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## Re: Pre-Sessional Review of Malta

Dear Committee Members,

We write in advance of your upcoming pre-sessional review of Malta to highlight areas of concern regarding the Maltese government's compliance with the Convention on the Rights of the Child. Informed by our on-going investigation, including on-the-ground research, this submission contains up-to-date information that Malta's treatment of unaccompanied migrant children is inconsistent with Articles 2, 8, 12, 20, 22, and 37 of the Convention. It also highlights concrete steps that the Maltese government should be asked to take to address these problems.

Human Rights Watch has closely monitored the human rights situation in Malta and, in particular, the treatment of unaccompanied migrant children over the past nine months. This research is part of our on-going work on unaccompanied migrant children in Europe.<sup>1</sup> We have interviewed child and adult migrants in Malta, as well as government and civil society representatives. Our findings in this submission draw on a series of research trips to Malta by Human Rights Watch staff from February to May 2012.

<sup>1</sup> Human Rights Watch has conducted research on unaccompanied migrant children in Europe for more than five years. See *Human Rights Watch, Unwelcome Responsibilities: Spain's Failure to Protect the Rights of Unaccompanied Migrant Children in the Canary Islands*, July 27, 2007, <http://www.hrw.org/reports/2007/07/25/unwelcome-responsibilities>; *Human Rights Watch, Left to Survive: Systematic Failure to Protect Unaccompanied Migrant Children in Greece*, December 22, 2008, <http://www.hrw.org/reports/2008/12/22/left-survive>; *Human Rights Watch, France – Lost in Transit: Insufficient Protection for Unaccompanied Migrant Children at Roissy Charles de Gaulle Airport*, October 29, 2009, <http://www.hrw.org/reports/2009/10/29/lost-transit-0>; *Human Rights Watch, No Refuge: Migrants in Greece*, November 2, 2009, <http://www.hrw.org/reports/2009/11/02/no-refugees>; *Human Rights Watch, Spain – Eternal Emergency: No End to Unaccompanied Migrant Children's Institutionalization in Canary Islands Emergency Centers*, June 22, 2010, <http://www.hrw.org/reports/2010/06/22/eternal-emergency-0>; *Human Rights Watch, Buffeted in the Borderland: The Treatment of Asylum Seekers and Migrants in Ukraine*, December 16, 2010, <http://www.hrw.org/reports/2010/12/16/buffed-in-borderland-0>.

Human Rights Watch welcomes the government's actions in recent years to improving the situation of migrant rights in Malta, and its repeated efforts to provide adequate care for unaccompanied migrant children. However, the government continues to detain unaccompanied migrant children pending age determination, despite the availability and feasibility of alternative care arrangements. And while the government has taken clear steps towards establishing adequate age determination procedures, the remaining delays – and reliance on lengthy medical tests – leaves children in detention for far too long. Finally, the government fails to provide children with adequate guardianship and legal representation in compliance with the standards articulated in the Convention and in General Comment No. 6.

### **Treatment of unaccompanied migrant children**

In the ten-year period from the beginning of 2002 to the end of 2011, approximately 14,000 migrants and asylum seekers have traveled by boat to Malta, a huge increase from previous years. Numbers peaked in 2008, with 2,775 migrants entering, and in 2011, 1,579 migrants entered Malta by boat. Approximately 99% of these migrants apply for asylum.<sup>2</sup> Most of these migrants are from sub-Saharan Africa, and depart from Libya to cross the Mediterranean Sea in basic vessels with limited navigation systems, food, water, and fuel.

Since 2002 approximately 700 of these migrants have been unaccompanied migrant children. In 2011, for example, there were 61 unaccompanied minors recognized by the Maltese authorities after an age determination process, of whom 29 were from Somalia. Seven unaccompanied minors were girls.<sup>3</sup> Whereas most children who arrive with their families are quickly accommodated in open centers outside detention, almost all unaccompanied migrant children are detained for weeks or months pending age assessment, in detention facilities with unrelated adults.

In addition to three primary immigration detention facilities,<sup>4</sup> Malta operates a number of “open” (non-custodial) reception centers in order to assist adult migrants and migrants in families with housing needs after their release from detention.<sup>5</sup> In addition, Malta operates two open centers specifically for unaccompanied migrant children who have passed Malta's age determination procedures.<sup>6</sup> The conditions in open centers for unaccompanied migrant

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<sup>2</sup> Office of the Refugee Commissioner, Malta, Report, February 2012.

<sup>3</sup> Office of the Refugee Commissioner, Malta, Statistics on Category C (Boat Persons) as on 31/12/2011, on file with Human Rights Watch.

