

Saturday, 16 May 2020

Ylva Johansson
Commissioner for Home Affairs
Rue de la Loi/Wetstraat 200
1049 Brussels
Belgium

Dear Commissioner Johansson,

We write to you in relation to the situation of around 167 migrants currently being held aboard the private vessels **Europa II** and the **Atlantis**, just outside Malta's territorial waters¹. The Maltese government chartered a number of private pleasure craft vessels to accommodate migrants rescued in Malta's SAR zone in the period between 28/29 April and 6 May 2020. The migrants were transferred from the private and Armed Forces of Malta vessels involved in the rescue to the chartered vessels, and have remained there since the beginning of May. With our letter we wish to express our serious and urgent concern at the treatment of these men.

Many have been out at sea for over two weeks, this not counting the time spent at sea before their rescue. Living conditions aboard the vessels must be extremely challenging, as these are boats generally used for parties or for tours of Malta's coast. The vessels usually sail under a Commercial Vessel Certificate, which allows them to sail within three nautical miles from land and not more than three nautical miles from a place of refuge, in favourable weather conditions². They are not equipped to host people for long periods of time.

We have no information as to whether any assessments have been conducted to identify vulnerable persons or unaccompanied minors, although we are aware that 18 women and children were brought ashore to Malta. The persons that remain on board have no access to lawyers, supporting organisations, interpreters or UNHCR. From what we can understand, they have not been provided information as to their legal situation and related rights. In particular, we sincerely doubt that the right or possibility to seek asylum has been explained to them, as it is clear that Malta's intentions are for them not to reach Maltese territory.

Legal considerations

Although it may be argued that the regulation of search and rescue operations remains a Member State exclusive competence regulated by international law³, we contend that the current situation calls into play EU external border control and should be guided by the applicable relevant human rights law and EU acquis.

¹ A timeline of the events is annexed to this letter.

² https://mtip.gov.mt/en/document%20repository/msiu%20documents/investigations%202012/mv%20europa%20ii_final%20safety%20investigation.pdf

³ This principle is also recognised by Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur): "*The Council recalls that search and rescue at sea is a competence of the Member States which they exercise in the framework of international conventions.*"

Article 77(1)(b) of the *Treaty on the Functioning of the European Union* (TFEU) provides for the implementation of a common policy on the crossing of external borders. This has led to the adoption of a number of measures, primarily the *Schengen Borders Code* (SBC)⁴ which lays down common measures on border control at external borders that reflect the Schengen acquis.

In this regard, we consider that Malta's decision to place the groups of rescued persons on vessels just outside national and, by consequence, European Union territory, is unequivocally one of border surveillance, border check and border control as defined by the SBC.

Article 4 of the SBC clearly lays down that, in applying the Regulation, Member States shall act in full compliance with relevant Union law, relevant international law and obligations related to access to international protection, in particular the principle of non-refoulement and fundamental rights. The provisions of the Geneva Convention and of the EU Charter of Fundamental Rights are therefore not merely of an indicative nature, but a binding one. Furthermore, this article lays down that, in accordance with the general principles of Union law, decisions taken by Member States under this Regulation must be taken on an individual basis and must not be applied not collectively.

It is clear that the SBC applies in instances where the act of surveillance and control happen outside Schengen external borders, including outside the territorial waters. This is also recognised in Regulation (EU) No 656/2014⁵ which makes clear that

“...the objective of Union policy in the field of the Union external borders is to ensure the efficient monitoring of the crossing of external borders including through border surveillance, while contributing to ensuring the protection and saving of lives.”

Furthermore,

“...border surveillance is not limited to the detection of attempts at unauthorised border crossings but equally extends to steps such as...arrangements intended to address situations such as search and rescue that may arise during a border surveillance operation at sea and arrangements intended to bring such an operation to a successful conclusion”.

