

*Ir-Rappreżentant Permanenti tar-
Repubblika ta' Malta*



*The Permanent Representative of the
Republic of Malta*

22nd September 2020

Agnes Callamard

Special Rapporteur on extrajudicial, summary or arbitrary executions

Felipe Gonzáles Morales

Special Rapporteur on the human rights of migrants

Nils Melzer

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Maria Grazie Giammarinaro

Special Rapporteur on trafficking in persons, especially women and children

Dubravka Šimonovic

Special Rapporteur on violence against women, its causes and consequences

OHCHR
Palais des Nations
1211 Geneva

Dear Special Rapporteurs,

JOINT COMMUNICATION FROM SPECIAL PROCEDURES

I refer to your letter AL MLT 1/2020 of 20 July 2020, regarding the decision reportedly adopted by the Government of Malta to close the country's ports as a measure to fight against the spread of COVID-19. Our observations on the points raised in your letter are provided in the enclosed annex.

I hope the further detail set out in the annex addresses your concerns in regard to the allegations you received. The Maltese Government reiterates its strong support for your mandates and the work of the Office of the High Commissioner for Human Rights.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Christopher Grima'.

Christopher Grima

Enc.



**MINISTRY FOR FOREIGN AND
EUROPEAN AFFAIRS**

PALAZZO PARISIO, MERCHANTS STREET, VALLETTA, MALTA

22nd September 2020

Office of the UN High Commissioner for Human Rights
Palais des Nations
CH-1211 Geneva 10

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Dear Special Rapporteurs,

Thank you for your letter dated 20th July 2020 on the decision reportedly adopted by the Government of Malta to close the country's ports as a measure to fight against the spread of COVID-19. The Government's observations on the points raised in your letter are provided in the enclosed annex.

COVID-19 continues to present an unprecedented challenge. At the same time tens of thousands of migrants are escaping from migrant detention camps and looking to the Mediterranean Sea for their escape. Malta continues to face a considerable threat from this pandemic. Our limited medical and security resources are over-stretched. Nevertheless, Malta has rescued thousands of people and has gone way beyond its legal rescue obligations to save lives. Like Italy and other European countries, Malta closed its ports because of the COVID-19 pandemic. In nearby Libya there is a humanitarian crisis developing, compounded by the pandemic itself. I have expressed my serious concerns on the situation in the Mediterranean on numerous occasions.

I hope the Government's observations in the annex address your concerns with regards to the allegations that you refer to. Malta reiterates its strong support for the work of the Special Procedures mandate holders of the Human Rights Council and the Office of the High Commissioner for Human Rights. We would also like to express appreciation for your continuous efforts to address human rights concerns.

Yours sincerely,


Evarist Bartolo



REPLY BY THE MALTESE GOVERNMENT TO JOINT COMMUNICATION OF 20 JULY 2020

Annex

1) To provide additional information on the allegations listed.

Malta continues to respect all its international legal obligations regarding the rescue of persons in distress at sea. All such efforts are conducted in full respect of relevant instruments of international law fulfilling all Search and Rescue (SAR) obligations as set out in the UN Convention on the Law of the Sea, applicable provisions contained within the 1979 Maritime SAR Convention and the International Aeronautical Manual for Search and Rescue, whilst at the same time respecting the fundamental human rights of all involved. Such obligations are adhered to regardless of the provenance and/or legal status of the persons requiring rescue. Malta has never ignored any distress calls inside its area of responsibility as is being alleged. All calls are attended to and the obligations assumed in accordance with international law are strictly adhered to. What is being alleged falls outside the responsibility of the Maltese authorities, relative to which, Malta is not in a position and is neither the competent authority, nor a better Rescue Coordination Centre (RCC), to coordinate calls outside its area of responsibility. Malta is not responsible for any gaps in the Mediterranean outside its area of responsibility, and such gaps are at most a collective responsibility. Indeed, there are RCCs who in particular cases are in a better position to coordinate such cases and who are omitted by Civil rescue organisations. It is also pertinent to point out that Libya is a contracting party of the Hamburg Convention of 1979 and their Search and Rescue Region (SRR) has been legitimately claimed and, thus, remains the competent recognised authority for cases inside Libya SRR.

