

**Position Paper on the Report of the Board of Inquiry nominated by the Prime Minister on
January 17, 2005, in terms of Article 4 of the Inquiries Act, dated December 9, 2005**

**Emigrants' Commission & Jesuit Refugee Service (Malta)
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Introduction

This position paper, which was prepared by Emigrants' Commission and Jesuit Refugee Service (Malta), is intended as a brief, initial reaction to the report of the inquiry into the events which took place in Safi Barracks on January 13, 2005. The inquiry report was published by the government on December 12, 2005.

This position paper is not an exhaustive discussion of, or reaction to, all the points raised by the Board of Inquiry that, in our view, merit attention or clarification. It simply aims to highlight the concerns and issues we feel are most pressing. We believe that the points raised in this document should be taken into account by the authorities concerned in the course of the evaluation currently being undertaken¹ in order to determine the course of action which should be taken in the circumstances.

The Board of Inquiry, composed of Judge Depasquale, was instructed to examine all the circumstances that led the armed forces to use force against the irregular immigrants who were detained in Safi, whether the use of force was justified in the circumstances in which the members of the AFM found themselves, and whether the force used was proportionate in the circumstances. The Board was also authorised to examine all ancillary questions relating to what took place on the day and to make its recommendations in the light of conclusions reached.

1. Conclusions regarding the incident on January 13, 2005

The report presented by Judge Franco Depasquale draws a detailed picture of the events which took place in the football ground inside Safi Barracks on January 13, 2005, in spite of the considerable difficulties inherent in the task. This account was painstakingly put together from the verbal accounts of numerous, often reluctant, eye-witnesses (army personnel, journalists and immigrants), and from the audio-visual records (video footage and photographs) taken on the day.

In so doing, the report reveals a number of matters which we believe are extremely relevant, not only to determine what action should be taken with regard to the incidents that took place on January 13 but, perhaps more importantly, to address certain long-standing shortcomings in the current system.

1. In spite of the fact that many of the soldiers working directly with the immigrants do their best to meet the needs of the people entrusted to their care, they labour under a huge burden of frustration and discontent. This is due largely to the conditions in which they work, which they perceive as unnecessarily harsh and unfair. As a result many soldiers, including those who do not work directly with the immigrants, have a very negative perception of the detainees and believe them to be somehow responsible for this situation.
2. The authorities running the detention centres lack the resources required to effectively administer centres housing such a large number of immigrants. This naturally increases the suffering of detainees and contributes to insecurity and tension among staff, making their work far more difficult and stressful.

¹ See *Times of Malta*, Thursday, December 15, 2005, "Government 'studying' Safi incident report".

3. It is very difficult for immigrants in detention to gain access to the authorities taking decisions about their future or to obtain accurate information about their situation, in spite of their repeated requests. This situation is made worse by the fact that in many cases, as on the day of the incident, the authorities running the detention centres fail to take the immigrants' demands seriously, even if they are reasonable and legitimate. This aggravates the dissatisfaction and frustration naturally felt by people who are deprived of their liberty.
4. There are no clear rules and standards for the maintenance of discipline within detention centres; this could, and in fact does, lead to a certain amount of arbitrariness both in the evaluation of what actions can or should be punished and in the choice and implementation of measures used to exert control.
5. The soldiers are not trained or prepared either to work with detained immigrants or to deal with eventualities such as those which arose on January 13, 2005. In fact, on that day, the situation quickly descended into chaos and confusion, which the judge describes as a 'free for all'.

The Board concluded that the decision taken by the military command to use force on that occasion was justified. However, in our view, the wisdom of a decision to implement a course of action for which one clearly does not have the necessary resources (in terms of trained personnel), should be questioned and, in view of the result, carefully evaluated in order to take the necessary action.

Moreover, the actions of all the soldiers involved, not only the one caught on film without a visor, should be scrutinised and the required action taken, as it is amply clear from the account contained in the report that excessive force was used by more than just this one soldier.