<sup>4</sup> Malta has used a number of detention facilities over time, and has moved groups of migrants between the facilities depending on the emergency nature of the situation. At the time of Human Rights Watch's most recent visit, in April – May 2012, there were three open and occupied detention facilities: Hermes Block, within the Armed Forces of Malta facility at Lyster Barracks, Hal Far (consisting of five “zones” housing different groups of migrants including single men, single women, and families); Safi Warehouse (housing single men); and Safi B Block (housing single men). Both Safi Warehouse and Safi B Block are within the Armed Forces of Malta facility at Safi.

<sup>5</sup> The primary “open centers” in use at the time of Human Rights Watch's most recent visit in April – May 2012 were: the Marsa Open Center, in Marsa (housing single men); and Hal Far Tent Village, Hangar Open Center, Hal Far Reception Center (housing primarily single women), and Hal Far Families Open Center (housing families), all four of which are in Hal Far. All of the Hal Far centers are run by the government Agency for the Welfare of Asylum Seekers, while the Marsa center is run by an NGO, Fondazzjoni Suret il-Bniedem, relying on government funding. There is also a small open center at Balzan, run by the Good Shepard Sisters, a Catholic charity, and several other small facilities.

<sup>6</sup> These facilities are called Dar il-Liedna, in Furga, Malta, and Dar is-Sliem, in Sta Venera, Malta.

children are far more favorable than the conditions in detention, with children provided with adequate shelter, food, and security.

Migrants also arrive in Malta by air. For the most part, these people are not detained. This submission focuses on migrants who arrive by boat, who are considered to have arrived irregularly. Maltese law mandates that a person who enters the country without “right of entry” shall be designated a “prohibited immigrant” and may be detained.<sup>7</sup> An individual who applies for asylum may be detained while the application is being processed,<sup>8</sup> and individuals who have been issued removal orders may be further detained.<sup>9</sup>

For the purposes of this submission, we use the term “unaccompanied child” to describe both unaccompanied and separated children as defined by the Committee:

“Unaccompanied children” are children, as defined in article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. “Separated children” are children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.<sup>10</sup>

## **Detention of Unaccompanied Migrant Children**

(Articles 2, 20, 22, 37)

Our research shows that Malta applies a very low threshold for disputing the age of children, and detains all age-disputed cases pending age determination. As a result, children may be detained for weeks or months pending age assessment despite alternative available facilities, and that such detention is imposed routinely as a response to irregular entry. During detention, children are detained with adults, without any accommodation for their minority.

### ***Lengthy Detention of Unaccompanied Migrant Children***

Malta detains virtually every migrant who arrives by boat, for up to 18 months.<sup>11</sup> Various categories of vulnerable migrants are detained for shorter periods. Unaccompanied children are routinely detained pending age determination. Our interviewees who reported that they

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<sup>7</sup> Immigration Act Cap 217 Laws of Malta, Article 5(1) and Article 14(2).

<sup>8</sup> Immigration Act Cap 217 Laws of Malta, Article 5(1) and Article 14(2).

<sup>9</sup> Article 14(2) of the Immigration Act.

<sup>10</sup> UN Committee on the Rights of the Child, “Treatment of Unaccompanied and Separated Children Outside their Country of Origin,” General Comment No. 6, UN Doc. CRC/GC/2005/6 (2005), paras. 7-8.

<sup>11</sup> The Maltese Immigration Act does not establish a maximum duration for administrative detention. However, since 2005 the Maltese authorities have capped detention at 12 months for asylum seekers and at 18 months for those who have not applied for asylum or whose asylum claims have been rejected. 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, para. 11, June 2011.

were detained as children were between 15 and 17 years old at the time of detention<sup>12</sup>; two interviewees reported that there were children between 12 and 14 detained with them.<sup>13</sup>

The age determination procedure can take some months, leaving children in detention for considerable periods of time. Among those we interviewed who were children at the time of the interview or who were children on arrival in Malta, the maximum time in detention was seven months (in 2011). Among those we interviewed who were determined to be children in Malta's age determination procedure (who were detained between 2008 and 2011), the average time in detention was 3.4 months.<sup>14</sup>

For example, Kibreab A., who was 17 when he arrived in Malta from Eritrea in 2009, told us he was detained for five months before being released to a children's home.<sup>15</sup> Isaias B., an Eritrean 17-year-old, arrived in Malta aged 16 in 2011, and was detained for 5 months. After leaving the Ivory Coast and traveling for several months, Stéphane K. was 16 when he reached Malta in 2011. He was detained for seven months awaiting age assessment. He commented: "For someone [at that age] to be in detention, it's not normal. Seven months of detention, it's not normal. Shut in, I can't go out. It's not normal."<sup>16</sup>

