



## **Further Information Submitted under Article 20 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment**

Additional information relating to the request submitted by the Centre Suisse pour la Defense des Droits des Migrants on 26th June 2020 concerning Italy's liability for the torture of migrants crossing the Mediterranean from Libya

**Geneva, 16 November 2020**

<b>CONTENTS</b>	<b>PAGE</b>
Introduction	2
The Facts	3
Italy	3
Malta	7
The Law	13
Jurisdiction	13
Torture	14
Systematic	20
Conclusion	21

## INTRODUCTION

1. On 26th June 2020 the Centre Suisse pour la Defense des Droits des Migrants ('CSDM') submitted information to the Committee seeking an inquiry under Article 20 UNCAT into the responsibility of Italy in the systematic torture of migrants pulled-back to Libya. The purpose of the present document is to provide an update relating to recent developments along the Mediterranean migration route for the Committee's attention. These developments have occurred since the original inquiry submission and are relevant to its consideration. They have occurred during the summer months when migratory movements across the Mediterranean reach their peak. We request that the information contained herein be considered alongside the original information in determining the application of the Article 20 UNCAT inquiry procedure.
2. Although our request for an inquiry procedure under Article 20 UNCAT concerns only Italy, some of the information provided below relates to practices of the authorities of Malta. We submit also this information in order to give the Committee the broader context of what is currently happening in the Mediterranean. To be clear, we are not asking the Committee to broaden its inquiry procedure to include Malta in addition to Italy.
3. Although the original information was prepared and submitted by the CSDM alone, this further information has been jointly prepared by the CSDM and the World Organisation Against Torture ('OMCT').
4. The issue set out in this further information concerns the repeated occurrence of sea vessels with rescued migrants onboard being refused permission to disembark at a safe port by authorities in both Italy and Malta. As a consequence of refusing such permission, the vessels are prevented from docking at the nearest safe port from the point at which migrants are rescued in accordance with established principles of human rights and maritime law. This has resulted in the migrants enduring prolonged periods of time in the Mediterranean Sea on board a vessel without adequate resources or medical attention or the ability to seek protection under the Refugee Convention. For the reasons set out below, these occurrences are demonstrative of a 'Closed Ports' policy<sup>1</sup> and amount to evidence of a systematic practice of torture and cruel, inhuman and degrading treatment of migrants by both Italy and Malta.
5. This further information is separated into two sections, the first setting out the relevant factual details concerning the 'Closed Ports' policy in relation to both Italy and Malta, and the second detailing the applicable legal principles demonstrating the policy

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<sup>1</sup> The use of the term 'Closed Ports' policy here is not an official term used by either governments of Italy or Malta, but a term commonly adopted by the media and commentators to refer to the repeated and systematic occurrence of sea vessels carrying refused migrants being refused permission to disembark. The term is adopted herein as shorthand to refer to this practice.

amounts of evidence of systematic practice of torture or cruel, inhuman and degrading treatment.

## THE FACTS

### A. Italy

6. The ‘Closed Ports’ policy in Italy must be considered in the context of the wider Italian strategy to prevent migrants coming from Libya, as set out in detail in the original information submitted to the Committee on 26th June 2020, which has historical roots. However, the ‘Closed Ports’ policy of refusing permission to disembark to vessels carrying rescued migrants as a means of preventing and deterring migrants arriving began in 2018 after the electoral success of the Lega, an anti-immigration political party. The election resulted in Matteo de Salvini [‘Salvini’] being appointed Minister of the Interior in June 2018 who stated that "the good times for illegal immigrants were over", adding that they should "get ready to pack their bags"<sup>2</sup>
7. Immediately after his appointment, in early June 2018, Salvini commenced preventing migrants from arriving in Italy by refusing permission to disembark to the Aquarius, a ship operated by Doctors Without Borders and SOS Méditerranée, carrying 629 rescued migrants crossing the Mediterranean. This included 123 unaccompanied minors, 11 other children and several pregnant women. The vessel was brought to Italian waters and sought permission to disembark and for the migrants on board to be processed for their eligibility for asylum in Italy. The vessel was refused permission to disembark at an Italian port by orders made by Salvini.<sup>3</sup>
8. Upon being refused permission, the migrants were stranded at sea on board the Aquarius with no port to receive them. Despite the confirmation of the unaccompanied minor children, pregnant women and individuals in need of immediate medical attention, the Italian government continued to refuse to allow the vessel to disembark in Italy. After 8 days, the Prime Minister of Spain granted permission for the vessel to disembark at Valencia, where the migrants received medical attention and were permitted to claim refugee protection.
9. The head of MSF Spain stated, “[this] is a very negative precedent. The truth is there is a question on the table as to whether this is a single event which is resolved quickly, or if we will no longer be allowed to dock in Italy and the blockage continues which would

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<sup>2</sup> BBC News, “Italy migrants: Matteo Salvini calls for end to Sicily 'refugee camp'”, 3rd June 2018  
<https://www.bbc.com/news/world-europe-44346084>

<sup>3</sup> Financial Times, “Italy refuses port access to migrant rescue boat”, 11 June 2018;  
<https://www.ft.com/content/7c6b73a4-6cfe-11e8-92d3-6c13e5c92914>.

completely change rescue operations.”<sup>4</sup> On the other hand, Salvini declared this outcome as a ‘victory’ for Italy.<sup>5</sup>

10. Following this precedent, other vessels were refused permission to disembark at Italian ports including Lifeline and NGO vessels such as Sea Watch, Sea Eye, Mediterranean and Open Arms<sup>6</sup>. An Italian Coast Guard vessel was also prevented from docking at an Italian port.<sup>7</sup> Between June 2018 to July 2019, MSF documented that 2,443 people remained at sea while waiting for authorization to disembark in Italy.<sup>8</sup>
11. In May 2019, Salvini drafted a new law, dubbed “the Decreto Sicurezza Bis”, which set out fines for NGO vessels of up to € 5,500 per rescued person.<sup>9</sup> The tabled decree included provisions which give the Interior Minister the power to restrict and prohibit transit within Italian territorial waters.
12. After the new law was passed, in June 2019 the German charity rescue and Dutch-flagged vessel Sea Watch 3 was sailing in the Strait of Sicily. Following a rescue operation, the vessel had to remain at sea for 16 days awaiting authorisation to dock in a place of safety.<sup>10</sup> Amongst those rescued on board were toddlers and pregnant women. During this period Salvini declared no NGO would set foot in Italy to land migrants any more, blaming Europe for its inaction.
13. On 15 June 2019 Italian authorities allowed 10 migrants to disembark due to medical concerns.<sup>11</sup> Captain Carola Rackete was arrested after manoeuvring the ship carrying some 41 migrants<sup>12</sup> into the port of Lampedusa without permission, a crime punishable by between three and 10 years in jail.<sup>13</sup> Rackete was later released but continues to face possible charges for helping illegal immigration.<sup>14</sup>

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<sup>4</sup> TheLocal.IT, “Rejected migrant ship is ‘symbol of EU’s failure’”, 15 June 2018;

<https://www.thelocal.it/20180615/rejected-migrant-ship-is-symbol-of-eus-failure>

<sup>5</sup> The Guardian, “Italian minister declares victory as Spain accepts rescue boat”, 11 June 2018;

<https://www.theguardian.com/world/2018/jun/11/un-calls-for-migrant-ship-to-be-allowed-to-dock-in-italianport>

<sup>6</sup> <https://www.theguardian.com/world/2019/aug/20/spain-sends-warship-to-pick-up-migrants-stranded-in-italian-waters>

<sup>7</sup> Friedrich Ebert Stiftung, “Immigration in Italy Between Two Elections: Myths and Reality”, July 2019; <http://library.fes.de/pdf-files/bueros/rom/15603.pdf>

<sup>8</sup> Ibid.

