

**Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the human rights of migrants**

Ref.: AL MLT 1/2025  
(Please use this reference in your reply)

29 July 2025

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Working Group on Arbitrary Detention; Special Rapporteur on extrajudicial, summary or arbitrary executions and Special Rapporteur on the human rights of migrants, pursuant to Human Rights Council resolutions 58/14, 51/8, 53/4 and 52/20.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the criminal prosecution of **Amara Krumak, Abdalla Bari and Kone Tiemoko Abdul Kader**, three individuals accused by the authorities of Malta of hijacking an oil tanker on its way from Türkiye to Libya. The ship had rescued them and a boatload of refugees and migrants attempting to cross the Mediterranean from Libya to Europe and had intended to disembark them in Tripoli, Libya.

We are concerned about the severity of the charges brought against these young men, which include offences under counter-terrorism legislation, some punishable with life imprisonment, which do not appear to be substantiated or are otherwise inappropriate, do not take into account the age of the teenagers, and do not reflect the risks to their lives had they been returned to Libya. We also express our concern about their treatment and lack of access to a fair trial in Malta in accordance with international human rights law. Specifically, we raise concerns about the rights to liberty (article 9 of the International Covenant on Civil and Political Rights (ICCPR), which Malta ratified on 13 September 1990), fair trial (article 14, ICCPR) and the rights of children under the Convention on the Rights of the Child (CRC), which Malta ratified on 30 September 1990.

According to the information received:

The three youths left Garabulli, Libya, on board a rubber boat in the early morning of 25 March 2019. At the time, Amara and Abdalla, nationals of Guinea, were 15 and 19 years old respectively, and Kone, a national of Côte d'Ivoire, was 16 years old. It is estimated that there were over 100 people on board, including 20 women and at least 15 children. Not long after their departure, their boat began to deflate and an aircraft deployed by the European Union's (EU) Joint Operation EUNAVFOR Med Sophia, a naval operation to combat refugee smuggling in the Mediterranean, spotted the sinking boat. According to radio transcripts of the operation, it requested the *El Hiblu 1*, a Turkish-registered commercial oil tanker on its way from Istanbul, Türkiye, to

Tripoli, Libya, to “proceed to the area and help the boat in the water... to rescue those people”. Upon approaching the sinking vessel, the chief officer of the *El Hiblu 1* introduced himself, explained that he had been instructed to assist them, and invited the passengers to climb aboard the *El Hiblu 1*. While most of the migrants accepted to board the *El Hiblu 1* for fear of drowning, six men refused as they were too scared at the prospect of being taken back to Libya, where they were informed the *El Hiblu 1* was scheduled to sail. Their fate is unknown and they are presumed drowned.

Once the rescued individuals were brought on board the *El Hiblu 1*, it is alleged that the vessel’s chief officer, who spoke English, provided assurances that they would not be returned to Libya. He reportedly relied on 15-year-old Amara, who was proficient in English, to serve as an interpreter between himself and the other individuals on board. According to accounts, the chief officer explained that two vessels from Europe were expected to rendezvous with the *El Hiblu 1*, and that he had received instructions to transfer the rescued individuals to them, before then traveling on to Libya, the vessel’s intended destination.

That evening, as people started falling asleep on the deck, the EUNAVFORMED Sophia aircraft instructed the *El Hiblu 1*, on behalf of the Libyan Coast Guard, to go to Libya. At about 6 a.m. the next day, as the migrants began to wake up, they realised that they were approaching the Libyan coastline and panic ensued. People started crying, screaming and shouting that they refused to go back. Some threatened to jump overboard, and many banged their fists or metal objects found onboard against the sides of the ship in protest. Concerned at the reaction of the migrants, the chief officer asked Amara how to calm down the situation. Amara did not want to get involved, afraid of the migrants turning on him. Meanwhile, Abdalla and Kone were working to calm the panicked migrants. Eventually, all three of them spoke to the chief officer and explained that if they were sent back to Libya, some of them would certainly die. They suggested he take the boat towards Europe, as he had originally promised. According to his subsequent testimony to Maltese authorities, the chief officer agreed to take them to Valletta, Malta.