It is clear that with Malta's actions at sea in relation to these incidents, it is engaging in EU external border control affecting the interests of the European Union. The actions fall within the scope of application of EU law and sufficiently affecting the interests of the European Union for the EU Charter of Fundamental Rights to apply, in accordance with criteria confirmed by the Courts in *Fransson* (Case C-617/10).

We would also like to emphasise that, from the moment of SBC applicability, effect must be given to the safeguard provisions in Article 4 of the Regulations themselves, and to Articles 6, 18 and 47 of the Charter in particular.

⁴ Regulation (EU) 2016/399 of The European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

⁵ Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

Firstly, Malta is exercising full control and authority over the individuals being kept on board the vessels. It is clear that this is not a mere restriction of movement for the purposes of border control but a deprivation of personal liberty contrary to Article 6 of the Charter. Secondly, we contend that the right to asylum, guaranteed under Article 18 of the Charter, would be rendered theoretical and illusory when border control and surveillance results in the prevention of asylum-seekers from physically accessing and exercising their rights. Lastly, the persons on board do not have access to legal counsel or information, and do not have any access to an effective remedy for the rights that have been breached.

We also note Malta's request for funding from the European Union to cover the costs of the vessels out at sea⁶. We must underline the irony presented by a situation where – on the one hand – Malta is treating the persons on board the vessels as if they were wholly outside the protection afforded by national, European and international law whilst simultaneously seeking assistance from European Union to keep this situation afloat.

We wish to highlight the urgency of this matter, in view of excessive time spent at sea in inadequate conditions and without access to any legal assistance or asylum procedures. It is clear that Malta's actions sufficiently affect the interests of the European Union and are being carried out in pursuance of EU external border control. This, we believe, triggers the application of the Charter, in particular Articles 6, 18 and 47, and emphatically point out that the notion of fundamental rights does not end at the EU's external borders.

Whilst we appreciate the challenges faced by Malta in coping with the arrival by sea of asylum-seekers, we nonetheless stress that Malta's difficulties do not justify its disregard for its human rights obligations. In view of the above considerations, and of Malta's commitments as an EU Member State to the principles enshrined in the EU Treaties, we urge you to use your good offices and intervene with the Malta authorities in order to seek a swift resolution to this situation.

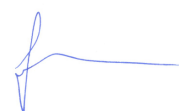
Yours Sincerely,



Katrine Camilleri
JRS Malta



Maria Pisani
Integra Foundation



Neil Falzon
aditus foundation

⁶ The Times of Malta, *€3,000-a-day for Captain Morgan vessels to house migrants offshore - Government applies for EU funding to cover costs*, <https://timesofmalta.com/articles/view/captain-morgan-vessels-housing-migrants-costing-3000-each-daily.791378>.

