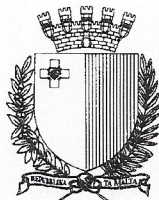



*Ir-Rappreżentant Permanenti tar-  
Repubblika ta' Malta*



*The Permanent Representative of the  
Republic of Malta*

  
February 2021

**Felipe Gonzáles Morales**

Special Rapporteur on the human rights of migrants

**Agnes Callamard**

Special Rapporteur on extrajudicial, summary or arbitrary executions

**Nils Melzer**

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

OHCHR

Palais des Nations

1211 Geneva

*Dear Special Rapporteurs,*

#### JOINT COMMUNICATION FROM SPECIAL PROCEDURES

I would like to refer to your letter AL MLT 2/2020 dated 9 December 2020. I have the honour to enclose the response of the Government of Malta, which I hope will address your concerns with regard to the allegations you have received.

I wish to take the opportunity to thank you for your commitment to your mandates, and to reiterate Malta's strong support for your work and that of the Office of the High Commissioner for Human Rights.

Yours sincerely,



Christopher Grima

Enc.



**MINISTRY FOR FOREIGN AND  
EUROPEAN AFFAIRS**  
PALAZZO PARISIO, MERCHANTS STREET, VALLETTA, MALTA

9<sup>th</sup> February 2021

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

Dear Special Rapporteurs,

I wish to thank you for your letter of 9<sup>th</sup> December 2020, on allegations you received on matters within your respective mandates. Further to communication MLT1/2020 last year, the Government appreciates your follow up on concerns regarding incidents that took place on 15 April 2020.

Malta's observations to AL MLT 2/2020 are provided in the enclosed annex.

Yours sincerely,

**Evarist Bartolo**  
**Minister for Foreign and European Affairs**

**1. Please provide any additional information and/or comments you may have on the allegations mentioned above.**

Malta welcomes the opportunity to offer the following comments. As a preliminary matter, it is emphasised that in the events mentioned in the Joint Communication from Special Procedures (hereinafter “the letter”), there was no case of ‘collective expulsion’, nor ‘pushback’, given that the irregular migrants in question were never within the jurisdiction of Malta. Furthermore, their rescue was carried out in international waters by a vessel that bears the flag of another State, not that of Malta. In this regard, it is first of all recalled that Malta is not a party to and did not ratify the 2004 amendments to the IMO Safety of Life at Sea Convention (SOLAS) and the IMO search and Rescue (SAR) Convention, by virtue of which a State is obliged to take in persons rescued within its SRR. Accordingly, Malta is under no obligation pursuant to the said Conventions to take and allow disembarkation of migrants rescued within its SRR, insofar as such migrants are outside Maltese jurisdiction. The obligation of the Maltese authorities in such circumstances is to *coordinate* the rescue operation, by immediately alerting the nearest vessel to provide assistance and ensuring that such migrants are taken to the nearest place of safety. In this case, Malta was at no point in time the nearest place of safety when the rescue operation occurred. Malta’s RCC therefore coordinated the rescue operation in question in full compliance with its obligations at international law.

It is noted with concern that some of the claims made in the letter are inaccurate or unsubstantiated. Whilst it is alleged that there were twelve (12) casualties, the number of casualties has in fact never been confirmed through corroborated evidence. On the contrary, video footage in the possession of the Maltese authorities excludes this possibility as well as the possibility that any persons threw themselves at sea.

Malta strongly rebuts any allegation that there was a delay or inaction in the assistance provided. On the contrary, as soon as the vessel entered the Maltese SRR on 12th April, immediate action was taken by RCC Malta, which issued a UMIB/NAVTEX for all vessels in the area to assist. This broadcast was subsequently repeated. It is additionally noted that while the letter describes the vessel in question as having been in ‘international waters’ prior to 12 April 2020, i.e. prior to its entry into the Maltese SRR, it must be emphasised that the vessel was in actual fact in the SRR of Libya. Malta is concerned by the suggestion that it could in any way be held responsible for the period during which the migrant boat was in the SRR of another State with SAR competence over it.

The letter states that “*all the informed authorities had initially refused to engage or coordinate in conducting search and rescue operations*”. While Malta is of course not in a position to reply for any other authority, it strongly rebuts the allegation that Malta did not take all immediate action within its remit and capabilities to provide for the safety of the migrants on board. The Government takes its obligations under international human rights law very seriously. It is inarguable that our operations are consistent with our obligations. Malta does its best in these difficult circumstances, including being in the midst of a declared public health emergency due to COVID-19, to coordinate multiple SAR cases, which include a total of 12 cases at the same point in time. Resources were, naturally, stretched to the limit and thus cases had to be prioritised by means of triage, focusing efforts on the most serious and imminent cases. The Armed Forces of Malta (AFM) had no other available seagoing assets as these were all otherwise engaged on other rescues or missions.

The period in question saw numerous departures from Libya which in turn resulted in distress situations. Malta cannot be held responsible for this extraordinary situation, particularly when it did all within its power to coordinate multiple rescues and save as many lives as possible.

The use of private assets in the rescue operation goes to illustrate the extent to which Malta went beyond the strict call of duty in its endeavours to dispatch assistance through any means available. Such endeavours, however, clearly do not shift legal obligations away from the flagstate or other RCCs onto the Maltese Government.