<sup>9</sup> Global Detention Project, October 2019, op.cit

<sup>10</sup> Infomigrants, “Orphaned in Liberia, Mariam reaches Italy on the Sea-Watch 3”, 26 July 2019; <https://www.infomigrants.net/en/post/18423/orphaned-in-liberia-mariam-reaches-italy-on-the-sea-watch-3>

<sup>11</sup> Ibid.

<sup>12</sup> Euronews, “Sea-Watch captain Carola Rackete released by Italian judge”, 26 July 2019; <https://www.euronews.com/2019/07/02/sea-watch-captain-carola-rackete-released-by-italian-judge>

<sup>13</sup> Al Jazeera, “Sea-Watch enters Lampedusa, captain Carola Rackete arrested”, 29 June 2019; <https://www.aljazeera.com/news/2019/06/sea-watch-enters-lampedusa-captain-carola-rackete-arrested190629050255767.html>

<sup>14</sup> Euronews, 26 July 2019, op. cit.

14. The occurrence of denying permission to sea vessels carrying rescued migrants onboard therefore began in June 2018 following the electoral success of the Lega party, and the appointment of Salvini as Minister of Interior. Since then, and throughout 2019, there were numerous occasions in which vessels were prevented from disembarking resulting in the migrants on board enduring prolonged periods of time without adequate resources or medical supplies. Salvini ended his tenure as Minister of Interior in September 2019.
15. The outbreak of the COVID-19 virus had a significant impact on travel worldwide. Italy was among the first countries to experience a significant and widespread outbreak of the virus and was the first to go into full-country lockdown on 10th March 2020. Significant limitations on the entry of tourists, and compulsory quarantine measures for any arrivals into the country were introduced<sup>15</sup> and domestic travel in Italy was further banned on 23rd March 2020.<sup>16</sup>
16. In response to COVID-19, the Italian government issued a specific decree on 7 April 2020 which prohibited Italian ports from being considered a port of safety for the purpose of incoming vessels carrying rescued migrants. The decree states:
- "For the entire duration of the national health emergency caused by the spread of the COVID-19 virus, Italian ports cannot guarantee the requisites needed to be classified and defined as a place of safety for the landing of people rescued from boats flying a foreign flag".<sup>17</sup>*
17. The impact of this decree was to prevent vessels carrying migrants and refugees rescued in the Mediterranean on the basis that, due to the spread of COVID-19, Italy could not guarantee an absence of threat to their lives. The duration of this decree is to last until the expiry of Italy's 'national health emergency', which was originally declared until 31 July 2020, but has subsequently been extended and is currently due to expire on 31st December 2020, although may be extended upon review beyond this date.
18. Italy's decree came the day after private German search-and-rescue ship, Alan Kurdi, entered Italian waters carrying 146 migrants it had rescued from wooden boats in Libyan waters.<sup>18</sup> The Alan Kurdi is operated by the German NGO 'Sea-Eye', and sails under a German flag.<sup>19</sup> On 6 April 2020, the Alan Kurdi entered Italian territorial waters, Italy however, refused to allow the vessel to port. The Alan Kurdi was instead stuck in a blockade for 12 days, joined by other boats carrying rescued migrants, while Italy, and broadly, the EU, debated their obligations.

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Human Rights Watch, 'EU/Italy: Port Closures Cut Migrant and Refugee Lifeline', 9 April 2020; <https://www.hrw.org/news/2020/04/09/eu/italy-port-closures-cut-migrant-and-refugee-lifeline>; See the official government decree here: Avvenire Italy [...]; [https://www.avvenire.it/c/attualita/Documents/M\\_INFR.GABINETTO.REG\\_DECRETI\(R\).0000150.07-04-2020%20\(3\).pdf?fbclid=IwAR1ND4AFGVqsfno7pzXcIdlG2NIPGcPKUgT1Mjgg6lYqsU-3cEsfPu3ovU4](https://www.avvenire.it/c/attualita/Documents/M_INFR.GABINETTO.REG_DECRETI(R).0000150.07-04-2020%20(3).pdf?fbclid=IwAR1ND4AFGVqsfno7pzXcIdlG2NIPGcPKUgT1Mjgg6lYqsU-3cEsfPu3ovU4)

<sup>18</sup> Human Rights Watch, 'EU/Italy: Port Closures Cut Migrant and Refugee Lifeline', 9 April 2020

<sup>19</sup> Ibid.

19. After significant pressure, Italy delivered food to the Alan Kurdi on 11 April,<sup>20</sup> and finally transferred the passengers onboard an Italian ferry, the Rubattino, for a 14-day quarantine beginning on 17 April 2020.<sup>21</sup> On 19 April, 34 migrants on board a Spanish rescue ship, Aita Mari, were transferred to the same ferry, joining the Alan Kurdi passengers in quarantine.<sup>22</sup> All of the passengers were tested negative for COVID-19,<sup>23</sup> and were allowed to disembark in Palermo, Italy on the 4 May 2020 when the 14-day quarantine period ended. Italian officials announced that most of the migrants would be transferred to other European countries.<sup>24</sup>
20. Even after Italy began to loosen its lockdown measures from 4th May 2020 onwards, the decree has remained in effect and continues to prevent or restrict migrant vessels from safe disembarkation. On 9 May 2020, another rescue vessel, the MV Marina, was prevented from port in Italy for five days, during which time conditions were deemed “intolerable” with food supplies wearing thin, and the 79 migrants onboard forced to sleep on cold steel surfaces on the boat deck.<sup>25</sup> Further, the Alan Kurdi was held for 12 days, and the crew were then also quarantined for 14 days, preventing the Alan Kurdi from conducting search and rescue operations for a total of nearly a month, despite increased numbers of departures from Libya.<sup>26</sup> As a result of the blocks to disembarkation, the German government called for rescue operations to stop due to the lack of disembarkation ports, raising concerns about the increasing number of boats departing from Libya and reduced search and rescue vessels.<sup>27</sup>
21. Between 25 - 30th June 2020, a total of 180 individuals were rescued while transiting the Mediterranean in unseaworthy boats by the SOS Mediterranee Ocean Viking. Afterwards, the Ocean Viking sought permission to disembark from authorities in 7 different ports in both Italy and Malta.<sup>28</sup> After such requests were repeatedly denied, many of the migrants aboard grew increasingly desperate, and 6 of them made suicide attempts due to the fear that no country would take them in.<sup>29</sup> On 6th July 2020, after over a week of consistent refusals to take action, the Italian authorities transferred the migrants onboard to a private quarantine ship in Sicily for coronavirus tests to be undertaken, and the individuals on board were eventually permitted to disembark.