Annex 1 – Timeline of events

Captain Morgan Europe II

1. On the night of Tuesday, **28 April 2020** a vessel with approximately 60 migrants aboard entered the Maltese SAR zone, as reported by NGO Alarm Phone at around 1am on Wednesday. Alarm Phone stated that it had reached out to the Armed Forces of Malta (AFM) to relay the coordinates of the vessel, however, the AFM was allegedly non-responsive to both calls and emails. Times of Malta was informed that the dinghy was believed to have departed from Libya on Monday (27 April) night. Sources involved stated that the EU's borders agency Frontex was also informed, and it sent a flight in order to establish visual confirmation of the boat in question. Alarm Phone also said that the private owned fishing boat *Dar El Salaam 1* (ex *Mae Yemanja*), which returned 51 survivors and 5 corpses to Libya shortly after Easter on the 15 April, was heading towards the migrant vessel. The *Dar El Salaam* that sails under the Libyan flag left from Valletta port on Tuesday evening at 19:19.
2. Alarm Phone reported on the morning of Wednesday, **29 April** that the migrants at sea were last spoken to at 9.20 am and they had survived the night. On this morning, the fishing vessel *Dar El Salaam 1* carried out the rescue of all 57 people aboard the dinghy. It was reported that the migrants were rescued safely under the coordination of AFM. Whilst this rescue operation was being conducted, it was reported that the government of Malta initiated official talks with the European Commission and all EU member states in order to arrange relocation of these migrants.
3. On **30 April**, the Maltese government decided to transfer the people rescued by *Dar El Salaam 1* the previous day onto a private ship, the *Europa II*⁷, a Captain Morgan ship normally used for coastal cruising. Mattresses and food supplies were seen being loaded onto it in Sliema earlier that day. The *Europa II* left from Sliema on Thursday afternoon with a banner of the EU flag strung on its side with the words, *European Solidarity*, on it. The government stated that the *Europa II* would be anchored just outside territorial waters, 13 nautical miles from the coast, keeping the 57 migrants aboard until the European Union finds a solution and Malta receives concrete commitments from other Member States regarding the relocation of migrants. *Marine Traffic*, a popular vessel tracking website, shows the *Europa II*'s tracker is "out of range" since its AIS (automatic identification system) remained switched off.
4. On **1 May** (Friday), the Maltese government sent a letter to the European Commission, demanding a more "predictable and mandatory" relocation mechanism to be agreed upon in the upcoming EU migration pact. Malta claimed that a total of 128 pledges by Member States (122 of which were made in 2019) to relocate migrants rescued by Malta have yet to materialise, Portugal being the only EU country that offered to accept six of the migrants aboard *Europa II*. Prime Minister Abela stated that the Search and Rescue Convention which Malta is a signatory to clearly states that a country's obligation is to coordinate the rescue of people in distress, which Malta fully complied with. However, he claimed that nothing stops the state from using private assets when fulfilling such obligations. "We know our obligations and have always abided by them, but we will remain firm in saying that our ports are not safe for the disembarkation of rescued people and that we cannot guarantee the resources for such rescues", PM Abela said. He also noted that even though the EU was covering the expenses for the rescue

⁷ (Passenger License: 445 Passengers / L.O.A.: 34.73m / Engine: VM Diesels, 373kW x2 / Gross Tonnage: 209; Pleasure Craft and it's sailing under the flag of [MT] Malta.)

of the most recent group of migrants, Malta will be insisting for a lot more and was not so far satisfied with the ongoing discussions.

5. Asked by the Malta Independent newspaper what will happen to the migrants currently onboard the *Europa II* if an agreement with European countries is not reached, PM Abela seemed to take umbrage at the line of questioning: *"I find it hard to understand how on such a nice day today, the start of a new normality for our people, you are only asking about immigrants. I think the subject has been exhausted."* Prime Minister Abela stated that all those aboard were provided with the basic needs and the Red Cross provided the necessary medical check-ups.
6. On **2 May** UNHCR also called for greater coordination, solidarity and responsibility-sharing, in view of the increased movements of refugees and migrants in the Mediterranean Sea and despite the COVID-19 pandemic. In all cases, it called for a safe port for disembarkation to be provided without delay, together with a prompt agreement on how to share responsibility amongst States for hosting people. UNHCR reiterated its position that no one should be returned to Libya after being rescued at sea, due to the ongoing conflict in Libya, as well as the routine detention of disembarked migrants and asylum-seekers.
7. On **3 May**, the government reaffirmed its stance and reiterated that *Europa II* was going to stay moored out at sea until an acceptable agreement is reached with other Member States.
8. On **4 May**, an EU Commission spokesperson told the Times of Malta that the Commission was ready to coordinate relocation efforts for migrants held on the *Europa II* only after a disembarkation has taken place. The Commission spokesperson said that finding a place of disembarkation for the migrants was outside of its remit. Malta, however, continued to refuse bringing the migrants ashore and PM Abela stated that Malta would not allow the migrants to disembark before an agreement is reached within the EU. According to him, this was an unacceptable proposal and added that *"we know what happens; they will be allowed in, and no solution will be found."*
9. The Prime Minister stressed that the fact that these migrants are on a private vessel is another piece of proof of how the Maltese government always followed its obligations of coordinating rescue.

