safeguards to be guaranteed in detention have to be respected.

However, the impression that one gets when looking closely at the Maltese detention system is that the presumed purpose of removal is really not the reason underlying the existence of such a system. If it were so, asylum-seekers would not be detained, vulnerable persons would be released on grounds of vulnerability and irregular migrants wouldn't have to spend lengthy periods in detention followed by no deportation. Detention of migrants and asylum-seekers and conditions in detention rather seem to stem from a widespread and wrongful idea that persons entering irregularly a country have to be punished, regardless of their legal status, that strict and coercive measures against irregular migration discourage other persons to enter irregularly and, most importantly, that migrants and asylum-seekers represent a threat to society and security measures need to be implemented.

However, what has been argued throughout this work exactly goes against this position. Asylum-seekers should, as a principle, not be detained, unless serious grounds justify their deprivation of liberty and the same applies to vulnerable persons. Detention as a punishment and even less, as a deterrent against irregular migration, are no legal grounds for justifying the deprivation of liberty of a person. According to Maltese legislation, only detention with a real prospect of deportation is lawful and this criteria doesn't even apply to all irregular migrants.

Furthermore, detention conditions in the Maltese facilities are a hideous affront to human dignity that cannot be justified even for persons who have committed the most terrible crimes. Asylum-seekers and migrants are not criminals and security means which do not even grant them detention safeguards accorded to unconvicted criminals are far too disproportionate and exacerbate the public feeling that they do actually represent a threat.

Apart from cases where removals are enforceable, the Maltese detention system is unlawful for asylum-seekers, vulnerable persons and migrants for the absence of real grounds justifying an exception to the right to liberty and security of the person. Additionally, this detention policy in practice is unlawful for any human being also because it deliberately deteriorates the integrity of the persons detained.

Asylum-seekers and migrants are not a threat to society but immigration detention surely threatens social interaction between refugees and migrants and the rest of the population by building up xenophobic and socially counterproductive beliefs.

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