Throughout the ensuing journey, the teenagers were reportedly welcome to walk in and out of the chief officer’s cabin, and joked around with the crew, who sometimes brought them coffee and peanuts. At no point during the journey did the three boys engage in any violent action or threaten the chief officer or any other members of the crew. This information was confirmed by evidence given by the crew, officers of the Armed Forces of Malta (AFM) and the Maltese police during the magisterial inquiry, which began on 9 April 2019 in the Court of Magistrates (Malta) sitting as a Court of Criminal Inquiry. Nobody was injured and the ship was not damaged. Despite this, as the *El Hiblu 1* approached Malta, the chief officer reportedly radioed the Maltese authorities to report that the rescued people had taken control of his ship and had forced the crew to proceed towards Malta. Consequently, Maltese authorities dispatched an AFM special operations unit to intercept *El Hiblu 1* as soon as it entered Maltese waters.

Upon boarding the ship, Maltese soldiers verified that no crew member or rescued individual had been injured and that the situation on board was calm and under control – circumstances later confirmed during the magisterial inquiry. Despite this, after the *El Hiblu 1* docked in Malta at 8:00 a.m. on 28 March 2019, Abdalla, Amara and Kone – hereafter referred to as “the El Hiblu 3” – were arrested and charged by police prosecutors with a number of serious offences, including hijacking and terrorism. On 30 March 2019, they were formally arraigned before the Court of Magistrates (Malta) sitting as a Court of Criminal Inquiry, and charged with having “on the 28th of March 2019, while in the territorial waters of Malta, [...] unlawfully seized or exercised control over the ship with the name of *El Hiblu 1* bearing registration number IMO:9753258 by use of force or threat thereof, or by any other form of intimidation.” On 9 April 2019, they were issued with fresh charges on nine counts, including terrorism, before the same court.

Although Amara and Kone were minors, all three individuals were held in the maximum-security adult division of Malta’s Corradino Correctional Facility, after they were reportedly interrogated by the authorities without being appointed legal guardians or placed in the care of independent child protection officials. The younger two were transferred to a correctional facility for minors and given Care Orders only after an official age assessment confirmed their declared age on 16 April 2019, nearly three weeks after their arrest. The first bail hearing took place on 18 April 2019, at which time bail was denied. Despite repeated subsequent applications, bail continued to be refused.

The charges against them include:

- Act of terrorism, involving the seizure of a ship (article 328A(1)(b), (2)(e), Criminal Code);
- Act of terrorism, involving the extensive destruction of private property (article 328A(1)(b), (2)(d), (k), Criminal Code);
- “terrorist activities”, involving the unlawful seizure or the control of a ship by force or threat (article 328A(4)(i), Criminal Code);
- Illegal arrest, detention or confinement of persons and threats (articles 86 and 87(2), Criminal Code);
- Illegal arrest, detention or confinement of persons for the purpose of forcing another person to do or omit an act which if voluntary done, would be a crime (article 87(1)(f), Criminal Code);
- Unlawful removal of persons to a foreign country (article 90, Criminal Code);
- Private violence against persons (article 251(1) and (2), Criminal Code);

- Private violence against property (article 251(3), Criminal Code); and
- Causing others to fear that violence will be used against them or their property (article 251B, Criminal Code).

In May 2019, the United Nations Office of the High Commissioner for Human Rights (OHCHR) expressed concern about the treatment of the boys and the failure to appoint legal guardians for the two children before their interrogation. OHCHR called on Malta to drop the terrorism charges, noting that some of the migrants saved by the *El Hiblu 1* “exhibited clear signs of torture and ill-treatment” from their time in Libya or before, suggesting that a return to Libya was not a humane option.<sup>1</sup> In June, the United Nations Committee on the Rights of the Child also expressed concern that the two children were being charged before an adult court rather than a juvenile one.<sup>2</sup>

Almost eight months after their arrest, in November 2019, they were released on bail but required to register with the police every day and restricted in their daily movements. Since then, the accused have attended court hearings almost every month, as the magisterial inquiry continued, and have always maintained their innocence. Numerous Maltese and international organisations, activists, academics, legal scholars and public figures have campaigned for the charges against the boys to be dropped and for the trial to be dismissed.