Beyond this, however, it is necessary to redress the inadequacies in the system that leave immigrants in detention deprived of access to information and without adequate channels of communication with the authorities taking decisions about their future.

Moreover, the recently established Detention Service should be provided with sufficient resources, in terms of personnel and finances, to ensure that the condition of both immigrants and staff are significantly improved.

In addition, it is clear that there is a pressing and urgent need to establish rules and standards for the maintenance of discipline within detention centres, and to ensure that the staff is trained to respect and implement such standards.

We therefore call upon the authorities to ensure that, in the light of the account of events on January 13, 2005 described in the report, the decisions and actions taken by the armed forces personnel on that day are carefully evaluated and the action to be taken clearly identified and implemented, in the absence of specific recommendations to this effect in the Inquiry report.

We urge the authorities concerned to ascertain that, in view of their decision to maintain a policy of mandatory and long-term detention of asylum seekers and irregular immigrants, sufficient resources are invested and policies and practices put in place to ensure that human rights are respected.

In addition, we recommend that, as a matter of priority, the authorities concerned take positive action to address the shortcomings in the current arrangements, which fuel stress, tension and frustration and create unnecessary hardship for all concerned.

2. Scope of the report

Beyond the examination of the incidents which took place on January 13, 2005, the report also discussed various other matters, such as government policy on the length of detention, repatriation procedures and irregular employment of migrants in the local labour market.

We believe that the Board went beyond the scope of its mandate, discussing matters which cannot be described as auxiliary or secondary to the incidents which took place on January 13, 2005.

Each of these supposedly ‘ancillary questions’ is a highly complex issue, on which no conclusion can be reached without an in-depth examination of all relevant factors and at least a reference to Malta’s human rights obligations².

Malta’s policy of mandatory and long-term detention and, in particular, the conditions in which asylum seekers and immigrants are detained have been repeatedly criticised not only by local NGOs but by international institutions, such as the United Nations High Commissioner for Refugees, the Council of Europe Human Rights Commissioner³ and the Committee for the Prevention of Torture⁴. These bodies, which are created by states, are recognised authorities in their respective fields and are legally authorised to monitor states’ compliance with human rights and other conventions which they freely signed.

It is our hope that the authorities will not attempt to dismiss their concerns, which are based on a detailed analysis of the requirements of the law and the facts on the ground, on the basis of recommendations and conclusions which the Board of Inquiry was neither authorised nor competent to make.

We therefore call upon the authorities concerned to ensure that the numerous recommendations made by the CPT, the UNHCR and the Council of Europe Human Rights Commissioner, are implemented and that Malta’s policies and practices are brought in line with its human rights obligations.

3. Portrayal of immigrants

One major concern regarding the report issued by the Board of Inquiry is the image that it projects of immigrants, not only those directly involved in the protest, but also those living in other detention centres and in the community.

Throughout the report the detainees are depicted in a very negative manner, which is uncomfortably resonant of the perception which is predominant among members of the security forces. This perception, which is characterised by dehumanisation and criminalisation of the ‘other’, generally reflects an almost total inability to empathise with the situation of immigrants who are deprived of their liberty for so long in such difficult

² “States have the sovereign right to protect their borders and to introduce measures controlling migration within their jurisdiction...However, the exercise of this right must be in accordance with a State’s other international obligations, including those of a human rights nature falling under the CPT’s mandate”, page 8, CPT report on its visit to Malta, August 25, 2005, CPT/INF(2005)15.

³ See report by Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights, dated February 12, 2004, CommDH(2004)4.

⁴ See *op cit* CPT report.

conditions. Thus, immigrants' concerns are belittled and prejudices and security concerns are amplified to justify the status quo.