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<sup>20</sup> DW News, ‘Italy delivers food to stranded German rescue ship’, 2nd May 2020, <https://www.dw.com/en/italy-delivers-food-to-stranded-german-rescue-ship/a-53096627>

<sup>21</sup> Sea-Eye.Org, ‘Odyssey of the Alan Kurdi Rescue Ship Ends’, 17th April 2020, <https://sea-eye.org/en/odyssey-of-the-alan-kurdi-rescue-ship-ends/>

<sup>22</sup> Daily Sabah, ‘Refugees allowed to disembark from Italy’s quarantine ferry’, 2nd May 2020 <https://www.infomigrants.net/en/post/24224/180-migrants-quarantined-on-board-ferry-near-palermo>

<sup>23</sup> Ibid.

<sup>24</sup> InfoMigrants, ‘Italy impounds migrant rescue ship Alan Kurdi’, 6th May 2020, <https://www.infomigrants.net/en/post/24565/italy-impounds-migrant-rescue-ship-alan-kurdi>

<sup>25</sup> Info Migrants, ‘79 Migrants Disembark in Sicily, 162 More Wait at Sea’, 11 May 2020; <https://www.infomigrants.net/en/post/24653/79-migrants-disembark-in-sicily-162-more-wait-at-sea>

<sup>26</sup> Op. Cit; Sea-Eye.org, 17th April 2020

<sup>27</sup> Ibid.

<sup>28</sup> InfoMigrants, ‘Ocean Viking: Italy to transfer migrants to quarantine ship after suicide attempts’ 6th July 2020, <https://www.infomigrants.net/en/post/25803/ocean-viking-italy-to-transfer-migrants-to-quarantine-ship-after-suicide-attempts>

<sup>29</sup> Ibid.

However, on 22nd July 2020, Italian authorities detained the Ocean Viking rescue ship on the basis of “technical and operational irregularities”. The detention of the ship was described by SOS Mediterranee as "a blatant administrative harassment manoeuvre aimed at impeding our lifesaving work".<sup>30</sup>

22. Throughout 2020, Italian prosecutors have sought to bring criminal charges against Matteo Salvini for illegal detention on the basis of his consistent refusal to permit sea vessels carrying migrants and refugees to disembark during his 14 month tenure as Minister of Interior between July 2018 - September 2019. During this time, the Italian Prime Minister called Salvini "obsessed" with keeping migrants out of Italian ports.<sup>31</sup> On 30th July 2020, the Italian senate voted in favour of lifting Salvini’s parliamentary immunity, enabling the criminal prosecution to proceed.

## **B. Malta**

23. Although Malta is located in the Mediterranean between Libya and Italy, and has a large Search and Rescue (SAR) Region, encompassing a significant portion of the route taken by migrants transiting from Libya to Italy,<sup>32</sup> it has taken in relatively few migrants. Arrivals by sea to Malta were recorded as 1,445 in 2018, 3,406 in 2019 and 2,161 so far in 2020.<sup>33</sup> Nonetheless, the Government of Malta has actively pursued a strategy of prevention and deterrence against the arrival of migrants transiting the Mediterranean from Libya. To provide context to the Maltese ‘Closed Ports’ policy, it is necessary to consider the wider strategy of “push-backs” and the bilateral agreement made between Malta and Libya in May 2020.

24. There have been several documented incidents in which the Maltese authorities have coordinated pull-backs of migrant vessels incoming from Libya, that had entered the Maltese SAR Region and then forcibly returned to Libya, where migrants are systematically tortured, as set out in the original information submitted to the Committee on 26th June 2020. These include, among others, the following notable incidents:

- a. In October 2019, a wooden boat carrying around 50 people that departed from Libya entered the Maltese SAR Region. Alarm Phone, an NGO monitoring and coordinating distress calls of migrants transiting the Mediterranean, made contact with the Maltese authorities, which acknowledged the call and affirmed

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<sup>30</sup> France 24, ‘Migrant rescue ship Ocean Viking detained by Italy's coastguard’, 23rd July 2020, <https://www.france24.com/en/20200723-migrant-rescue-ship-ocean-viking-is-detained-by-italy-s-coastguard>

<sup>31</sup> BBC News, ‘Italy's Salvini in row with PM over Open Arms migrant ship’, 16th August 2019, <https://www.bbc.co.uk/news/world-europe-49364217>

<sup>32</sup> A map of the Malta Search and Rescue area can be found online on the Armed Forces of Malta website at: <https://afm.gov.mt/en/operationsanddeployments/national/Pages/Operations-Centre.aspx>

<sup>33</sup> Data from <https://data2.unhcr.org/en/situations/mediterranean> and <https://www.unhcr.org/mt/figures-at-a-glance>

that the situation would be coordinated. However, the authorities failed to respond to any further communication for several hours and it was eventually discovered that the Libyan Coast Guard had been contacted to intercept the boat and force their return to Libya. The individuals ended up in the Libyan detention centre of Trik-al-Sikka.

- b. On 14th March 2020, a fiberglass boat carrying 49 people that departed Libya and entered the Maltese SAR Region, was forced back to Libya the LCG's vessel Ras Al Jadar, a speedboat donated to the LCG by Italy. That same weekend of 14-15 March saw over 400 people being pulled-back to Libya by Libyan authorities in multiple operations – an outcome criticized by IOM as “unacceptable”, exposing vulnerable people to detention and abuse.
- c. On 15th April 2020, a group of 63 people including 7 women and 3 children entered the Maltese SAR Region. They were then forcibly returned to Libya by a fishing boat Dar As Salam, a Libyan vessel docked in Malta. When returned to Libya, only 51 individuals remained, 5 people dead and a further 7 people missing at sea. The Maltese authorities confirmed having coordinated the “privatised” (i.e. using a commercial vessel) pull-back in an official statement.