Between 2019 and 2023, proceedings were held before the Court of Magistrates (Malta) acting as a Court of Criminal Inquiry, during the compilation of evidence stage. Reports indicate that this preliminary phase of the judicial process, including the prosecution’s presentation of evidence, was marked by significant delays, procedural irregularities, and substantive omissions. The prosecution initially only called crew members of *El Hiblu 1* and members and officials of the AFM to testify and failed to call any of the 100 or more rescued people who climbed aboard the *El Hiblu 1* until March 2021, after the defence submitted an application to the court. By then, many of these key eyewitnesses had already left the island to other European countries. Those migrants that were allowed to testify were denied the ability to testify in Bambara, a language widely spoken in West Africa. Witnesses also questioned the accuracy of the interpreting occurring in court, with the defence requesting a new interpreter.

It is reported that those who did testify confirmed the boys’ role as interpreters and mediators who helped the chief officer at his request, and not as ring leaders or hijackers as they were portrayed in the media.

In August 2023, Kone absconded from Malta. In light of Kone’s departure, the proceedings were severed: the case against Amara and Abdalla has continued, while proceedings against Kone have been suspended pending his extradition.

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<sup>1</sup> OHCHR, Press briefing note on Malta, 7 May 2019, available at:

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24569&LangID=E>.

<sup>2</sup> Committee on the Rights of the Child, Concluding Observations on the combined third to sixth periodic reports of Malta, June 2019, <https://www.ohchr.org/EN/Countries/ENACARegion/Pages/MTIndex.aspx>.

Notwithstanding witness testimony indicating that the El Hiblu 3 did not engage in any violent or unlawful conduct, and despite widespread international concern regarding the fairness of the proceedings, the Attorney General proceeded to formally charge Amara and Abdalla with the original offences. The formal bill of indictment was served on the individuals on 6 November 2023.

At a court hearing in May 2024, the defence lawyers for the El Hiblu 3 argued that Malta had no jurisdiction over their case as the initial events occurred on the high seas outside Malta's territorial waters and that no Maltese citizens were involved. The court dismissed their argument, and the Court of appeal upheld this decision on the basis that some alleged offences appeared to have continued or to have been consummated within Maltese territorial waters and that such facts could only be decided by a jury. The trial will therefore take place in Malta's criminal court. The proceedings remain at the pre-trial phase and no trial date has been set.

While we do not wish to prejudge the accuracy of these allegations, we express our serious concern about the prosecution of the El Hiblu 3, two of them minors at the time of the arrest and accused of grave crimes under Maltese law, with apparently no consideration of their best interests as children, as required under international law. We are alarmed at the severity of the charges laid against all three individuals, some of which carry a sentence of life imprisonment. We are concerned that such charges appear to be unjustified in relation to the reportedly wholly peaceful actions of the defendants, and that the proceedings appear to involve violations of the rights to liberty (article 9, ICCPR) and fair trial (article 14, ICCPR) and the rights of children under the CRC.

#### *Inappropriateness and severity of charges*

We are deeply concerned that the charges laid against the El Hiblu 3 do not appear to be based on violent or coercive criminal conduct and as such, that their detention may be arbitrary, contrary to article 9(1) of the ICCPR. We are further concerned at the choice to lay very serious terrorism charges, which carry a sentence of life imprisonment and do not appear to be justified in the circumstances. The conduct of the defendants moreover does not appear to involve the aim of "unduly compelling a Government" as required by the definition of terrorism under article 328A(1)(b) of Malta's Criminal Code. In addition, according to best practice international standards (see Annex to this letter), conduct is genuinely "terrorist" only where it involves intentional killing or serious injury or hostage taking, none of which was committed on the facts alleged by the authorities. The relevant Maltese terrorism offences charged in the case are overbroad in extending to property damage and the seizure of the ship in the absence of death, injury or hostage taking.

