

UNITED NATIONS HUMAN RIGHTS COMMITTEE
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6 - 31 October 2014

**THE INTERNATIONAL COMMISSION OF JURISTS' SUBMISSION
TO THE UN HUMAN RIGHTS COMMITTEE IN ADVANCE OF THE
EXAMINATION OF MALTA'S SECOND AND THIRD PERIODIC REPORTS
UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS**

Submitted on 24 September 2014

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

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Introduction

1. During its 112th session, from 7 to 31 October 2014, the Human Rights Committee ('the Committee') will examine Malta's implementation of the provisions of the International Covenant on Civil and Political Rights (ICCPR or 'the Covenant'), including in light of the State Party's consolidated 2nd and 3rd periodic reports under Article 40 of the ICCPR. The International Commission of Jurists (ICJ) welcomes the opportunity to submit the following observations to the Committee.
2. In this brief submission, the ICJ expresses concern that the State party has violated its obligations under Articles 2, 3, 6, 7 and 26 in relation to the continued criminalization of abortion, and under Articles 2, 3, 7, 16, 17, 19, 23 and 26 in relation to its interference with the enjoyment of Covenant rights in connection with sexual orientation and gender identity. Further, in this submission the ICJ raises questions about the continuing necessity of Malta's reservations to the Covenant.
3. This submission builds on the ICJ's submission on the list of issues of December 2013, which also addressed the organization long-standing concerns regarding Malta's migration law and policy.¹

Articles 2, 3, 6, 7 and 26: Access to reproductive health and criminalization of abortion

4. Malta's criminal code prohibits the termination of pregnancy, specifying that both women who procure their own miscarriages and medical professionals who perform or assist them may be held criminally responsible.² The terms of the law do not provide for any exceptions; abortion is not permitted for therapeutic purposes to save the life of a pregnant woman or to protect her health. Nor is abortion permitted in cases of fatal foetal abnormalities or pregnancy resulting from sexual assault or other crimes.
5. These provisions of Maltese criminal law are inconsistent with and give rise to breaches of the State party's obligations under Articles 2, 3, 6, 7 and 26 of the Covenant, including in respect of Malta's obligations to ensure women's enjoyment of the rights to life, freedom from torture and cruel, inhuman or degrading treatment and equality before the law.
6. The Committee on the Elimination of Discrimination against Women, in its Concluding Observations on Malta in 2010, expressed concern about the extent of these prohibitions and urged Malta to remove the provisions criminalizing women who undergo abortion from its law and to enact exceptions allowing for termination of pregnancy for therapeutic purposes and in cases of rape or incest.³ The Committee on Economic, Social and Cultural Rights had expressed similar concerns and had urged the Maltese authorities to implement similar recommendations in 2004.⁴
7. These concerns and recommendations on Malta mirror those of this Committee as well as other Treaty Bodies and UN Special Procedures in relation to other States with similarly restrictive laws that criminalize abortion without relevant exceptions.⁵

¹ International Commission of Jurists, 'ICJ submission to the Human Rights Committee on Malta' (2013), <http://www.icj.org/2013/09/10/2013-09-10-icj-submission-to-the-human-rights-committee-on-malta/>, and <http://www.icj.org/2014/01/24/2014-01-24-chapter-9/>.

³ Concluding observations of the Committee on the Elimination of Discrimination Against Women, UN Doc. CEDAW/C/MLT/CO/4 (2010), para. 34-35.

⁴ Concluding observations of the Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/1/Add.101 (2004), para. 23, 41.

⁵ See for example: Concluding observations of the Human Rights Committee on Ireland, UN Doc. CCPR/C/IRL/CO/4 (2014); Concluding observations of the Human Rights Committee on

- 8. The ICJ considers that, consistent with its obligations under Articles 2, 3, 6, 7 and 26 of the Covenant, the State party should decriminalise abortion and ensure that women are able to access safe and legal abortions in Malta in a range of circumstances, including, at a minimum where their life or health is at risk, where there is a fatal foetal abnormality, or where the pregnancy is the result of sexual assault or other crimes.**

Enjoyment of Covenant rights in connection with sexual orientation and gender identity