With regards to rescues conducted inside the Libyan SRR by NGO vessels or other private vessels, this does not place any additional obligation on Malta or any other state for disembarkation. This position is in accordance with the applicable 1979 International Convention on Maritime Search and Rescue, and other Guidelines, and also the International Maritime Organisation's Resolution number MSC167/78 which holds that in the absence of the possibility to disembark in the SAR region where migrants have been rescued, it is the responsibility of ALL governments to cooperate with each other in order to provide suitable places of safety¹. This is therefore not the responsibility of one sole RCC. Additionally, reference is also being made to IMO FAL.3/Circ.194 where in Para 2.3 it unequivocally states that: "All parties involved (for example, the Government responsible for the SAR area where the persons are rescued, other coastal States in the planned route of the rescuing ship, the flag State, the shipowners and their representatives, States of nationality or residence of the persons rescued, the State from which the persons rescued departed, if known, and the United Nations High Commissioner for Refugees (UNHCR) should cooperate in order to ensure that disembarkation of the persons rescued is carried out swiftly...". This effectively puts the obligation on ALL abovementioned parties and not solely on Malta, as the communication seems to suggest.

It is therefore evident that the responsibility for disembarkation does not fall only on Malta alone, but is indeed a collective responsibility of all governments and all Member States, including the Flag State of NGO vessels and other private vessels being no exclusion to this.

NGO vessels intercepting migrant boats have the full capability to proceed to any place of safety in the Mediterranean and beyond (which in fact they do once they disembark). This is evidenced by the fact that NGO vessels spend days at sea loitering in the area between Malta and Sicily notwithstanding the fact that they could easily proceed to their homeport, Flag State, or many other better able coastal States in the Mediterranean in a matter of 48 hours or less. On the contrary, experience shows that NGO vessels are intentionally choosing to remain loitering inside the Maltese SRR in order to deliberately

¹ Para 6.16 MSC 167/778: 'Governments should co-operate with each other with regard to providing suitable places of safety for survivors after considering relevant factors and risks.'



deteriorate the situation on-board and eventually force a disembarkation on their chosen Coastal State i.e. Malta.

2) To explain how the decision by Malta to close the ports is compatible with the country's international human rights obligations.

The Government's decision was indiscriminatory and ports were closed to all vessels (including EU nationals) due to the exceptional situation relating to a health emergency and in line with other States.

Italy has also issued a decree on the same lines. This had an effect that migrants boats departing Libyan shores were directed towards Malta. Account has also been taken of the following: the European Convention on Human Rights and Fundamental Freedoms, the Convention relating to the Status of Refugees/Geneva Convention, the 1982 UN Convention on the Law of the Sea with particular regard to Article 19, the Hamburg Convention on Maritime Search and Rescue, and the local bans in connection with travel and imposition of quarantine introduced to protect public health.

The EU Commission also made an official communication that all EU external borders are closed except for essential travel. Following advice by the Health Superintendent, the Maltese Government also issued a travel ban and including the closure of ports through LN 42 of 2020 and LN92 of 2020.

The Government of Malta's communication informed the European Commission that in light of the Covid19 pressures, it is considered that the Maltese authorities are not in a position to guarantee the disembarkation of a large amount of migrants on board of any boats, ships or other vessels, nor to ensure the availability of a "safe place" on the Maltese territory to any persons rescued at sea. This in view of the involvement of the law enforcement officers, primarily the Armed Forces of Malta, the Police Force, and the Civil Protection Department whose resources were all focused on combating the spread of the pandemic. Also considering that a place of safety is defined (as referred to in the Annex to the 1979 SAR Convention, paragraph 1.3.2) as a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter, and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination.

In light of these restrictions, Malta still continued to coordinate all emergency cases at sea, however with limitations due to the emergency scenario. Malta also made sure that any medical, alimentary or other needs relating to such emergency cases at sea were catered for and that the necessary coordination was affected to ensure the protection of life at sea and the obviation of any inhuman and degrading treatment.

3) How the government envisages to continue to carry out SAR operations and how distress calls are being handled.