We are concerned that such serious charges risk deterring migrants and asylum seekers who have been rescued at sea from engaging in dialogue with the captain and crew of rescue vessels about the intended port of disembarkation, including to inform the crew about the risks of *refoulement* to places where their lives and safety are at risk. Migrants and asylum seekers should not be punished for seeking protection. We urge the Maltese authorities to review and vacate the charges and to respect the rights of refugees and migrants seeking safety and protection.

We note that in the context of assessing exclusion from refugee status, the United Nations High Commissioner for Refugees (UNHCR) emphasizes that “duress” is a defence to individual criminal responsibility “where the act in question results from the person concerned necessarily and reasonably avoiding a threat of imminent death, or of continuing or imminent serious bodily harm to him- or herself or another person, and the person does not intend to cause greater harm than the one sought to be avoided”.<sup>3</sup> The UNHCR further notes that the defence of duress should be examined with particular care in relation to the responsibility of minors (para. 28). The UNHCR also notes the relevance of “[a]ction in self-defence or in defence of others or of property must be both reasonable and proportionate in relation to the threat” (para. 22).

In this respect, we draw your attention to the decision of the Italian Supreme Court of Cassation in April 2022, which overturned the criminal convictions of two individuals who had resisted the attempt by the crew of the *Vos Thalassa*, a merchant vessel that had rescued them, to return them to serious risks of violence and inhuman or degrading treatment in Libya. The Court ruled that the defendants’ actions, including violence and threats, were in self-defence and defence of 65 other rescued people, and were thus not punishable, since they were asserting the customary international law protection against *non-refoulement* to an unsafe place. The court also indicated that the defendants’ acts were proportionate to the threat faced. We note with regret that six men who fled Libya with the three accused, who refused to board the *El Hiblu I* out of fear of being returned to Libya and chose to stay on the sinking rubber vessel, remain unaccounted for. Their harrowing decision is a testament to the risks they feared if returned to that country.

In this context, the UNHCR considers that no one should be forcibly returned to Libya under any circumstances and that returning people to Libya constitutes a breach of the principle of *non-refoulement*,<sup>4</sup> which prohibits returns where there are substantial grounds for believing that a person would be at risk of serious human rights violations or other irreparable harm (see Annex). It is widely reported that in conflict-affected Libya, refugees and migrants who enter the country, either to find work or to attempt the journey toward Europe, remain trapped in a cycle of serious human rights violations and abuses, including unlawful killings, arbitrary detention, torture and inhumane detention conditions, alarming rates of malnutrition, sexual and gender-based violence including gang rape, slavery, extortion, forced labour and exploitation at the hands of State and non-State actors in a climate of impunity.<sup>5</sup> These violations and

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<sup>3</sup> UNHCR, Guidelines on International protection No. 5: Application of the Exclusion Clauses – Article 1F of the 1951 Convention relating to the Status of Refugees (2003), para. 22.

<sup>4</sup> OHCHR, “*Lethal Disregard*”: Search and rescue and the protection of migrants in the central Mediterranean Sea, May 2021, p. 3, available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf>; see also, UN, Report of the Secretary-General on the United Nations Support Mission in Libya, 20 May 2022, para. 106, available at: <https://unsmil.unmissions.org/reports-secretary-general>; and UNHCR, *UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea*, September 2020, available at: <https://www.refworld.org/docid/5f1edee24.html>.

<sup>5</sup> See for example, OHCHR, “Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya”, 20 December 2019, available at: <https://www.ohchr.org/sites/default/files/Documents/Countries/LY/LibyaMigrationReport.pdf>; OHCHR, “Unsafe and Undignified: The forced expulsion of migrants from Libya”, 2 November 2021, available at:

abuses have been extensively documented, including by international human rights organisations, various United Nations bodies such as the Human Rights, Transitional Justice and Rule of Law Service (HRS) of the United Nations Support Mission in Libya (UNSMIL), and the European Court of Human Rights.<sup>6</sup> While Libya is party to the ICCPR and CAT, we note that it is not a signatory to the 1951 Geneva Convention relating to the Status of Refugees or the 1967 Protocol, nor does it have any domestic asylum legislation and there is clearly an absence of effective protection in practice.