9. The ICJ welcomes the adoption of the Constitution of Malta (Amendment) Act 2014,⁶ which amended the Constitution to add sexual orientation as well as gender identity to the list of prohibited grounds of discrimination. However, the organization remains concerned that the Constitution's anti-discrimination provision does not extend to matters of personal law.⁷
10. The ICJ also welcomes the adoption of the Civil Code (Amendment) Act 2013,⁸ which removed legal obstacles for individuals who have undergone a "legally recognized sex change" from the sex that was assigned to them at birth to their acquired sex, allowing recognition of the acquired sex for all civil purposes, including marriage.
11. In its submission to this Committee on the preparation of the list of issues the ICJ voiced concern regarding the conditions and procedure to obtain legal recognition of a sex change: besides it being costly and intrusive, the ICJ deemed the requirement of an "irreversible sex change", interpreted in domestic jurisprudence as meaning surgical intervention, in particular, to be inconsistent with the State's obligations under Articles 2, 3, 7, 16, 17 and 26 of the Covenant. The ICJ also expressed concern that the requirement of being unmarried in order to be able to bring an action for the legal recognition of one's gender identity imposes an unreasonable and discriminatory requirement that is inconsistent with the State party's obligations under Articles 2, 16, 19, 23 and 26 of the Covenant.
12. The ICJ understands that the Maltese government plans to introduce new legislation regarding gender identity.
13. Lastly, the ICJ notes the adoption of the Civil Unions Act, 2014 in April 2014 and welcomes its rationale of equating these unions – whether between persons of the same or opposite sex – with marriages in terms of procedures and substance, in a manner that guarantees equal rights to the parties in a civil union as to spouses in a marriage. However, the organization regrets that the institution of marriage remains open only to partners of the opposite sex. Beyond rights and

Ireland, UN Doc. CCPR/C/IRL/CO/330 (2008); Concluding observations of the Human Rights Committee on Ireland, UN Doc. A/55/40 (2000); Concluding Observations of the Committee against Torture on Peru, UN Doc CAT/C/PER/CO/4 (2006), para. 23; Concluding Observations of the Committee against Torture on Nicaragua, UN Doc CAT/C/NIC/CO/1 (2009), para. 16. See also: *KL v. Peru*, Human Rights Committee Communication 1153/2003, UN Doc CCPR/C/85/D/1153/2003 (2005); *V.D.A. v. Argentina*, Human Rights Committee Communication No. 1608/2007, CCPR/C/101/D/1608/2007 (2011). And see *LC v. Peru*, CEDAW Communication 22/2009, UN Doc CEDAW/C/50/D/22/2009 (2011); Report of the Special Rapporteur on the right of everyone on to the enjoyment of the highest attainable standard of physical and mental health, UN Doc A/66/254 (2011); Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/HRC/22/53 (2013).

⁶ Constitution of Malta (Amendment) Act, 2014, Act No. X of 2014.

⁷ Constitution, S. 45(4)(c) reads: "Sub-article (1) of this article shall not apply to any law so far as that law makes provision – ... (c) with respect to adoption, marriage, dissolution of marriage, burial, devolution of property on death or any matter of personal law not hereinbefore specified".

⁸ Civil Code (Amendment) Act 2013, Act No. VII of 2013.

responsibilities, marriage also has a symbolic significance. Continuing to withhold the title of marriage signals that same-sex couples are inferior and thus perpetuates a "separate but equal" doctrine repugnant to the concept of human dignity for all.⁹

14. In light of the above, and consistent with the Malta's obligations under Articles 2, 3, 7, 16, 17, 19, 23 and 26 of the Covenant, the ICJ considers that:

- a) Malta should amend the Constitutional clause guaranteeing protection from discrimination, extending it to cover matters of personal law in its scope of application;**
- b) the State should ensure that the forthcoming gender identity legislation establishes the fullest protection and promotion of the human rights of transgender people. In particular, it should address the concerns set out at paragraph 11 above and modify the existing conditions and procedure applicable to obtaining legal recognition of one's sex in a manner that makes them consistent with Malta's obligations under the Covenant; and**
- c) the authorities should introduce marriage for same-sex partners, thereby abandoning the "separate but equal" doctrine implied by the current legal framework.**

Malta's reservations to the Covenant

15. Upon its accession to the Covenant in 1990, Malta entered reservations to Articles 13, 14, 19, 20 and 22 of the Covenant.