Captain Morgan Bahari

10. On **7 May**, Malta was involved in two rescue operations that picked up all 123 persons in distress within the country's SAR zone. In the first instance, the army's P52 patrol boat rescued 45 people (including 39 men, 3 women, one of whom was pregnant and 3 children, two of whom were aged 18 months and 2 years) from a dinghy. In the second instant, the rescue was carried out by a private fishing vessel coordinated by the AFM. The fishing boat picked up 78 migrants (including 68 men, 5 women, one of whom was pregnant, and 5 children).
11. Government sources said an exception for humanitarian reasons was made to bring ashore 18 women and children. However, the remaining 105 people were transferred onto a second chartered Captain Morgan vessel, the *Bahari*⁸. The *Bahari* set off shortly after 4 pm from Sliema on the same day in order to take the migrants aboard and anchored just outside Maltese territorial waters.

⁸ Passenger License: 300 Passengers; L.O.A.: 23.59m; Engine: Iveco Aifo Diesel, V8 x2; Gross Tonnage: 74.23; BAHARI (MMSI: 248000777) is a Pleasure Craft and it's sailing under the flag of [MT] Malta.

12. On **8 May**, the UN High Commissioner for Human Rights stated that rescued migrants being held on board ships outside territorial waters must be “*urgently disembarked*” and called for “*restrictions on the work of rescuers to be lifted immediately. Such measures are clearly putting lives at risk... We are also aware of claims that distress calls to relevant Maritime Rescue Coordination centres have gone unanswered or been ignored, which, if true, seriously calls into question the commitments of the states concerned to saving lives and respecting human rights*”.
13. It was reported that the EU Commission stated that for Malta to qualify for funds to maintain the rescue operation being carried out by the Captain Morgan vessels it has to observe all the legal conditions, including disembarkation.
14. On **9 May**, government sources told Times of Malta that Brussels would be notified that Malta would no longer commit any military assets to Operation Irini. A senior government source said Malta would be using its veto to block the planned extension of Operation Irini through the use of further military vessels. The source said the decision was partly motivated by the ongoing migration crisis, as Malta seeks to realign its position on the ongoing Libya conflict.
15. On **10 May**, a government spokesperson told reporters that Captain Morgan had been chosen to provide the two vessels as this was the company that offered the cheapest price. It is unclear what selection process was used and whether there was a public call for quotations. The Office of the Prime Minister said that it would be publishing the costs at the end of the operation and the government would keep on insisting that these costs should be covered by the EU.
16. Malta received a request from Brussels for details of the 162 rescued migrants kept on two ships just outside territorial waters. The information requested include the migrants’ names, date of births, their country of origin, their language and whether they have relatives in Europe.
17. On the same day, Public Health Superintendent Professor Charmaine Gauci stated that swab tests were being carried out among the migrants aboard the Captain Morgan vessels, as well as on the vulnerable migrants who were brought ashore on 7 May.
18. On **11 May**, Commissioner Mijatov called on Malta in a letter to give priority to humanitarian conditions, to demonstrate that it was saving the lives of those who were stranded out at sea and that it was guaranteeing a safe port.
19. PM Robert Abela told Parliament that each Captain Morgan vessel chartered by the government was costing around €3,000 per day.

Captain Morgan Atlantis

20. On the night of **14 May**, a third Captain Morgan ship, the *Atlantis*⁹, sailed out beyond Malta’s territorial waters and has been alongside *Bahari*. According to Times of Malta, the Atlantis was sent to replace *Bahari* at its current position (13 nautical miles east of Valletta).

⁹ Passenger License: 499 Passengers, L.O.A.: 39.6m; Engine: Iveco Aifo Diesels, 410kW x2; Gross Tonnage: 330. is a Pleasure Craft and it's sailing under the flag of [MT] Malta