We note further that there is broad international agreement<sup>7</sup> that Libya cannot be regarded as a “place of safety” where refugees and migrants rescued at sea can be disembarked under the international law of the sea, namely under the amendments to the International Convention on Maritime Search and Rescue<sup>8</sup> and the International Convention for the Safety of Life at Sea.<sup>9</sup> The IMO Guidelines 2004 suggest that a place of safety is a location where the rescue ends, the person’s life is no longer in danger, their basic human needs (such as food, shelter and medical needs) can be met, and their onward transport can be arranged.<sup>10</sup> Refugees and asylum seekers must not be disembarked where they have a well-founded fear of persecution.<sup>11</sup>

We note that Amara, Abdulla and Kone have reportedly all maintained their innocence since their arrest and vehemently deny ever using violence or threats of violence. They also maintain that the evidence given during the magisterial inquiry indicates that none of them perpetrated any violent action constituting a crime. It is our view, however, that even if, at trial, the court found that any of the boys had *prima facie* committed a crime, prosecuting authorities should consider whether they acted reasonably to defend themselves and the other asylum seekers, or acted under duress, in a manner proportionate to the degree of danger that they faced if returned to Libya, in which case they should not be held criminally responsible.

We note that the asylum claims of some of the boys have been finalized. We are concerned that in the interests of fairness, the criminal proceedings should have been concluded prior to any final protection determination, lest the pending prosecution unduly influenced the outcome of the protection determination

We emphasize that in all actions concerning children, including by administrative and judicial authorities, the best interests of the child shall be a primary consideration (CRC, article 3(1)). We are concerned that no “best interest” assessment of the situation of the two children appears to have been undertaken by the Maltese authorities in relation to their asylum claims, their detention and the criminal

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<https://www.ohchr.org/en/documents/reports/unsafe-and-undignified-forced-expulsion-migrants-libya?utm;> and OHCHR, “Nowhere but Back: Assisted return, reintegration and the human rights protection of migrants in Libya”, November 2022, available at:

<https://www.ohchr.org/sites/default/files/2022-12/Report-on-assisted-return-and-reintegration.pdf>

<sup>6</sup> E.g. *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Grand Chamber, European Court of Human Rights (ECtHR), 23 February 2012.

<sup>7</sup> E.g. including OHCHR, UNHCR, the International Organization for Migration (IOM), the European Court of Human Rights and international human rights bodies.

<sup>8</sup> Opened for signature 1 November 1979, 1405 UNTS 109 (entered into force 22 June 1985).

<sup>9</sup> Opened for signature 1 November 1974, 1184 UNTS 278 (entered into force 25 May 1980).

<sup>10</sup> IMO Guidelines on the Treatment of Persons Rescued at Sea (20 May 2004), para. 6.12.

<sup>11</sup> *Ibid* para. 6.17. See also UNHCR, Legal considerations on the roles and responsibilities of States in relation to rescue at sea, non-refoulement, and access to asylum, para. 2.1; IOM, OHCHR, UNHCR, UNICEF, UNODC, and UN Special Rapporteur on the Rights of Migrants, The concept of place of safety under international law and the respect of the rights of migrants and refugees rescued at sea by all States (2022).

proceedings launched against them.

*Concerns about detention, investigation and trial*

We are concerned about the detention of the El Hiblu 3 and the conduct of the criminal proceedings, and in various respects we echo the concerns raised by OHCHR and the Committee on the Rights of the Child.<sup>12</sup> First, the three young people were initially detained in a high-security section of an adult prison, contrary to international law. Juvenile offenders must be detained separately from adults and treated in a manner appropriate to their age, as set out in article 10(2)(b) and (3) of the ICCPR, article 37(c) of the CRC, and rule 11 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (“Mandela Rules”). We are concerned that detention in an adult facility failed to take into account their individual circumstances and traumatic experiences, and was not in line with international standards. We remind your Excellency’s Government that standards on the use, length and conditions of detention are even more stringent for children in criminal proceedings (Human Rights Committee, general comment No. 35, para. 18).