16. In its 1993 Concluding Observations on Malta's first periodic report under the Covenant, the Committee recommended that the "Government review, with a view to withdrawing, the reservations made upon ratification of the Covenant, particularly those concerning article 13 and 14 of the Covenant".¹⁰ The Committee's recommendation was based on its observations that the: *reservations entered by Malta upon ratification of the Covenant with respect to a number of provisions have an adverse effect on the effective implementation of the Covenant. No convincing reasons have been offered for the reservations to article 13 and article 14, paragraph 6. Additionally, given the actual situation of human rights protection in Malta, some reservations may now have become obsolete.*¹¹

⁹ See Constitutional Court of South Africa, joined cases *Minister of Home Affairs et al. v. Fourie et al.*, CCT 60/04, and *Lesbian and Gay Equality Project et al. v. Minister of Home Affairs et al.*, CCT 10/05 (1 December 2005), in particular para. 152-153: "The crucial determinant will always be whether human dignity is enhanced or diminished and the achievement of equality is promoted or undermined by the measure concerned. Differential treatment in itself does not necessarily violate the dignity of those affected. It is when separation implies repudiation, connotes distaste or inferiority and perpetuates a caste-like status that it becomes constitutionally invidious. In the present matter, this means that whatever legislative remedy is chosen must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved. In a context of patterns of deep past discrimination and continuing homophobia, appropriate sensitivity must be shown to providing a remedy that is truly and manifestly respectful of the dignity of same-sex couples". Also see Supreme Court of Mexico, *Acción de Inconstitucionalidad 2/2010* (10 August 2010); United States District Court for the Northern District of California, *Perry v. Schwarzenegger* ("Proposition 8"), No. C 09-2292 VRW (4 August 2010).

¹⁰ Concluding Observations of the Human Rights Committee on Malta, U.N. Doc.

CCPR/C/79/Add.29, 5 November 1993, para. 13.

¹¹ *Ibid*, para. 10.

17. Notwithstanding the Committee's concern and recommendation, and the elapse of more than 20 years, Malta has maintained all of the reservations it entered upon accession to the Covenant in 1990.¹²
18. Malta's reservation to Article 13 stated that although the Government of Malta endorses the principles laid down in Article 13 "...in the present circumstances it cannot comply entirely with the provisions of this article".¹³ Similarly its reservation to Article 14(6) stated: "While the Government of Malta accepts the principle of compensation for wrongful imprisonment, it is not possible at this time to implement such a principle in accordance with article 14, paragraph 6, of the Covenant".¹⁴
19. Significantly, since making these reservations to the Covenant, Malta has ratified, **without reservations**, both Protocol 4 and Protocol 7 to the European Convention on Human Rights, which, *inter alia*, enshrine rights equivalent to those under Article 13 regarding the prohibition of collective expulsions and concerning expulsion proceedings¹⁵ and Article 14(6) of the Covenant regarding compensation for wrongful conviction.¹⁶
20. Finally, the ICJ considers that reservations must be, by their very nature, temporary. In this regard, the ICJ refers to this Committee's statement that:
*It is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires to render its own laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant. States should also ensure that the necessity for maintaining reservations is periodically reviewed, taking into account any observations and recommendations made by the Committee during examination of their reports. Reservations should be withdrawn at the earliest possible moment.*¹⁷
21. The ICJ therefore considers that the reservations entered by Malta to Articles 13 and 14 upon accession to the Covenant in 1990 are, as the Committee noted in 1993, "obsolete". The fact that Malta never refers to them in its State report whenever it addresses its obligations under Articles 13 and 14(6) of the Covenant is a further indication of their obsolescence.
22. In this connection, the ICJ is concerned that in the State's replies to the List of Issues Malta indicated that it would maintain its reservations to the Covenant since there has been no policy change in this area. The organization considers that the State Party has failed to take the opportunity to review the continuing necessity and appropriateness of its reservations to Articles 13, 14(6), 19, 20 and 22.

23. In light of the above, the ICJ recommends that the State Party should:

¹² See the United Nations Treaty Collection, as of 4 December 2013, available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

¹³ *Ibid*, Reservation no. 1.

¹⁴ *Ibid*, Reservation no. 3.

¹⁵ Articles 3 and 4 of [Protocol 4 to the European Convention on Human Rights](#), Article 1 of [Protocol 7 to the European Convention on Human Rights](#).

¹⁶ Article 3 of [Protocol 7 to the European Convention on Human Rights](#).

¹⁷ Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 20, available at: <http://www.unhchr.ch/tbs/doc.nsf/0/69c55b086f72957ec12563ed004ecf7a?OpenDocument>.

a) withdraw the reservations to Articles 13 and 14(6) given its the obligations under Protocols 4 and 7 to the European Convention on Human Rights; and

b) review the continuing necessity and appropriateness of its reservations to Articles 14(2), 19, 20 and 22 of the Covenant.