On a more positive note, compared with summer 2011, for example, detention times appear to have dropped in early 2012. This may be due to the fact that facilities are less crowded during the winter months because fewer migrants cross the Mediterranean during this time, rather than a fundamental change in Malta's policies. For example, Dalmar H., Nadif K., Korfa A., and Erasto M., all Somali boys aged 17, said they were detained for two weeks when they arrived in January 2012.<sup>17</sup>

Article 37(b) of the CRC permits detention of children "only... for the shortest appropriate period of time." The months unaccompanied migrant children spend in detention in Malta seem to exceed these parameters. Despite the relatively quick release of children in January 2012, this does not seem to be a permanent policy change, and we are concerned that detention of children for two weeks solely for the purposes of age determination, is not necessary. Best practices mandate that unaccompanied children should never be detained for reasons related to their immigration status or illegal entry, and that pending age assessment, the person claiming to be a child should provisionally be treated as such.<sup>18</sup> While we recognize that placing migrants pending age determination in the unaccompanied minor facilities may not be appropriate, there is no reason why they could not be released to "open centers" or similar facilities, to prevent prolonged detention of children.

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<sup>12</sup> Human Rights Watch interviewed 22 people in this category from March to May 2012.

<sup>13</sup> Human Rights Watch interviews with Abdi M. and Ghedi H., Valetta, April 27, 2012.

<sup>14</sup> Human Rights Watch interviewed 11 boys who went through the age determination procedure and were determined to be children. The average time in detention (pending age determination) for these boys was 3.4 months.

<sup>15</sup> Human Rights Watch interview with Kibreab A., Marsa, Malta, March 14, 2012.

<sup>16</sup> Human Rights Watch interview with Stéphane K., Marsa, Malta, March 15, 2012.

<sup>17</sup> Human Rights Watch interviews with Dalmar H., Nadif K., Korfa A., and Erasto M., Marsa, Malta, March 15, 2012.

<sup>18</sup> Save the Children, UNHCR, UNICEF (Separated Children in Europe Program), Statement of Good Practice, 4th Revised Edition, D5 and D6 (2009).

### ***Immediate, automatic detention***

Immediately after landing, virtually all migrants who arrive in Malta by boat – including unaccompanied migrant children – are detained because of irregular entry into the country without correct papers. Children are held in detention for months despite, as noted above, the availability of alternative facilities.

Typically, the first contact between unaccompanied migrant children and the authorities involves the police or the Armed Forces of Malta, depending on whether the boat reaches land or is intercepted at sea. In either case, the migrants and asylum seekers on board are transferred to the custody of the Malta Police, Immigration Section, which is responsible for border control.<sup>19</sup> The Police Immigration Section conducts the first asylum screening and takes virtually all of the passengers to detention.<sup>20</sup>

Even if an unaccompanied child identifies himself as a child during this initial contact with authorities, he will most likely still be taken to detention. We were told by the Agency for the Welfare of Asylum Seekers and Detention Service that only age disputed cases are detained, with those who are “visibly” children released from detention within 24 hours<sup>21</sup> and placed in the care of AWAS.<sup>22</sup>

But the problem is that it appears that in practice the cut-off is for children who look to be around 12 or 14 years old, with children who appear older presumed to be adults until an age assessment is carried out. Those who are not “visibly” children – using this relatively young, ad-hoc cut-off – are taken straight to detention following an irregular entry.<sup>23</sup> For example, on April 30, 2012, Human Rights Watch met with three boys detained in an immigration facility who said they had been taken straight into detention after arriving by boat two days earlier. Two of the boys, aged 15 and 16, were visibly children according to Human Rights Watch’s assessment: we were able to walk down a crowded hallway inside the detention facility and identify them by sight, having no previous knowledge of children detained in that facility. On the day of arrival, all three boys said they told the arresting authorities their birthdates during a routine data collection, but all three were taken straight to immigration detention and none were provided with information about procedures to establish their minority.<sup>24</sup>

Their experience is similar to that described by other interviewees. Bello E., who said he was 16 when his boat was intercepted near Malta, reported “before we knew it we were in detention... I tried to tell I was 16. They didn’t accept it, they sent me back into Safi... I had not committed a

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<sup>19</sup> General Directors’ Immigration Services Conference, Malta profile, [http://www.gdisc.org/index.php?id=187&no\\_cache=1&tx\\_gdiscdb\\_pi3%5BshowUid%5D=28](http://www.gdisc.org/index.php?id=187&no_cache=1&tx_gdiscdb_pi3%5BshowUid%5D=28).

<sup>20</sup> Human Rights Watch interview with Supt. Sandro Zarb, International Relations Unit and Supt. Neville Xuereb, Immigration Department, Malta Police, Floriana, Malta, May 1, 2012.

<sup>21</sup> Human Rights Watch interview with Supt. Sandro Zarb, International Relations Unit and Supt. Neville Xuereb, Immigration Department, Malta Police, Floriana, Malta, May 1, 2012.