The International Organization for Migration (IOM), whose representatives in Tripoli were present at the disembarkation, stated that “The migrants were rescued by a commercial ship from the Maltese search and rescue zone and handed over to the Libyan Coast Guard. We reiterate that people rescued at sea should not be returned to unsafe ports.”<sup>10</sup>

The Libyan office of the UN Refugee Agency (UNHCR) also expressed criticism about their transfer to Libya, describing the survivors as “traumatized and weakened by days adrift at sea” and reiterating that “Libya is a country at war and not a safe port for refugees and asylum-seekers to be returned to.”<sup>11</sup> Many of the people in the group were of Eritrean origin, and therefore likely to have a well founded fear of persecution.<sup>12</sup>

25. In addition to these “pull-back” incidents, following the Italy-Libya MoU concerning the prevention of migrant flows from Libya to Italy agreed in February 2017 and renewed in February 2020, the Maltese Prime Minister signed its own Malta-Libya MoU ‘in the field of combatting illegal immigration’ on 28th May 2020.<sup>34</sup> The agreement included the establishment of two new coordination centres in Valetta and Tripoli on 6th July 2020 with the function of ‘offering the necessary support to combatting illegal immigration in Libya and the Mediterranean region’. The MoU commits Malta to

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<sup>34</sup> Memorandum of Understanding between the Government of National Accord of the State of Libya and the Government of the Republic of Malta in the field of combatting illegal immigration, signed in Tripoli on 28 May 2020, [www.independent.com.mt/file.aspx?f=206640](http://www.independent.com.mt/file.aspx?f=206640)

coordinate with the EU to ‘propose funding towards additional maritime assets necessary for the interception and follow up of human trafficking activities in the SAR Region in the Mediterranean basin’. The MoU makes no reference whatsoever to guaranteeing any human rights standards or protections for migrants transiting the Mediterranean.

26. The Maltese ‘Closed Ports’ policy of refusing permission to disembark to vessels carrying rescued migrants can therefore be seen as part of a wider strategy aimed at prevention and deterrence of migrants arriving to Malta. As detailed above, in April 2020, Italy closed its ports to disembarkation following a decree based on the outbreak of the Covid-19 pandemic. In May 2020, Malta also declared its ports closed, and also announced that it was incapable of ensuring search and rescue operations within its own SAR Region, due to the Covid-19 outbreak.
27. In response to both Italy and Malta’s declarations of refusal to permit disembarkation at their ports based on Covid-19, in May 2020 the UNHCR and IOM issued a joint statement to all European states that the Covid-19 pandemic must not be used as an excuse to breach existing human rights obligations and that they “must continue to disembark people rescued at sea, in line with international maritime law obligations and ensure access to asylum and humanitarian assistance.”<sup>35</sup>
28. Despite the request, Malta refused all disembarkation requests from vessels carrying rescued migrants, including for rescues coordinated and carried out by Maltese authorities throughout May 2020. Instead, the Maltese government ordered incoming migrants to be indefinitely detained onboard four privately hired ferry boats. During this month, approximately 425 individuals were kept aboard these ferry boats which were kept just outside Maltese territorial waters. For approximately 6 weeks, lawyers, NGOs and the UNHCR were prevented from accessing the individuals and they were unable to seek protection in Malta under the Refugee Convention. In their joint statement, the IOM and UNHCR described it as “unacceptable to leave people at sea longer than necessary, especially under difficult and unsuitable conditions”.
29. On 4 June 2020, the Council of Europe Commissioner for Human Rights called for humanitarian aid and urgent safe disembarkation of those held on board the ferry boats, noting that “the confinement of those rescued on the ships, as well as the lack of remedies against this measure and its indefinite duration may not be compliant with the right to liberty of those on board, as guaranteed by Article 5 of the European Convention

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<sup>35</sup> UNHCR, IOM, urge European states to disembark rescued migrants and refugees on board the Captain Morgan vessels, 21 May 2020, [www.unhcr.org/news/press/2020/5/5ec664284/unhcr-iom-urge-european-states-disembarkrescued-migrants-refugees-board.html](http://www.unhcr.org/news/press/2020/5/5ec664284/unhcr-iom-urge-european-states-disembarkrescued-migrants-refugees-board.html)

on Human Rights".<sup>36</sup> On 7th June 2020, the individuals were eventually granted permission to disembark in Malta.<sup>37</sup>

30. Malta has since continued to refuse permission to disembark to vessels carrying reduced number of migrants within its SAR Region. On 2nd July 2020, a group of 52 migrants including 12 women were rescued by vessel MV Talia, a cattle-ship that had been alerted to a distress signal. According to Alarm Phone, the captain of the MV Talia had been given assurances of rescue coordination by the Maltese RCC. However, upon approaching Maltese territorial waters the vessel was denied entry. Over several days, Alarm Phone recorded that they telephoned the Maltese RCC 42 times, without substantive response.<sup>38</sup>
31. During the time in which the 52 migrants were on board the MV Talia, they endured severe and degrading conditions. The ship's captain, Mohammad Shaaban, told journalists that his ship was not an adequate place for human beings as the Talia is used for transporting livestock and the migrants have been lying in dirty cattle pens, sleeping among feces and are running out of water and food.<sup>39</sup> Eventually on 8th July 2020, the migrants were permitted to disembark in Malta.<sup>40</sup>
32. On 3rd August 2020, a group of 27 individuals (including 1 minor and 1 pregnant woman) entered the Maltese SAR Region on a wooden boat. The Maltese RCC was alerted and rescue coordination was sought by Alarm Phone, but no response was received. Nearby merchant vessels were therefore contacted and 4th August 2020 the engine of the wooden boat stopped working, leaving the boat drifting with the individuals on board in significant distress and panic.
33. On 4th August 2020 the airplane "Moonbird" operated by Sea-Watch and Humanitarian Pilots Initiative spotted the drifting boat and informed relevant authorities accordingly. Finally the Maersk Tanker Etienne (IMO: 9274642 / 219577000, sailing under Danish flag) stopped and monitored the people on board the wooden boat, but still no SAR vessel by the Maltese AFM arrived. On 5th August 2020, when the people in distress were about to sink, the Maersk Etienne took the people on board, which they confirmed to Alarm Phone as having been done under the instructions of RCC Malta. Afterwards

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<sup>36</sup> Council of Europe Commissioner for Human Rights, Immediate action needed to disembark migrants held on ships off Malta's coast, 4 June 2020, [www.coe.int/en/web/commissioner/-/immediate-action-needed-to-disembark-migrants-held-on-ships-off-malta-s-coast](http://www.coe.int/en/web/commissioner/-/immediate-action-needed-to-disembark-migrants-held-on-ships-off-malta-s-coast)

<sup>37</sup> Malta News Agency, '425 migrants entered Malta after weeks outside its territorial waters', 7th June 2020, <http://www.maltanewsagency.com/2020/06/425-migrants-entered-malta-after-weeks-outside-its-territorial-waters/>

<sup>38</sup> Times of Malta, 'Alarm Phone says it called Maltese Authorities 42 times, rarely heard back', 4th May 2020, <https://timesofmalta.com/articles/view/alarm-phone-says-it-called-maltese-authorities-42-times-rarely-heard.789860>

<sup>39</sup> InfoMigrants, 'Migrants disembarked from Talia animal cargo ship in Malta' 8th July 2020, <https://www.infomigrants.net/en/post/25873/migrants-disembarked-from-talia-animal-cargo-ship-in-malta>

<sup>40</sup>Ibid.

the Maersk Etienne headed in the direction of Malta, waiting for a port to disembark the 27 migrants on board. However, a positive answer regarding the possibility of disembarking people in Malta was never received, and no Place of Safety (POS) was indicated.