Secondly, the defendants were detained for eight months before being released on bail. International law is clear that the detention of children should only be used as a measure of last resort and for the shortest appropriate period of time, as set out in article 37(b) of the CRC and in the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“Havana Rules”) 1990. Even for adults, deprivation of liberty should only be used as a last resort, for the shortest possible period of time, and be reviewed on a regular basis with a view to its end (general comment No. 35, para. 19).

Thirdly the authorities failed to appoint legal guardians to the two children before their interrogation by the authorities and the children were allowed limited contact with their families. We emphasize that when children are arrested, notice of the arrest and the reasons for it should also be provided directly to their parents, guardians, or legal representatives (para. 28). Article 40(2)(b) of the CRC further requires that a child must have legal or other appropriate assistance in the preparation and presentation of his or her defence, while rule 58 of the Mandela Rules provides that “[p]risoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals”.

Finally, we raise serious concern regarding the alleged procedural irregularities and omissions during the initial stage of the judicial process, including the excessively slow compilation of evidence by the prosecution, the failure to call key witnesses until many had already left Malta, and the lack of proper interpretation in a language witnesses understood. All of these risk undermining the three individuals’ right to a fair trial under article 14 of the ICCPR, including the right to prepare a defence and to call and examine relevant witnesses. It also contributed to prolonging their detention and delaying the trial. We recall that article 10(2)(b) of the ICCPR requires accused juvenile persons to be “brought as speedily as possible for adjudication”. We are also concerned that the children were charged before an adult court rather than a juvenile one. The

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<sup>12</sup> OHCHR, Press briefing note on Malta, 7 May 2019, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24569&LangID=E>; and Committee on the Rights of the Child, Concluding Observations on the combined third to sixth periodic reports of Malta, June 2019, <https://www.ohchr.org/EN/Countries/ENACARegion/Pages/MTIndex.aspx>.

detention of three teenagers, despite no evidence of violence, in an adult maximum-security detention centre and the denial of bail for eight months, raises further concerns regarding the protection of their presumption of innocence under article 14 of the ICCPR.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please explain the factual and legal grounds for the arrest, detention and prosecution of all three abovementioned individuals, including the evidentiary basis for laying such serious charges, including terrorism charges.
3. Please indicate how the use of terrorism-related charges complies with the principles of legality, necessity, proportionality and non-discrimination. Please explain whether the Maltese authorities considered the defence of duress in relation to the defendants when deciding whether to bring charges.
4. Please detail the steps taken by your Excellency's Government to guarantee their freedom from arbitrary detention and their right to a fair trial and due process under articles 9 and 14 of the ICCPR and under the Convention on the Rights of the Child.
5. With respect to Abdalla and Amara who are currently being prosecuted, please provide information on how the principle of the best interests of the child is being upheld and what steps has your Excellency's Government taken to treat them in line with Malta's obligations under the Convention on the Rights of the Child.
6. Please indicate what measures have been taken by your Excellency's Government to protect the human rights of asylum-seekers, refugees and migrants and ensure the full respect of the principle of *non-refoulement*, including towards individuals rescued at sea.
7. Please provide detailed information about how the obligation of *non-refoulement* under international human rights law and international refugee law was applied to the individuals.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government to clarify the issues in question.

Further, we would like to inform your Excellency's Government that after having transmitted the information contained in the present communication to the Government, the Working Group on Arbitrary Detention may also transmit the case through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. The present communication in no way prejudices any opinion the Working Group may render. The Government is required to respond separately to the letter of allegation and the regular procedure.

Please be informed that a related communication has been sent to the European Union, the Government of Libya and the Government of Türkiye.

Please accept, Excellency, the assurances of our highest consideration.

Ben Saul

Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Matthew Gillett

Vice-Chair on communications of the Working Group on Arbitrary Detention

Morris Tidball-Binz

Special Rapporteur on extrajudicial, summary or arbitrary executions

Gehad Madi

Special Rapporteur on the human rights of migrants

## Annex

### Reference to international human rights law

In connection with the above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to the principles and international standards applicable to this communication.