<sup>22</sup> E.g. Human Rights Watch interview with Lt. Col. Brian Gatt, Commander Detention Service, Ministry for Justice and Home Affairs, Safi Barracks, Safi, Malta, April 26, 2012.

<sup>23</sup> Human Rights Watch interview with Supt. Sandro Zarb, International Relations Unit and Supt. Neville Xuereb, Immigration Department, Malta Police, Floriana, Malta, May 1, 2012.

<sup>24</sup> Human Rights Watch interviews with Amr S., Khaled M., and Hossein D., Safi, Malta, April 30, 2012.

crime. Why was I in prison?”<sup>25</sup> Labaan X., a young Somali who said he came to Malta when he was 15 years old, described to Human Rights Watch what happened after arriving in the country:

I got off the boat and went straight to detention. I said I was a child. But I spent three months in detention before they put me in a home for young people.<sup>26</sup>

Article 37(b) mandates that the detention of children “shall be used only as a measure of last resort.” In addition, the Committee has stated in General Comment No. 6 that unaccompanied migrant children should not be criminalized for the sole reason of illegal entry or presence in the country.<sup>27</sup> Malta’s policy of routine detention of unaccompanied migrant children who arrive by boat, pending age determination, stands in stark contrast to these standards.

### ***Detaining children with adults***

Detained migrant boys are routinely held in overcrowded conditions with unrelated adult men.

For example, Labaan, at age 15, said he was detained in 2008 for three months in the Ta Kandja facility.<sup>28</sup> He told us: “[It] was very difficult. I was in the same room with 100 guys.”<sup>29</sup> Kibreab, an Eritrean who arrived in Malta at the age of seventeen in 2009, said he was detained with unrelated adults for five months before being moved to a children’s facility. He complained to Human Rights Watch that the room was small for the 50 people that were staying there.<sup>30</sup> Seventeen-year-old Stéphane, an Ivorian who was 16 when he arrived in Malta in 2011, was not so lucky: he was detained in one room with 200-300 adult men. “The room wasn’t that big – we had bunk beds,” he told us.<sup>31</sup>

While some children reported that they did not feel unsafe while detained with adults, others reported instances of exploitation and violence. Ghedi H., who was detained with adult men in 2008 when he was 17 years old, commented, “sometimes they would take my food, adults would take my food because there’s not enough.”<sup>32</sup> Abdi M., a Somali migrant who was detained at the same time as Ghedi, and who was 17 years old when detained, related what happened to him at the Safi detention facility:

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

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<sup>25</sup> Human Rights Watch interview with Bello E., Marsa, March 13, 2012, and follow up interview, Marsa, April 25, 2012.

<sup>26</sup> Human Rights Watch interview with Labaan X., Marsa, Malta, March 13, 2012.

<sup>27</sup> United Nations Committee on the Rights of the Child, General Comment No. 6 para 62

<sup>28</sup> The Ta Kandja facility is no longer in use as an immigration detention facility. Email to Human Rights Watch from Lt. Col. Gatt, May 2, 2012. However, the policies permitting detention of unaccompanied migrant children pending age determination with adults has not changed.

<sup>29</sup> Human Rights Watch interview with Labaan X., Marsa, Malta, March 13, 2012.

<sup>30</sup> Human Rights Watch interview with Kibreab A., Marsa, Malta, March 14, 2012.

<sup>31</sup> Human Rights Watch interview with Stéphane K., Marsa, Malta, March 15, 2012.

<sup>32</sup> Human Rights Watch interview with Ghedi H., Valetta, Malta, April 27, 2012.

hour. I told the soldiers but they said, “we don’t care.” No one helped me, I just cried and went to sleep.<sup>33</sup>

During Human Rights Watch’s visit to Maltese detention facilities in April 2012, we met with three boys co-mingled with adults in a detention centre for single men. Two of the boys, who reported their ages as 15 and 16 years old, were visibly scared. Amr S., the 15 year old, said “It’s very difficult to live here at Safi. I’m afraid to live where people might hit me... I don’t have anyone to take care of me.”<sup>34</sup> Edgard O., a 26-year-old Ivorian man who was detained in the same facility as the boys, commented: “To be honest with you, I was a little bit concerned to see they were here [the boys.] Fifteen years old – he doesn’t deserve this.”<sup>35</sup>

The toll of detention caused mental stress for some of our interviewees. For instance, Kelile T., who said he was 17 when his boat was intercepted near Malta, had just been returned to detention after 15 days at a state psychiatric hospital. He commented: “These people, all big, big - not same as me. This is prison. These [people] are older ages. Only me, and this guy and another - they are the only ones like us... I take medicine now, for sleep. No medicine, I can't sleep... My mind is no good, it is very hard.”<sup>36</sup>

Detaining unaccompanied migrant children with adults is in clear violation of CRC, article 37, further elaborated in the Committee’s General Comment No. 6. The Committee states “special arrangements must be made for living quarters that are appropriate for children and that separate them from adults.” Malta has not made such arrangements for children pending age determination.