The following are some examples:

- a) The protest that took place on January 13 is repeatedly referred to as an escape, in view of the fact that the immigrants went outside the compound they were supposed to be restricted to, although in fact they remained within the confines of Safi Barracks.⁵
- b) The fact that the protest was planned, rather than spontaneous, is implicitly criticised.⁶
- c) The immigrants' refusal to move back into the compound until they saw the authorities they were requesting to meet on site is interpreted not as the natural reaction of people whose requests have been consistently ignored, but as a "negative attitude" on the part of the immigrants.⁷
- d) There is repeated mention of the fact that none were 'genuine' refugees, all were economic migrants who had no right to be in Malta.⁸ The report mentions a number of times that none were subsequently given refugee status – however nine were given humanitarian protection.⁹
- e) All rejected asylum seekers are portrayed as liars, who are doing their utmost to frustrate government attempts to deport them.¹⁰
- f) The immigrants' level of discontent while in detention is somehow taken to be an indicator of the 'genuineness' of their claim to refugee status – discontent is inversely proportional to 'genuineness', i.e. the greater the discontent the more likely they are to be 'fakes'.¹¹
- g) Their journey to Malta across the desert and sea is made to seem easy and almost risk free; it is even stated that in most cases, when they do not meet bad weather, immigrants arrive in Malta or Sicily looking clean and well dressed, with a clean-shaven face.¹² This conclusion is belied by the staggering numbers of people presumed to have lost their lives crossing the Sahara desert and the Mediterranean Sea
- h) Immigrants are linked with illegality, through references to illegal employment¹³, prostitution¹⁴, smuggling of dangerous weapons into detention centres¹⁵ and references to detainees' violence and unpredictability¹⁶, although, as the Board admitted, this security risk has never been realised to date.

We understand that, in the eyes of the authorities, refugee-assisting NGOs may appear partial and biased. In fact, NGOs are often accused of emphasising detainees' concerns and human rights above security concerns and the 'national interest'. However, it is worth noting that the authorities' position has been questioned by various credible human rights organisations and international institutions on more than one occasion¹⁷.

⁵ See Depasquale Report, December 2005, page 3 last paragraph, page 17 paragraph 3 and page 25 last paragraph, among others.

⁶ *Ibid* for example section 15: 'Il-protesta li saret dak inhar [sic]'.

⁷ *Ibid* page 33 paragraph 4.

⁸ *Ibid* page 71 paragraph 2.

⁹ See paragraph '(b) Immigrants' status at the time and after' in this same section of the Position Paper.

¹⁰ *Op cit* Depasquale Report, for example section 18, 'Procedura ghar-reimpatriju u dokumentazzjoni'.

¹¹ *Ibid* section 16: 'Ghaliex jtilqu minn pajjizhom', from page 69 last paragraph *et seq.*

¹² *Ibid* section 16: 'Ghaliex jtilqu minn pajjizhom'.

¹³ *Ibid* page 95 last paragraph.

¹⁴ *Ibid* page 77 last paragraph, pages 95 last paragraph *et seq.*

¹⁵ *Ibid* page 81 paragraph 3.

¹⁶ *Ibid*, for example page 42 paragraph 1 and page 83 paragraph 2.

¹⁷ See for example *op cit* Alvaro Gil-Robles report and *op cit* CPT report.

It is therefore a matter of concern that the Board seems to have adopted these negative perceptions and prejudices *in toto*, seemingly without question.

While it is impossible to counter all of these statements and address the underlying prejudices, some facts should be clearly stated in order to avoid possible inaccuracies:

a) The protest

While it is true that the immigrants went outside the boundaries of the detention centre, they stayed within the grounds of Safi Barracks.

The immigrants consistently stated that they had no intention of escaping. Given the circumstances on the ground, so eloquently described in the report, at the moment when they emerged from the compound, it is amply clear that had they wanted to walk out of the barracks at that time, they could easily have done so. They did not do so because they did not want to.

It is clear from the report that the immigrants were not armed and they did not attack the soldiers; when attacked, they defended themselves with sticks and stones they found on the ground not with weapons they had manufactured or smuggled into the barracks.

b) Immigrants' status at the time and after

At the time of the protest all the immigrants concerned were still asylum seekers.