34. On 2nd September 2020, the newspaper Times of Malta reported that the Captain of 2 the Etienne had requested “urgent humanitarian assistance and a safe disembarkation” for the migrants on board the vessel. It was declared that “Our crew continue to provide as much support and assistance as they can to this vulnerable group, but they lack the resources to offer sustained humanitarian and medical care”. Through the communication with relatives of migrants onboard, Alarm Phone has learned that during the whole period they spent on board the Maersk Etienne, the migrants never had the possibility to communicate with their families.
35. On 6th September 2020, after 32 days on board the Maerk Etienne, it was confirmed that 3 of the 27 migrants on board jumped overboard into the Mediterranean Sea. Upon jumping, the migrants were rescued by the crew to prevent them from drowning. These desperate acts of self-harm by the migrants demonstrated that their continued retention on board the Maersk Etienne was putting their lives in imminent danger. On 7th September 2020, the ICS, UNHCR and IOM issued an urgent call for the immediate and safe disembarkation of the Etienne stressing the fact that time now is running out for all concerned.<sup>41</sup>
36. Despite the urgent calls for safe disembarkation, and the fact that 3 migrants had jumped overboard, the Maltese authorities continued to refuse permission for a continuous period of 38 days. This period represents the longest stand-off in European history in which a port has continued to deny safe disembarkation to a vessel carrying rescued migrants. Eventually, the government of Italy intervened and on 14th September 2020, a charity rescue ship Mare Jonio transferred the migrants on board and they were safely disembarked in Pozzallo, Sicily.<sup>42</sup>
37. The Maltese ‘Closed Ports’ policy and use of the Covid-19 pandemic to justify the prolonged refusals to permit vessels carrying rescued migrants to disembark on health grounds, has been widely criticised. In May 2020, the UNHCR stated “rescue at sea is a humanitarian imperative and an obligation under international law. Legitimate public health concerns can be addressed through quarantine, health checks, and other measures. However, delayed rescue or failure to disembark boats in distress put the lives in danger. A safe port for disembarkation should be provided without delay,

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<sup>41</sup> ICS, UNHCR and IOM call on States to end humanitarian crisis onboard ship in the Mediterranean, <https://www.unhcr.org/news/press/2020/9/5f55e7fe4/ics-unhcr-iom-call-states-end-humanitarian-crisis-onboard-ship-mediterranean.html>

<sup>42</sup> New York Times, ‘Migrants Rescued by Tanker Arrive in Italy After Weeks long Standoff’ 14th September 2020, <https://www.nytimes.com/2020/09/14/world/europe/migrant-tanker-mediterranean-sicily.html>

together with a prompt agreement on how to share responsibility amongst States for hosting people once they reach safety on dry land.”<sup>43</sup>

38. This concern was also voiced by Amnesty International. In their reports titled ‘Malta: Waves of Impunity’ it is stated that “measures limiting human rights, for example for the protection of public health, may at times be justifiable; however, they should be set out in law and be proportionate and necessary to the pursuit of a legitimate aim. Rescue at sea, which includes disembarkation in a safe place, is an obligation aimed at protecting the right to life, which is non-derogable”<sup>44</sup>

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<sup>43</sup> UNHCR, News comment on search and rescue in the Central Mediterranean by Gillian Triggs, Assistant High Commissioner for Protection at UNHCR, the UN Refugee Agency, 1 May 2020 [www.unhcr.org/uk/news/press/2020/5/5eac53214/news-comment-search-rescue-central-mediterranean-gillian-triggsassistant.html](http://www.unhcr.org/uk/news/press/2020/5/5eac53214/news-comment-search-rescue-central-mediterranean-gillian-triggsassistant.html)

<sup>44</sup> Amnesty International, ‘Malta: Waves of Impunity, Malta’s Human Rights Violations and Europe’s Responsibilities in the Central Mediterranean’, September 2020, p.7 <https://www.amnesty.org/download/Documents/EUR3329672020ENGLISH.PDF>

## THE LAW

39. In demonstrating that the repeated occurrences of refusing permission to allow vessels carrying rescued migrants to disembark amounts to a systematic practice of torture or cruel, inhuman or degrading treatment within the jurisdiction of Italy, this section is separated in to the following sub-headings:

i) Jurisdiction: Italy has jurisdiction over the migrants in question because it has coordinated the rescue operation in its own SAR zone, where the ships have been left to wait for prolonged and indefinite periods of time with the migrants on board.

ii) The refusal to allow the migrants to disembark in Italy is a form of torture in accordance with the definition of Article 1 laid down in the Convention against Torture.

- (a) Severe pain or suffering, whether physical or mental,
- (b) intentionally inflicted
- (c) Based on discrimination due to immigration status and/or nationality
- (d) At the instigation of a public official

iii) The refusal to allow migrants that have entered Italian waters to disembark and to deny their right to claim asylum within Italy amounts to a systematic practice. [**Systematic Practice**]

### (i) Jurisdiction

40. As set out in the original information submitted to the Committee on 26 June 2020, the test for whether a State party is exercising jurisdiction outside its borders centres on the notion of “de facto effective control” over the individuals or area in question (GC 2, § 16).

41. The sea vessels carrying rescued migrants that have been refused permission to disembark by Italy have been consistently stationed on the borders of each country’s territorial waters, and have been in direct communication with the relevant port authorities. In all instances, the migrants on board have been rescued from within the SAR Region of each country respectively, and the port to which they have been taken by the sea vessel has represented the nearest safe port. The prolonged periods of time in which the vessels have been stationed outside the relevant port have been a direct consequence of each port’s refusal to allow the vessel to enter.

42. In the ECtHR case of *Women on Waves v Portugal App No 31276/05* the court assumed Portuguese jurisdiction in respect of an NGO vessel at the border of Portuguese territorial waters that was prevented from entering by a military ship. The extent of a State's territory for the purpose of establishing jurisdiction may therefore also be extended to vessels stationed at the border of territorial waters if their ability to enter is directed by the State. Consequently, Italy's obligations under the Convention against Torture and other treaties to which it is a State party, should apply to all vessels carrying migrants either physically present within Italian waters, or to those that are at the border but are prevented from entering due to orders from the Italian government.