### **Recommendations to Malta:**

- End the unnecessary detention of unaccompanied migrant children.
  - o Amend legislation to prohibit the detention of migrant children for the sole reason that they have arrived irregularly in Malta.
  - o In the interim period while detention continues, use separate detention facilities for those with pending age determination requests.
- Reform the age determination procedure to treat applicants as children until proven otherwise.
  - o Release those with pending cases to alternate facilities until age determination is completed.

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<sup>33</sup> Human Rights Watch interview with Abdi M., Valetta, Malta, April 27, 2012.

<sup>34</sup> Human Rights Watch interview with Amr S., Safi, Malta, April 30, 2012.

<sup>35</sup> Human Rights Watch interview with Edgard O., Safi, Malta, April 30, 2012.

<sup>36</sup> Human Rights Watch interview with Kelile T., Safi, Malta,

## **Insufficient Age Determination Procedures**

(Articles 8, 12, 37(b))

Age determination procedures in Malta can take several months, leaving children in detention pending the outcome. Malta's Agency for the Welfare of Asylum Seekers (AWAS) has, to its credit, instituted a relatively sophisticated age determination procedure in the short period of time that unaccompanied children have been arriving by boat. Nonetheless, the procedure needs several improvements – including a reduction in processing time, increased provision of information to incoming children, a lessened reliance on medical testing, and some type of interim care order to release children from detention pending age determination.

### ***Extended processing times***

Our research shows that age determination in Malta can take too long – especially when children remain in detention – and relies unnecessarily on invasive medical testing.

For example, Labaan, the Somali boy who arrived in Malta at 15 in 2009, went to detention pending a long age assessment: "I had to wait for three months in detention. Two months before they [AWAS age determination officials] questioned me."<sup>37</sup> In an interview with an NGO staff member who routinely works within the detention centers, Human Rights Watch was told that in 2008 and 2009, some asylum procedures actually moved more quickly than age determination procedures. Accordingly, some adult asylum seekers who arrived at the same time as children awaiting age determination were released from detention while the children remained behind bars.<sup>38</sup> This may have the effect of discouraging children from disclosing that their age for fear that it could extend their period of detention.

As noted above, in early 2012 some migrant children have moved more quickly through the age determination process and out of detention, some in as little as two weeks. Likewise, Agency for the Welfare of Asylum Seekers (AWAS) has made clear attempts to take policy steps to shorten the process, including by setting internal benchmarks for preliminary interviews with children within 10 working days of arrival, and by participating in training initiatives through common European mechanisms.<sup>39</sup> But while Malta continues to detain children pending age assessment, any delay in the procedure results in children unfairly detained.

General Comment No. 6 indicates that age determination is a procedure that should be prioritized immediately after arrival in the country, and that the best interests of the child should be a guiding principle in these proceedings.<sup>40</sup> Furthermore, children should never be detained for reasons related to their immigration status. Malta's lengthy age determination

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<sup>37</sup> Human Rights Watch interview with Labaan X., Marsa, Malta, March 13, 2012.

<sup>38</sup> Human Rights Watch interview with NGO staff member, Birkirkara, M February 27, 2012.

<sup>39</sup> Human Rights Watch interview with Sarah Borda Bondin, Service Manager, Agency for the Welfare of Asylum Seekers, Ministry for Home and Parliamentary Affairs, Sliema, Malta, April 30, 2012.

<sup>40</sup> CRC Article 8, General Comment No. 6 paragraph 31 (a).

procedures, in combination with routine detention of children in age disputed cases and low threshold for disputing age, stand in opposition to these principles.

### ***Lack of screening and reliance on self-identification***

Some migrants who request an age determination procedure are seemingly ignored: interviewees reported telling authorities they were minors but never receiving age determination procedures. Other children never request an age determination because they lack information on the procedure and its benefits.

For example, Perry O., a Ghanaian migrant, said he traveled to Malta shortly before his 17<sup>th</sup> birthday in 2008. He reported that he told the detention guards that he was 16 years old, but he was never given an interview with AWAS or a medical test to determine his age. He did not know if the guards ever reported his claim to AWAS.<sup>41</sup> Chris K., from Nigeria, was 17 when he arrived in 2007. He reported to Human Rights Watch: "I told them I was a child but they still put me in detention for 10 months. I told the police when I came in."<sup>42</sup> Like Perry, Chris never received an interview with AWAS and said he does not know what happened to his claim.