Subsequently, 9 of these asylum seekers were granted Humanitarian Protection in terms of the Refugees Act, in recognition of the fact that they need protection and cannot return home safely. Some had their application rejected, but many were still pending a final decision after 12 months and were in fact released to live in the community.

c) Refugee status and other forms of protection

Refugee status is granted only to a very narrow category of immigrants who can prove that they face a real risk of serious harm if returned home, because of their race, religion, nationality, membership of a particular social group or political opinion.

Not all immigrants who need protection are refugees at law. People fleeing war do not come within the narrow confines of this definition, yet they are granted protection nonetheless in terms of the Refugees Act (humanitarian protection).

Also excluded are people who will face torture or other serious violations of their human rights, for reasons other than those found in the refugee definition. Yet, Malta is obliged to protect them in terms of international human rights law.

d) Rights of rejected asylum seekers who do not need protection and the repatriation process

Immigrants who have no need for protection under refugee or human rights law can be removed from Malta, however there are numerous serious difficulties inherent in repatriation. It is true that some immigrants do not provide accurate information about their identity, but this cannot be said to be true of all rejected asylum seekers.

All immigrants, even those who are not entitled to protection, leave their home for a reason. Many leave behind grinding poverty and deprivation; they are pushed to leave by despair and the impossibility of living with dignity, not just lured by the promise of a better life.

Though they may not all be entitled to protection and the right to stay in Malta, they are nonetheless deserving of our compassion and understanding. Moreover, they have a right to be treated with dignity and to have their basic human rights respected.

In this light, we call upon all concerned to recognise the humanity and inherent dignity of each person, irrespective of factors such as race or immigration status.

We also re-affirm our stand that the human person has to be at the centre of any discussion on immigration policy and practice, and that the ultimate aim of any policy has to be to ensure that the fundamental rights of every individual are safeguarded.

4. The role of NGOs, journalists and UNHCR

From the contents of the report it would appear that the Board is labouring under the illusion that had the UNHCR representative or 'helpers' (presumably NGO personnel) not spoken to the detainees, they would not have protested about their situation or possibly they would have been less discontent¹⁸.

It should be stated that all immigrants, without exception, whether or not they are refugees at law, believe that their prolonged detention is fundamentally unjust. They believe that they are being deprived of their liberty totally unnecessarily and that their human rights are being violated.

NGO personnel and refugee assisting organisations have to deal with these feelings honestly and openly if they are to build a relationship of trust with the detainees. While we agree that NGOs should never incite discontent or make false promises, we believe that it is incumbent upon all who work with detainees to make them aware of their legal rights and to work to ensure that the rights of every individual are safeguarded.

We believe that NGOs and international organisations must go beyond the mere provision of material assistance and services to refugees and asylum seekers, to advocating for a system where the rights of all are respected and safeguarded.

The media have an important role to play in this respect, allowing for increased accountability and public scrutiny of government policy and the conditions in which immigrants are detained.

To imply that NGOs, representatives of international institutions, or even journalists, by doing their job, are somehow responsible for what happened on January 13, 2005, is as unacceptable as it is facile, particularly in the face of the conditions on the ground in detention centres.

We therefore encourage the authorities to move beyond a culture of charity to one of true respect for the rights of all.

We also urge the authorities to ensure that the important role of civil society (including media and NGOs) and of international institutions, in the safeguarding of fundamental human rights and freedoms through public scrutiny of state actions, is respected and that such organisations are allowed to work unhindered.

In addition we call upon the authorities to create a climate of open and constructive dialogue with civil society and international institutions, particularly UNHCR, in the area of immigration and asylum policy, in order to ensure that policy and practice in this sensitive area is in line with our international obligations and the interests of all are truly recognised and safeguarded.

¹⁸ *Op cit* Depasquale Report page 78 last paragraph *et seq*