#### *Prohibition of arbitrary detentions*

Article 9 of the ICCPR states that no one shall be subjected to arbitrary arrest or detention or deprived of liberty except on such grounds and in accordance with such procedures as are established by law. As interpreted by the Human Rights Committee, the notion of "arbitrariness" should not only be equated with "against the law", but should be interpreted more broadly to include considerations of inappropriateness, injustice, unpredictability and due process, as well as considerations of reasonableness, necessity and proportionality (general comment No. 35, para. 12). In addition, the Working Group on Arbitrary Detention has established in its jurisprudence that preventive deprivation of liberty, as a precautionary and non-punitive measure, must also comply with the principles of legality, necessity and proportionality to the extent strictly necessary in a democratic society. It may only proceed in accordance with the limits strictly necessary to ensure that the efficient development of investigations is not impeded and justice is not evaded, and provided that the competent authority substantiates and accredits the existence of the aforementioned requirements. Because of the particularly restrictive nature of pre-trial detention, the imposition of this measure should be the exception rather than the rule (general comment No. 35, para. 38).

The enjoyment of the rights guaranteed in the ICCPR is not limited to citizens of State Parties but "must also be available to all individuals, regardless of their nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party" (ICCPR/C/21/Rev.1/Add.13, para. 10).

In regard to the detention of minors, article 40(3) of the Convention on the Rights of the Child requires that States Parties "seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law". In particular, article 40(3)(b) and (4) notes that States Parties should seek to establish "measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected", and consider alternatives to institutional care to "ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence".

#### *Conditions of detention*

Article 10 of the ICCPR enshrines the right of anyone deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person. Paragraph 2(b) requires States Parties to hold accused juvenile individuals separately from adults and to bring them "as speedily as possible for adjudication". Similarly, rule 11 of the Mandela Rules provides for the separation of young prisoners

from the adult prison population. Further, rule 58 states that “[p]risoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals”.

### *Right to a fair trial and due process*

The right to a fair trial and due process is enshrined in articles 10 and 11 of the Universal Declaration of Human Rights and article 14 of the ICCPR. In particular, article 14(3)(b) of the ICCPR provides that in the determination of a criminal charge against any individual, everyone shall be entitled, in full equality, to “have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”. In its general comment No. 32, the Human Rights Committee noted that “[t]he right to communicate with counsel requires that the accused is granted prompt access to counsel” (para. 34). In that regard, principle 9 and guideline 8 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court provide that the right to legal assistance is applicable at any time during the detention, including immediately after apprehension. All persons apprehended must be promptly advised of this right and access to legal counsel must be provided without delay. The right to legal assistance at all times is inherent to the right to liberty and security of the person and to the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, enshrined in articles 9 and 14 of the ICCPR.

Article 14(3)(e) of the ICCPR further protects the right to “examine, or have examined, the witnesses against [the accused] and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”. As noted by the Human Rights Committee, this right is integral to the principle of equality of arms and is “important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution” (general comment No. 32, para. 39).

In accordance with article 14(3)(c) and (f) of the ICCPR, “[a]ll individuals who have been criminally charged have a right to be tried without delay and to “the free assistance of an interpreter if [they] cannot understand or speak the language used in court”.

In the case of juvenile persons, article 14(4) of the ICCPR provides that “the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation”. In this regard, the Human Rights Committee noted that in addition to being entitled to “at least the same guarantees and protection as are accorded to adults under article 14 of the Covenant”, juveniles are entitled to special protection and to “be tried as soon as possible in a fair hearing in the presence of legal counsel, other appropriate assistance and their parents or legal guardians, unless it is considered not to be in the best interest of the child, in particular taking into account their age or situation” (general comment No. 32, para. 42). Detention before and during trial should also be avoided to the extent possible (*ibid.*).

The elements of the right to a fair trial enumerated above are similarly protected under article 40 of the Convention on the Rights of the Child.

### *Duties of States towards migrants and principle of non-refoulement*

Article 98 of the United Nations Convention on the Law of the Sea of 1982, to which Malta has been a party since 20 May 1993, requires coastal States to promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose. Further, according to conclusion No. 15 (1979), para. (c) of the UNHCR Executive Committee: “It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum.” In that sense, it is required that States take all reasonable precautionary steps to protect life and prevent excessive violence.