A number of our interviewees chose not to report their minority to the authorities, often on the advice of fellow migrants. Ali K., a Malian migrant who came to Malta at 17 years old, received such advice: "I came when I was 17. I spoke no English, I had no-one who could understand me. I was told by a Somali guy not to reveal my age."<sup>43</sup> Bello, a Nigerian migrant who reached Malta when he was 16 years old, had a similar story: "The captain told all the people on my boat not to say we were below 18."<sup>44</sup> Bello later tried to report his real age:

Before we knew it we were in detention. They just record your details, you don't know what we're supposed to do.... When I got information from immigration, I rushed back to say I'm 16. I went back to the security to tell them I was a child... They didn't accept it, they sent me back into Safi [the detention facility].<sup>45</sup>

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

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<sup>41</sup> Human Rights Watch interview with Perry O., Sliema, Malta, March 16, 2012, and follow up, Bugibba, Malta, April 28, 2012.

<sup>42</sup> Human Rights Watch interview with Chris K., Marsa, Malta, April 25, 2012.

<sup>43</sup> Human Rights Watch interview with Ali K., March 14, 2012 (real name).

<sup>44</sup> Human Rights Watch interview with Bello E., March 13, 2012.

<sup>45</sup> Human Rights Watch interview with Bello E., Marsa, March 13, 2012, and follow-up interview, Marsa, April 25, 2012.

### ***Heavy reliance on medical testing***

There is an increasing pool of evidence indicating that medical tests fail to provide sufficient levels of accuracy for their use to be a prominent part of the age determination process, especially when coupled with the ethical concerns of subjecting children to unnecessary and invasive medical procedures. In Malta, many children have their wrists x-rayed as part of the age determination procedure.<sup>46</sup> Some interviewees reported that they endured a significant wait after the medical test before their age determination was finalized. For instance, Adama, a 17-year-old Ivorian who arrived in Malta when he was 16 in 2011, reported: "A machine looked at my hand. After the machine, I waited [in detention] for one or two months more, it was one month after that that my friend left, and then one month more, so two months total."<sup>47</sup>

Medical examinations used to determine the age of presumed children are subject to margins of error of up to five years.<sup>48</sup> Pediatricians have further criticized the fact that some exams expose children to X-ray for non-medical purposes as a violation of medical ethics.<sup>49</sup> The Committee and UNHCR have both asked states not to base age assessments solely on the physical appearance of a child, but to also consider his or her psychological maturity, to take into account the margin of error that medical exams are subject to, and to give the child the benefit of doubt.<sup>50</sup>

Standards for age assessment of migrants differ tremendously among and within EU Member States.<sup>51</sup> Medical examination is just one possibility for age determination, along with personal interviews, searches for documentation, and psychological evaluation.<sup>52</sup> Malta should avail itself of best practices elsewhere in Europe and of guidelines promoted by agencies such as UNHCR in order to decrease reliance on invasive medical tests.

### **Recommendations to Malta:**

- End the policy of detaining children in age-disputed cases pending age assessment.
- Take all practical steps to reduce the time of age assessment proceedings, including by:
  - o Supporting AWAS with additional capacity during peak seasons; and
  - o Encouraging faster processing of medical testing.

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<sup>46</sup> Human Rights Watch interview with Kibreab A., Marsa, Malta, March 14, 2012.

<sup>47</sup> Human Rights Watch interview with Christophe G., Fgura, Malta, May 3, 2012.

<sup>48</sup> "Age determination is an inexact science and the margin of error can sometimes be as much as 5 years either side." Royal College of Paediatrics and Child Health, *The Health of Refugee Children: Guidelines for Practitioners* (London: 1999), p. 13.

<sup>49</sup> *Ibid*, pp. 13-14.

<sup>50</sup> United Nations High Commissioner for Refugees (UNHCR), "Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum" (hereafter UNHCR Guidelines), February 1997, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae6b3360> (accessed September 1, 2008), section 5.11; Committee on the Rights of the Child, "Treatment of Unaccompanied and Separated Children outside their Country of Origin," General Comment No. 6, CRC/GC/2005/6 (2005), para. 31 (i).

<sup>51</sup> Council of Europe, Parliamentary Assembly, *Unaccompanied Children in Europe: Issues of Arrival, Stay and Return*, Rapporteur: Ms Mailis Reps, Estonia, Section 3.2.2, Paragraph 30, available at: <http://assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12539.pdf>.

<sup>52</sup> *Id.* at para. 32.

- Further embrace best practices in the age assessment field:
  - o Carry out assessments only if there are reasonable doubts about a person being underage.
  - o Base assessment on the presumption of minority.
  - o Reduce reliance on medical testing by using multi-disciplinary assessments by an independent authority.
  - o Indicate the margin of error in medical testing.
  - o If doubts remain that the person is underage, grant the benefit of the doubt.
  - o Provide for administrative or judicial appeal of assessment decisions.
- Instruct arresting officers, detention staff, and all others with routine contact with migrants to heed migrants' reports of minority, increase efforts to identify those who might be children, and refer both categories to the age determination procedure within a speedy time frame.