The letter moreover claims that on 13<sup>th</sup> April, contact with the boat in distress was lost for over 36 hours. Malta however confirms that at no point in time was contact lost between RCC Malta and the vessel in question. RCC Malta continued to monitor the situation and to coordinate accordingly.

The letter also states that RCC MT issued a NAVTEX on 14<sup>th</sup> April 2020 at 1030hrs. As has already been indicated, RCC MT did not wait until the 14 April but issued its first NAVTEX on the 12 April, with subsequent repeated broadcasts.

As regards the allegation that seven passengers drowned in an attempt to be saved, Government reiterates that the evidence held by it positively excludes this. The aerial assets in the area at the time did not detect any such movements. Had any person attempted to jump into the water, the aerial assets would have detected them.

As regards the privately-owned commercial vessels, these arrived on scene at 0230 hrs and not at 0500hrs. The said vessels were not 'enlisted'. They were/are not vessels of the Government of Malta or its Armed Forces and additionally, they bear the flag of another State, not Malta. Furthermore, these vessels were in no way instructed to switch off their satellite tracking devices. It should be noted in this regard that under SOLAS, fishing vessels are under no obligation to have an AIS on board.

It is additionally clarified that the Portuguese cargo ship IVAN was indeed requested by RCC Malta to provide shelter to the migrant boat until rescue arrived. Given the size of the vessel, IVAN was precluded from rescuing the migrants itself. Had IVAN approached the migrant boat, the latter would have been at serious risk of capsizing. Nevertheless, said vessel was essential in providing shelter from the inclement weather on the day and was naturally released to leave once the rescue was completed. It is noted that the extreme, unfavourable meteorological conditions on the day complicated this rescue severely and that whilst no urgent Medevacs were requested, this would in any case have not been possible with the prevailing weather.

It is again emphasized that Malta was at no point in time the nearest place of safety to the position from which the rescue occurred and that, similarly to Italy, it had announced the closure of its ports in view of the pandemic and local public health emergency. Malta also understands that the persons rescued were returned safely to the UNHCR mission in Libya, and food supplies were also provided as a form of humanitarian assistance.

- 2. Please indicate whether the abovementioned allegations, including the multiple casualties related to the incident of April 2020, have been or are subject of any further investigation and/or prosecution by the relevant authorities. Please provide information about their outcomes, in particular as regards remedies for families and victims.**

As stated previously, a Magisterial Inquiry was launched into the incident to ensure that if any criminal offence was carried out, the culprits would be duly investigated, prosecuted and penalised. The independent and impartial Magisterial Inquiry was concluded on 26<sup>th</sup> May 2020. It excluded that there were any grounds for the prosecution of criminal offences.

On 4<sup>th</sup> November 2020, 50 persons who were allegedly among the rescued migrants and 2 further individuals who claim to be the brothers of 2 of the alleged casualties, filed constitutional redress proceedings in Malta, in front of the First Hall, Civil Court (constitutional jurisdiction). The plaintiffs allege a violation of fundamental rights and have requested, *inter alia*, compensation/damages. The proceedings are still *sub iudice*.

- 3. Please clarify the relationship between your Excellency's Government and the private vessels involved in the rescue and the subsequent pushback operation in question, in particular whether the former instructed, requested or in any way cooperated with the latter to return the rescued migrants to Libya.**

Once again, the use of the term 'pushback' is objectionable.

The partial reference to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is also objected to as Art 2 of the same Convention is unequivocal in holding that the convention applies solely to territory under the jurisdiction of the State Party. Art 3 of CAT cannot therefore find application unless there was some sort of territorial jurisdiction, which in these particular circumstances, was wholly absent. It is once again reiterated that the rescue in question occurred in international waters by a fishing vessel bearing the Libyan Flags. The Maltese authorities had no effective control whatsoever, neither *de jure* nor *de facto*, over the migrants in question. The

exercise of jurisdiction is a necessary prerequisite for a State to attract responsibility for acts or omissions imputable to it. In this particular case, there was clearly no *de iure* jurisdiction, given that the rescue operation occurred on the high seas, and the vessel does not bear a Maltese flag. *De facto* jurisdiction is likewise absent as there was no control over either the territory, or the vessel, or the persons themselves. The coordination of SAR events (which is an obligation on a State Party signatory to the SAR Convention) clearly does not amount to the exercise of jurisdiction, particularly when State Naval assets are absent from the scene and the flag state of the vessel effecting the rescue is another sovereign State. Hence, it is relevant to point out that there exists no legal basis for asserting that the conduct of SAR in any way represents the exercise of jurisdiction. This assertion is supported by the fact that there is no known example of search and rescue conventions which permit or indeed provide for forcible rescues where the persons in question positively refuse to be rescued.

- 4. Please indicate measures taken by your Excellency's Government to protect the human rights of migrants at the maritime border, including measures to ensure their access to relevant procedures for persons in need of protection under international human rights and refugee law. These include measures taken or to be taken in accordance with the principle of non-refoulement and the prohibition of arbitrary and collective expulsions.**

As already indicated, the migrants in question were at no point at the Maltese maritime border, within Maltese territory or within the effective control or jurisdiction of the Maltese authorities. The rescue took place within international waters, by a vessel belonging to a flagstate other than Malta.

Malta has always fulfilled its international obligations by upholding the Conventions applicable to it.