## **(ii) Torture**

43. The refusal to permit migrant vessels to disembark may be considered a form of torture as set out in Article 1 of the Convention against Torture:

*1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*

44. There are several components of the definition of torture, all of which are fulfilled in the context of preventing migrant vessels from being permitted to disembark. Each component of how this definition is fulfilled is set out below:

### **a. Severe pain or suffering, whether physical or mental**

45. The first component of the definition of torture is that severe pain or suffering, whether physical or mental is intentionally inflicted. In determining whether the refusal to allow migrant vessels to disembark fulfils this component, it is important to consider the relevant legal obligations that Italy has towards migrants relating to non-refoulement. Although Article 1 CAT does not specifically mention an 'omission' to act as being capable of being a type of infliction, the Committee has previously recognised that

omissions to act by public authorities are capable of fulfilling the criteria to be considered an act of torture.<sup>45</sup> Through the intentional omission to fulfil non-refoulement obligations, it is demonstrable that such migrants endure a real risk of severe pain or suffering.

46. Upon entering Italian territory, non-refoulement obligations under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT') and the 1951 Refugee Convention arise in respect of the migrants on board the vessel. Article 3 CAT prohibits refoulement, providing that:

*1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*

*2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.*

47. The principle of non-refoulement is also set out at Article 33 of the 1951 Refugee Convention, Article 7 of the ICCPR, Article 3 (1) of the UN Declaration on Territorial Asylum and Article 19 of the EU Charter of Fundamental Rights, all of which Italy is party to. The principle of non-refoulement has been crystallised in customary international law, and binds all states regardless of whether or not they have ratified the relevant treaties.<sup>46</sup>

48. The Refugee Convention specifies under Article 31(1), that unlawful entry by those seeking asylum does not preclude them from the application of the principle of non-refoulement. Importantly, non-refoulement applies to persons who 'have not had their status formally declared', and includes direct and indirect removal.<sup>47</sup>

49. The non-refoulement obligation of states is inherently tied to the right to claim asylum, and the obligation of states to process claims for asylum. This includes the prohibition of rejection at a frontier. The right to seek asylum is set out in Article 14 of the Universal Declaration of Human Rights and under the 1967 UN Declaration on Territorial Asylum. Italy prevention of migrants from disembarking is a clear denial of their right to claim asylum and Italy obligation to provide channels for asylum claims to be made.

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<sup>45</sup> CAT, General Comment N°3: Implementation of Article 14 by States Parties (13 December 2012), UN Doc. CAT/C/GC/3, §§ 3, 23 and 37.

<sup>46</sup> UNHCR Advisory Opinion, 27 January 2007, op. cit., [15]; Trevisanut, 2008, op. cit., p215; E. Lauterpacht and D. Bethlehem, "The scope and content of the principle of non-refoulement: opinion", in E. Feller, V. Trk and F. Nicholson (eds.), Refugee protection in international law: UNHCR's Global Consultations on International Protection (Cambridge: Cambridge University Press, 2003), 87-177, at 149; [Also in Hathaway]

<sup>47</sup> UNHCR Executive Committee, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol', 26 January 2007; <https://www.unhcr.org/4d9486929.pdf> ('UNHCR Advisory Opinion'), [6]-[8].

50. This refusal to fulfil the non-refoulement obligations and permit vessels to disembark has the immediate result of indefinite detention of persons on board such vessels. Indefinite detention is the deprivation of liberty with no time limit or fixed release date. As the Italian authorities brought about the detention of persons on board the vessels, each state responsible for the mental and physical well-being of those on board. The uncertain and prolonged situation, from which deprivation of liberty arises, results in the mental and physical pain and suffering of persons detained on the vessels.<sup>48</sup>
51. The psychological effects that indefinite detention may have on persons on board the vessels constitutes mental pain or suffering for the purpose of Convention against Torture Article.<sup>49</sup> The open-endedness of the situation arouses feelings of fear, anguish and inferiority capable of breaking an individual's moral and physical resistance, and humiliating and debasing the individual.<sup>50</sup>
52. In this context it should be borne in mind that the migrants in question are highly vulnerable individuals many or most of whom have already endured severe mistreatment even torture through exploitation and detention in Libya. Furthermore, they are weakened by the sea journey across the Mediterranean which is undertaken under life-threatening circumstances with little food or water. When rescued at sea, they are therefore already in a highly vulnerable state, psychologically weakened and physically exhausted and in need of medical attention. These circumstances of heightened and even extreme vulnerability should be taken into account in evaluating the effects of the indefinite and arbitrary detention on board vessels.
53. The UNHCR, the UN Committee against Torture and other bodies have called on states to have recourse to immigration detention only as an exceptional measure and for the shortest possible time, which entails that such detention should be of limited duration.<sup>51</sup> While the Committee has called for states to introduce time limits in immigration detention,<sup>52</sup> Italy has not done so in the context of detaining migrants on vessels.
54. The material conditions of detention on board the vessels held by the authorities at the Italian or Maltese ports contribute to physical and mental suffering. The failure of the

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<sup>48</sup> ECtHR [GC], *A and others v. the United Kingdom*, Appl. No. 3455/05, 19 February 2009, para. 130: "The Court considers that the uncertainty regarding their position and the fear of indefinite detention must, undoubtedly, have caused the applicants great anxiety and distress, as it would virtually any detainee in their position. Furthermore, it is probable that the stress was sufficiently serious and enduring to affect the mental health of certain of the applicants. This is one of the factors which the Court must take into account when assessing whether the threshold of Article 3 was attained."

<sup>49</sup> *A and others v Secretary of State for the Home Department* [2004] UKHL 56 (Belmarsh 9 case)

<sup>50</sup> *Pretty v. the United Kingdom*, no. 2346/02, para.52, ECHR 2002-III

<sup>51</sup> UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention* (2012); UN Committee against Torture, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland*, UN doc. CAT/C/GBR/CO/6 (7 June 2019), para. 55(c).

<sup>52</sup> CAT, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, UN doc. CAT/C/AUS/CO/4-5 (23 December 2014), para.16; UN Committee against Torture, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland*, UN doc. CAT/C/GBR/CO/6 (7 June 2019), para. 55(c).

to provide, or provide access to, adequate food, medical treatment, and hygiene, exposes persons on board the vessels to prolonged, and therefore severe and detrimental, mental and/or physical, pain and/or suffering, which diminishes their human dignity. Little or no access to food<sup>53</sup> which is of nutritional value adequate for health and strength<sup>54</sup> contributes to a finding of torture.