### **Incomplete Guardianship and Lack of Legal Representation**

(Articles 20(1), 22, 37)

#### ***Lack of meaningful guardianship***

Children we interviewed reported that they did not receive adequate assistance in preparing asylum applications, nor did they receive any other meaningful assistance from their legal guardians, in making decisions for the future. While each child is technically assigned a legal guardian,<sup>53</sup> the resulting procedure is bureaucratic and does not respond to these children's need for guidance in asylum proceedings, access to education, or finding part-time work.

Care for unaccompanied migrant children is split between three ministries and numerous agencies, meaning their needs can fall into a bureaucratic void. At the conclusion of the age determination procedure, the Minister for Justice and the Family issues a care order for the child, at the direction of the Children and Young Persons Advisory Board. The child is then placed in a group home run by the Agency for the Welfare of Asylum Seekers (AWAS), an entity under the Ministry of Home and Parliamentary Affairs. Children under AWAS's care are entitled to education – though issues of truancy and language often arise – and at that stage their needs fall to the Ministry of Education.

While Malta is to be praised for its multi-faceted commitment to the welfare of these children, a more comprehensive and less bureaucratic guardianship system could deliver individualized care to each child. The group homes run by AWAS have social workers on staff, but they do not

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<sup>53</sup> Human Rights Watch interview with Mario Friggieri, Refugee Commissioner, Valetta, Malta, April 27, 2012.

necessarily coordinate with the child's "official" guardian at the Ministry for Justice and the Family. Children report that the group homes meet their basic needs but do not offer more. For example, Labaan, who was 16 when he moved from detention to a group home, commented, "They gave me 7 Euros a week, food, and a home."<sup>54</sup>

Likewise, Maltese law permits unaccompanied migrant children to attend school, and AWAS has several initiatives to encourage attendance.<sup>55</sup> There are a small number of positive examples of unaccompanied migrant children who have gone on to higher education.<sup>56</sup> However, particularly past the age of 16, the school leaving age in Malta, children report that language and other barriers make further attendance difficult, and that their guardians do not help them access education. Abdi, who was 17 when he moved into a group home, stated "I had a bad time... There was no school. A teacher came once a week. I couldn't go to a Maltese school, they told me I wasn't Maltese."<sup>57</sup> Kibreab, who was also 17 when he moved to the group home, highlighted a common concern for these children: "I tried to go [to school] but I stopped. I had to work."<sup>58</sup> An NGO worker, himself a migrant, who works on access to education, emphasized the difficulty children face negotiating these hurdles without guidance: "From our experience working with [the unaccompanied minors] we can see there are problems: no clear guidelines for integration, language issues, and problems with identity."<sup>59</sup>

The guardianship system does little to provide advice on asylum or other issues of importance to the children's future. Labaan stated that at his asylum procedure, "there was a legal guardian but she said nothing. She gave me no advice beforehand."<sup>60</sup> According to the Committee, an asylum-seeking child should be represented by an adult who is familiar with the child's background and who is competent and able to represent his or her best interests.<sup>61</sup> Such an adult – a guardian – should have "the necessary expertise in the field of childcare, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered."<sup>62</sup> Malta needs to do more – through training, coordination, and additional staffing – to ensure a meaningful system of guardianship that provides individualized care and responds to unaccompanied migrant children's varied needs.

### ***Lack of legal representation in asylum procedures and in challenging detention***

Unaccompanied migrant children in Malta receive little or no legal representation, either in challenging their detention or in requesting asylum. The Maltese government relies heavily on non-governmental and inter-governmental organizations, including the Jesuit Refugee Service

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<sup>54</sup> Human Rights Watch interview with Labaan X., Marsa, Malta, March 13, 2012.

<sup>55</sup> Human Rights Watch interview with Anne-Marie Pisani, coordinator, Dar il-Liedna group home, Fgura, Malta, May 2, 2012.

<sup>56</sup> There are five students who have enrolled in foundation courses at the Maltese College of Arts, Science and Technology. Human Rights Watch interview with Helen d'Amato, Children's Commissioner of Malta, Santa Venera, Malta, April 26, 2012.

<sup>57</sup> Human Rights Watch interviews with Abdi M. and Ghedi H., Valetta, April 27, 2012.

<sup>58</sup> Human Rights Watch interview with Kibreab A., Marsa, Malta, March 14, 2012.

<sup>59</sup> Human Rights Watch interview with NGO staff member, Birkirkara, Malta, March 1, 2012.