Any decision taken by neighbouring coastal States should not impose any additional obligations on Malta. Malta continues to coordinate cases inside its area of responsibility, as it has always done. Any action taken upon notification of such cases varies and depends especially upon the assessment of the case.

Malta has never ignored any distress calls inside its area of responsibility notwithstanding what is being alleged. All notifications received by RCC MT are investigated, assessed, prioritised and actions are taken accordingly. On the other hand, Malta is not in a position and is neither the competent or better able RCC to coordinate calls outside its area of responsibility.

Not all cases are considered as SAR, and not all SAR cases are distress cases. Mass migration at sea is an extraordinary event which needs collective responsibility. The SAR Convention was never meant to deal with such phenomena and by addressing this issue only as a SAR issue is not enough. No single



State is in a position to cope with such extraordinary numbers. In addition, a clear distinction needs also to be made between Maritime Interdiction Operations on the High Seas and Maritime Rescue Operations. RCC Malta always exercises the duty of care for every case, and closely monitors every case. Uncertainty, apprehension (or alert) and distress are three distinct phases of a potential SAR case. These three phases (uncertainty, alert, and distress) are clearly defined in the 1979 SAR Convention. Any elements extraneous to this definition may be elements that support the designation of a situation as being one of uncertainty or apprehension (or alert), but do not, in themselves form a part of the considerations that are used to designate a situation as being a distress.

Rescue cases inside Malta SRR are coordinated using all possible private and public means. Malta's responsibility within its SRR is to coordinate all SAR activities using any available resources including assets belonging to other countries (which, however, are reluctant to provide due to disembarkation issues) and commercial shipping.

4) To explain the circumstances involving a specific incident that took place on 15 April 2020.

During the span of two days, the RCC MT was involved in the coordination of searches of 5 migrant vessels in addition to the verification process of numerous other calls. Therefore, while already working under stressful and restricted conditions, the searches for the 5 vessels continued to make the situation even more overwhelming and extraordinary. Resources had to be managed and allocated in order to try and locate every missing vessel and searches were being conducted in different locations.

The SAR Convention states that each Party shall ensure that its rescue co-ordination centres provide, when requested, assistance to other rescue co-ordination centres, including assistance in the form of vessels, aircraft, personnel, or equipment. It is also pertinent to note that this migrant vessel was located in an area closer to other ports where rescue units are available in addition to Frontex Operation Themis, EU Funded assets which albeit being well aware of the case they kept their units only inside their operational area. Neither did they make any offer to rescue, even though they were the closest rescue assets to the location and were well aware of the emergency situation being faced by the Maltese authorities.

The particular boat to which reference is being made was initially signalled by Frontex and had been adrift inside Libya's SRR for three days or more, where at the time of sighting it remained adrift inside the Libya SRR for a further two days without any rescue asset intervening or coordinating until it then eventually drifted inside the Malta SRR. This despite the fact that the sighting had been communicated to many other nearby RCCs, including the competent RCCs of Libya, Tunisia and Italy.

Notwithstanding that Malta's position was communicated as early as possible to the EU Commission, no single EU naval unit, or EU Agency (including Frontex and EUNFM) intervened to assist even though some have Naval units operating very close to the area. On the contrary, they shifted their respective operational areas far away from these areas in order not to be burdened with disembarkation.

In this case Malta has done all within its ability, available resources and within its remit to coordinate multiple SAR operations including this case. It is pertinent to note that albeit all coastal authorities were aware of this case, once again Malta had to conduct all efforts by itself, with no external support whatsoever.

Relative to this particular incident, a Magisterial Inquiry was concluded on 26th May 2020, where the Magistrate concluded that the members and the crew of the Armed Forces had not carried out any attempted murder, nor did the Magistrate find that the Prime Minister and the Head of the Armed Forces were responsible for voluntary homicide.

5) To explain if any investigation has been launched in order to ascertain the details and the possible responsibilities in relation to the incident.



A magisterial inquiry was launched to ascertain the details and possible responsibilities in relation to the incident. The inquiry was concluded on the 26th May 2020 and the process verbal were published online.