55. In these circumstances, Italy is in breach of positive obligations<sup>55</sup> to prevent torture in situations where there is: detention without medical treatment,<sup>56</sup> denial of medical assistance,<sup>57</sup> refusal of permitting communication with medical professional(s),<sup>58</sup> lack of appropriate access to medical treatment,<sup>59</sup> an existing but inefficient medical system,<sup>60</sup> provision of inadequate or ineffective medication,<sup>61</sup> insufficient or incomplete medical treatment, and failure to provide timely medical treatment.<sup>62</sup> This type of omission is irrespective of the reasons for which the persons are detained, such

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<sup>53</sup> In the case of *M.S.S. v. BELGIUM AND GREECE* 30696/09, 21 January 2011, para. 254, 264, an asylum seeker was in extreme poverty “unable to cater for his most basic needs [including]: food”, this “situation” contributed to a finding of a violation of Article 3 ECHR

<sup>54</sup> Mandela Rule number 22 states that “Every prisoner shall be provided by the prison administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served”; *ACHPR, Krishna Achuthan and Amnesty International (on behalf of Aleke Banda and Orton and Vera Chirwa) v. Malawi*, Communications Nos. 64/92, 68/92 and 78/92, decision adopted during the 16th session, October-November 1994, para. 33

<sup>55</sup> CAT Art 2; As per the UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), adopted by consensus of the UN General Assembly in Resolution 70/175 of 2015, the provision of medical treatment for detainees is a State responsibility; The Human Rights Committee has stated that “the State party by arresting and detaining individuals takes the responsibility to care for their life.” The State has a duty to be proactive in providing adequate medical care. It is “incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection”.

<sup>56</sup> *Abdulrahman Kabura v. Burundi*, para. 7.8, U.N. Doc. CAT/C/59/D/549/2013 (Nov. 11, 2016) (noting that the complainant was detained without medical treatment, and that this contributed to a finding of ill-treatment)

<sup>57</sup> *Ilascu and Others v. Moldova and Russia*, Eur. Ct. H.R., App. No. 48787/99, ¶ 451 (2004) (holding that “a denial of all forms of appropriate medical assistance” in detention contributed to a finding of ill-treatment); *Abdel Hadi, Ali Radi & Others v. Republic of Sudan*, Communication 368/09, Afr. Comm’n H.P.R., ¶ 74 (Nov. 5, 2013) (holding that a “denial of access to medical care” contributed to a finding of ill-treatment); See *Gladkiy v. Russia*, App. No. 3242/03, Eur. Ct. H.R. (2010), para 96)

<sup>58</sup> In the case of *Déogratias Niyonzima v. Burundi*, para. 2.7, U.N. Doc. CAT/C/53/D/514/2012 (21 November 2014) “despite repeated requests, he [the detainee] was not allowed to see a doctor,” and that this contributed to a finding of torture.

<sup>59</sup> Detainees “did not have appropriate access to medical care” in *Prosecutor v. Simić*, Case No. IT-95-9-T, Judgment, para. 773 (International Criminal Tribunal for the Former Yugoslavia 17 October 2003)

<sup>60</sup> A medical system can be inefficient even where medical care provided, such as in a makeshift infirmary (*Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, para. 1101 (International Criminal Tribunal for the Former Yugoslavia 16 November 1998).

<sup>61</sup> In the case of *Kaing Guek Eav alias Duch*, judges found “deprivation of medical treatment” to include the treatment of cuts, bruises, and other injuries with salty water, the provision of inadequate or ineffective medication, and the insufficient treatment of rashes, malaria, diarrhea, and severe dehydration.

<sup>62</sup> A failure to provide medical services in “a timely, adequate and complete manner” contributes to a finding of torture (IACtHR, *Vélez Lóor v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 132, para. 223 (23 November 2010); the UN Human Rights Committee has made clear that failure to provide appropriate and timely medical care to detainees is a breach of the the prohibition on torture or cruel, inhuman or degrading treatment or punishment under the ICCPR Article 7.

as the immigration status of the persons on board the vessel.<sup>63</sup> The Committee has paid particular attention to this type of omission particularly when the medical condition has been contracted in detention, or when the medical condition is continuous and lasts the duration of detention without treatment<sup>64</sup>

56. By refusing to allow persons to disembark, Italy is unable to meet their positive obligations under CAT and distinguish between different individuals in order to provide assistance to vulnerable people in need of particular medical care. For example, pregnant women, children, previous torture survivors, and those with mental health conditions.

57. According to Guideline 7 of the United Nations High Commissioner for Refugees on applicable criteria and standards relating to the detention of asylum-seekers states:

*“Given the very negative effects of detention on the psychological well-being of those detained, active consideration of possible alternatives should precede any order to detain asylum-seekers falling within the following vulnerable categories: Unaccompanied elderly persons. Torture or trauma victims. Persons with a mental or physical disability...”*

58. The detention of a torture survivor constitutes treatment that is *prima facie* harmful. The Italian authorities fail to identify torture survivors at the earliest possible opportunity and arrange alternatives to detention. The authorities fails to offer specialised treatment pursuant to their obligation to provide rehabilitation to torture survivors in violation of Article 14 of the CAT (see *inter alia* A.N. v. Switzerland, Communication no. 742/2016; *Adam Harun v. Switzerland*, Communication no. 758/2016).<sup>65</sup>

59. The use of detention as a restriction on the freedom of movement of migrants on board the vessels on the grounds of their illegal entry, which includes a failure to provide those detained on vessels with the requisite medical care, amounts to torture.

60. Limited or no access to sanitary facilities<sup>66</sup> such as toilets,<sup>67</sup> showers, and the ability to clean or wash cells, access to separate bed and bedding, floor space, and clothing which

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<sup>63</sup> Kevin Mgwanga Gunme et al. v. Cameroon, Communication 266/03, African Commission on Human and Peoples' Rights, paras. 18, 113, 114 (May 27, 2009) (finding that a “denial of medical treatment” was not justified even when the victim was detained in the context of “fighting terrorist activities,” and contributed to a finding of torture and ill-treatment);

<sup>64</sup> (Todorov v. Ukraine (ECtHR) (2012) para.)

<sup>65</sup> See also CAT, General Comment No.3: Implementation of article 14 by States parties, UN doc. CAT/C/GC/3 (19 November 2012, para. 156); see A.N. v. Switzerland, Communication no. 742/2016; *Adam Harun v. Switzerland*, Communication no. 758/2016.

<sup>66</sup> M.S.S. v. BELGIUM AND GREECE 30696/09, 21 January 2011, para. 263).

<sup>67</sup> Toilets: with “no water” (HRC, *Giri v. Nepal*); “not properly partitioned off” (ECtHR case *Nevmerzhitsky v. Ukraine*; with no “working flush” (ECtHR case *Nevmerzhitsky v. Ukraine*); where all the detainees have to “use one toilet that was in an appalling state” (*Déogratias Niyonzima v. Burundi*, para. 2.7, U.N. Doc. CAT/C/53/D/514/2012 (21 November 2014)); with limited access such as “a bucket in the cell, often in

shall be in no manner degrading or humiliating, are factors which contribute to findings of torture and ill-treatment.<sup>68</sup> The detention of persons on board the vessels denies access to work, education, or any other meaningful activity such as exercise.<sup>69</sup> These factors contribute to the physical and mental suffering of persons detained.