<sup>60</sup> Human Rights Watch interview with Labaan X., Marsa, Malta, March 13, 2012.

<sup>61</sup> General Comment No. 6, Para 69.

<sup>62</sup> General Comment No. 6, Para 33.

and UNHCR, to provide counseling to unaccompanied migrant children and other vulnerable migrants in detention. However, this is insufficient to meet the government's full obligations to provide legal representation.

The Maltese government has made great strides in asylum processing in the 10 or so years since it has started receiving significant numbers of asylum applications, and now has one of the fastest processing times and lowest backlog in the European Union. Simultaneously, those responsible for first instance decisions in the Office of the Refugee Commissioner have undergone training on the specific needs of children seeking asylum through the EU-sponsored European Asylum Curriculum, and the Refugee Commissioner has urged his staff to view children's cases in light of child-specific forms of persecution and appropriate credibility standards. While the Maltese government is to be commended on these steps, it could take further action to ensure that unaccompanied migrant children requesting asylum receive legal representation.

As the Committee has articulated in General Comment No. 6, children involved in asylum procedures should, in addition to the appointment of a guardian, be provided with legal representation.<sup>63</sup> The lack of representation in first instance proceedings impacts children's capacity to understand the proceedings and present their case. Labaan, one of our interviewees, struggled to understand the asylum procedure: "I had three interviews with two different people. It made me confused. I now have humanitarian status. I don't know when it expires."<sup>64</sup>

In meeting with Human Rights Watch, the Refugee Commissioner stressed that Malta has one of the highest rates of asylum applications per capita in the industrialized world, and pointed to this as a reason why legal representation in the first instance is hard to provide to all migrants.<sup>65</sup> He also noted that Malta has a very high recognition rate of granting some form of protection to asylum applicants, suggesting that legal representation to all at first instance is unnecessary. Nonetheless, provision of legal representation to unaccompanied migrant children is important particularly to ensure that those who are entitled to refugee status rather than temporary protection are granted it. There are a relatively small number of children in this category – approximately 50-75 – who claim asylum each year.

Likewise, unaccompanied migrant children who are deprived of their liberty through detention for illegal entry do not receive legal representation. According to the European Court of Human Rights in *Louled Massoud*, the Maltese legal system lacks the necessary "effective and speedy remedy" for challenging the lawfulness of immigration detention. Article 37(d) of the Convention mandates that children deprived of their liberty should have prompt access to

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<sup>63</sup> General Comment No. 6, para. 33.

<sup>64</sup> Human Rights Watch interview with Labaan X., Marsa, Malta, March 13, 2012.

<sup>65</sup> Human Rights Watch meeting with Mario Friggieri, Valetta, Malta, April 27, 2012.

legal assistance, and the Committee emphasizes in General Comment No. 6 that this specifically applies to unaccompanied migrant children in immigration detention.<sup>66</sup>

### **Recommendations to Malta:**

- Ensure adequate, individualized guardianship for each unaccompanied migrant child:
  - o Streamline the coordination between agencies; institute a review process (perhaps housed with the Ministry of Justice, Dialogue, and the Family) to evaluate regularly the effectiveness of the guardianship process.
  - o Transfer additional resources to AWAS so that they may provide meaningful guardianship directly to the children in their care.
  - o Provide additional training to those who function as guardians to unaccompanied migrant children so that they might advise children on their specific needs, including but not limited to asylum, other immigration options, education, and future development.
  
- Ensure adequate free legal representation for unaccompanied minor children:
  - o Provide unaccompanied minor children with free legal representation in all stages of asylum proceedings.
  - o Provide unaccompanied minor children with free legal representation to challenge the legality of their detention.
    - Change the legal framework of migrant detention so that children may challenge their detention without waiting for the conclusion of the age determination process.

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We encourage the Committee to take these findings into account during Malta's pre-sessional review. In particular, we recommend that the Committee request the Maltese government to provide information that demonstrates how its policy commitments will contribute to concrete improvements in the treatment of unaccompanied migrant children.

In addition to our detailed recommendations above, we further encourage the Committee to:

- Urge Malta to take immediate steps to end the detention of unaccompanied migrant children.

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<sup>66</sup> General Comment No. 6, para. 63.

- Request information from Malta on adjustments to the age determination procedure to speed up the process so that unaccompanied migrant children can be released from detention more rapidly.
- Request information from Malta on steps taken toward the provision of meaningful guardianship and free legal representation to unaccompanied migrant children.

We strongly believe that sustained monitoring of the Maltese government by the UN and other rights bodies are crucial to ensure that the rights of marginalized children, such as unaccompanied migrant children, are best respected.

We hope you will find these comments useful and would welcome an opportunity to discuss them further with you. Thank you for your attention to our concerns, and with best wishes for a productive session.

Sincerely,



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