States should ensure that all border security measures, including those aimed at addressing irregular migration, are in accordance with the principle of *non-refoulement* and provide adequate procedural guarantees and judicial protection. The principle of *non-refoulement* forms an essential and non-derogable protection under international human rights, refugee, humanitarian, and customary law present in the ICCPR and the Convention on the Rights of the Child. Moreover, the principle of *non-refoulement* is codified in the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, article 3 of the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, as well as articles 6 and 7 of the ICCPR (Malta acceded to the latter two treaties on 13 September 1990). It prohibits all forms of removal and transfer of any individual, regardless of their status, when there are substantial grounds for believing that the individual would be at risk of irreparable harm, such as death, torture or cruel, inhuman or degrading treatment or punishment, persecution, enforced disappearance or other serious human rights violations, in the place to which they are to be transferred or removed.

Each case should be examined individually, impartially and independently by the State party through competent administrative and/or judicial authorities, in conformity with essential procedural safeguards, notably the guarantee of a prompt and transparent process, a review of the deportation decision and a suspensive effect of the appeal (Committee against Torture, general comment No. 4, para. 13). Any application of the Refugee Convention exclusion clauses in article 1(F) “always needs to be exercised with great caution”.<sup>13</sup>

### *Rights and best interests of migrant children*

A formal procedure to determine the best interests of migrant children should be conducted with certain safeguards (Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations, A/HRC/37/34/Add.1). For example, such safeguards should include the meaningful participation of authorities responsible for child protection, as well as the right of the child to be heard and to have competent and independent legal representation (principle 6, guideline 6). Further, children should not be separated from their families

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<sup>13</sup> See further guidance in UNHCR, Guidelines on International Protection No. 8: Child Asylum Claims under Article 1A(2) and 1F of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (2009), para. 59.

(principle 9).

Restrictive migration or asylum policies render migrant and asylum-seeking children, including unaccompanied or separated children, particularly vulnerable to suffering exploitation, violence, and sexual abuse during their migration journey and in countries of destination. Unaccompanied migrant and asylum-seeking children should have access to the national child-care system on an equal basis as national children and enjoy all relevant safeguards with regard to the protection of children. As per article 22 of the Convention on the Rights of the Child, States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance. Further, State parties are obligated to protect the child from all forms of sexual exploitation and sexual abuse, sale and trafficking of children, and all other forms of exploitation, in accordance with articles 34 to 36 of the Convention.

#### *Use of counter-terrorism legislation*

Finally, we would like to remind your Excellency's Government that although there is no agreement on a multilateral treaty on terrorism which, inter alia, defines "terrorism", States should ensure that counter-terrorism legislation is limited to criminalizing conduct which is properly and precisely defined on the basis of the international counter-terrorism instruments,<sup>14</sup> Security Council resolution 1566 (2004) and the Declaration on Measures to Eliminate International Terrorism (1994).<sup>15</sup> The model definition of terrorism advanced by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism provides clear guidance to States on appropriate conduct to be proscribed and best practice. Those elements include:

- a) Acts, including against civilians, committed with the intention of causing death or serious bodily injury, or the taking of hostages,
- b) Acts committed for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act,
- c) Such acts constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism.<sup>16</sup>

We also bring the attention of your Excellency's Government to the principle of legal certainty under article 15(1) of the ICCPR, which requires that criminal laws are sufficiently precise so that it is clear what types of behaviour and conduct constitute a criminal offence and the legal consequences of committing such an offence. This principle recognizes and seeks to prevent ill-defined and/or overly broad laws which are open to arbitrary application and abuse, including to target members of civil society

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<sup>14</sup> See [https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2\\_en.xml](https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml).

<sup>15</sup> S/RES/1566; A/RES/51/210.

<sup>16</sup> E/CN.4/2006/98, para. 37.

on political or other unjustified grounds.<sup>17</sup>

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<sup>17</sup> A/70/371, para. 46 (b).