61. Contrary to its obligations under Article 11 of the CAT, Italy fails to keep under systematic review instructions, methods and practice as well as arrangements for the custody and treatment of persons under a form of arrest, detention or imprisonment on board the vessel. The failure to take measures, such as due process and the provision of safeguards, required to reduce the risk of exposing persons on board vessels to risk of torture and ill-treatment.<sup>70</sup> Italy fails to apply certain basic guarantees to all persons deprived of their liberty in order to protect them from torture and ill-treatment. Such guarantees include, among others: maintaining an official register of detainees, the right promptly to receive independent legal assistance, independent medical assistance, and to contact relatives, the need to establish impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability to detained and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment.<sup>71</sup>

62. To conclude, once a vessel carrying migrants has crossed the Mediterranean and entered Italian jurisdiction, there are clear obligations against non-refoulement and must process a claim for asylum for any migrant on board that seeks protection. If the vessel is intentionally refused the ability to disembark, Italy fails to meet these obligations and the immediate consequence of such omission is a period of indefinite detention for the migrants on board such vessels in poor conditions. For the reasons set out above, this period of indefinite detention is a form of severe physical and mental suffering and should be considered a form of torture.

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the presence of . . . cellmates” with “extremely limited personal space” (ECtHR case, *Neshkov and Others v. Bulgaria*)

<sup>68</sup> In accordance with Rules 10, 12, and 17 of the U.N. Standard Minimum Rules for the Treatment of Prisoners, minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed. Human Rights Committee stressed that minimum requirements should always be observed, regardless of economic constraints suffered by the state. Non-compliance with minimum standards amounted to a violation of Article 7; *A.A. v. Greece*, no. 12186/08, para. 57-65, 22 July 2010

<sup>69</sup> “a period of detention of six days, in a confined space, with no possibility of taking a walk, [and] no leisure area” (*M.S.S. v. BELGIUM AND GREECE* 30696/09, para. 222, 21 January 2011) *S.D. v. Greece*, no. 53541/07, para.51, 11 June 2009;

<sup>70</sup> Reports of the Working Group on Arbitrary Detention, UN Docs. A/HRC/7/4 (10 January 2008), paras. 59-58; and A/HRC/13/30 (18 January 2010), paras. 72-80).

<sup>71</sup> Redress, *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Guide to Reporting to the Committee against Torture* (September 2018) <<https://redress.org/wp-content/uploads/2018/10/REDRESS-Guide-to-UNCAT-2018.pdf>>

**b. Intentional infliction**

63. The second component requires that the acts amounting to torture be intentional. Article 1 of the CAT provides that “... the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is *intentionally* inflicted on a person” (our emphasis).
64. The Committee against Torture has clarified that “the elements of intent and purpose in Article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances.”<sup>72</sup> In other words, the intentionality requirement excludes from the definition of torture, pain and suffering resulting from accidents or negligent conduct.<sup>73</sup> However, it includes conduct whose foreseeable consequences cause extreme suffering (regardless of the subjective motivation of the perpetrator). As one commentator explains, “[t]he intent required under the international torture convention is simply the general intent to do that act which clearly or foreseeably causes terrible suffering”.<sup>74</sup>
65. It is evident that the Italian authorities’ refusal to allow disembarkation to migrants under the circumstances described above cannot reasonably be characterized as an “accident”. Nor is it attributable to “negligence” on the part of Italian port authorities. It is also evident that the foreseeable consequences of the refusal to allow disembarkation is to cause the severe mental and physical suffering of the persons concerned. The act of refusing disembarkation therefore fulfil the intentionality requirement of the definition of torture under Article 1 CAT.

**c. Purpose / Based on discrimination due to immigration status and/or nationality**

66. The third component of the definition of torture as set out in Article 1 CAT is that it be for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.
67. It is clear that the reason for which migrants find themselves indefinitely detained on board such vessels is based on their immigration status, or alternatively their nationality

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<sup>72</sup> U.N. Committee against Torture, General Comment no. 2 (Jan. 24 2008)

<sup>73</sup> Burgers and Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1988)* at 118 (“[W]here pain and suffering is the result of an accident or of mere negligence, the criteria for regarding the act as torture are not fulfilled.”)

<sup>74</sup> Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, Colum. Hum. Rts. L. Rev. 291, 320-22 (1994) at 325-

(on the basis that they are not Italian or other nationality entitled entry to Italy without visa). The refusal to allow disembarkation is there based on discrimination due to immigration status and/or nationality, both of which are capable of being a type of ‘*discrimination of any kind*’ for the purpose of Article 1 CAT.<sup>75</sup>

**d. Official involvement**

68. The final component of the definition under Article 1 CAT is that it *is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*. The refusal to allow migrants to disembark is clearly a decision made by the Italian government. Indeed, in the cases of the refusing to allow independent search and rescue operation ships to disembark from 2018-2019, the decisions were made by the Ministers or Interior themselves. The Decree forbidding migrant ships from disembarking following the outbreak of Covid-19 have been made by the central Italian and Maltese governments.
69. For all the reasons set out above, the refusal to allow migrants that have crossed the Mediterranean and entered Italian waters to disembark may be considered a form of Torture in accordance with Article 1 CAT.

**(iii) Systematic**

**Habitual, widespread, deliberate, see: the Committee’s own definition of systematic at :**

<https://www.ohchr.org/EN/HRBodies/CAT/Pages/InquiryProcedure.aspx>

70. The criteria for initiating an inquiry under Article 20 CAT is that such torture is practiced *systematically*. As set out at in the detailed facts above, the Italian government had already refused to permit migrant vessels from disembarking at Italian ports on several occasions from 2018-2020, and the decisions to so formed part of a wider strategy of criminalization and deterrence towards independent search and rescue operations in the Mediterranean.
71. Currently, although the long term position of the Italian government following the Covid-19 pandemic will continue to unfold, it is apparent from the Government decrees that the official position is that no migrant vessel will be permitted to disembark at Italian ports. The refusals are not therefore isolated ‘one-off’ incidents, but form part of a systematic practice.

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<sup>75</sup> ECtHR, *Hode\_and\_Abdi\_v.\_UK* (No.22341/09), 06.11.2012, §56.

## CONCLUSION

72. As we have demonstrated above, Italy has systematically refused to allow permission for safe disembarkation of sea vessels with rescued migrants on board. As a consequence of refusing such permission, the vessels are prevented from docking at the nearest safe port from the point at which migrants are rescued in accordance with established principles of human rights and maritime law. This has resulted in the migrants enduring prolonged periods of time in the Mediterranean Sea on board a vessel without adequate resources or medical attention or the ability to seek protection under the Refugee Convention. These occurrences are demonstrative of a 'Closed Ports' policy and amount to evidence of a systematic practice of torture and cruel, inhuman and degrading treatment of migrants by Italy. We urge the Committee to consider this information as a follow-up to our inquiry submission of 26 June 2020.