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Message:

Re: TARAKHEL v SWITZERLAND
29217/12

Please see attached intervention

AMNESTY INTERNATIONAL

THE AIRE CENTRE
Advice on Individual Rights in Europe

ecre
European Council
on Refugees and Exiles

The Registrar
Grand Chamber
European Court of Human Rights
Council of Europe
Strasbourg France

ECHR-LE5.1ar
SPR/SPD/elf

12th January 2014

Dear Sir

Before the Grand Chamber of the European Court of Human Rights
Tarakhel v Switzerland Application No 29217/12

The above three organisations, **The AIRE centre, Amnesty International and ECRE** are attaching their third party intervention in the above case for the attention of the Grand Chamber.

The narrative is accompanied – for the convenience of reference by the Court- by a number of relevant documents as annexes. Please note that in order to minimise unnecessary printing we are providing only hyperlinks for those documents which are readily available online and only faxing print outs of document which are not publicly available. We will also send an electronic version of the narrative and annexes which the Court may find it convenient to have at its disposal .

Please let us know , by telephone to the AIRE centre on +44 207 831 4276, if the Court would find it more convenient for us to fax print outs of any those documents tomorrow , 13th January .

Yours faithfully

Nuala Mole
Senior Lawyer, The AIRE Centre
on behalf of The AIRE Centre, Amnesty and ECRE

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OISC
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N200600055

BEFORE THE GRAND CHAMBER
EUROPEAN COURT OF HUMAN RIGHTS

Application No 29217/12

B E T W E E N:

TARAKHEL

Applicant

- and -

SWITZERLAND

Respondent

SUBMISSIONS FOR THE INTERVENOR
AIRE CENTRE, EUROPEAN COUNCIL ON REFUGEES AND EXILES AND AMNESTY INTERNATIONAL

Summary

1. The Interveners' submissions are in summary as follows:

(1) A state party to the Convention may not remove an individual to another state party in circumstances where this would entail a breach of any of the removing state's Convention obligations.

(2) The removal of a person from a state party will breach Article 3 rights "where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country", and that test is unaltered when removal is to a member state of the European Union: *MSS v Belgium and Greece* (2011) at [365] ("MSS").

(3) The assessment of that risk must be "rigorous", and must take account of all relevant evidence, including evidence about the circumstances of the individual.

(4) Demonstration of operational or systemic failures in the receiving state is not necessary for a finding of a breach by the removing state; it may, however, be sufficient, triggering a duty of enquiry and not merely rebutting, but reversing the presumption that member states will comply with their international obligations (as was the case in *M.S.S* at [359]).

(5) The presumption that member states will comply with their international obligations is exactly that: a mere presumption rebuttable by evidence, with no threshold of exceptionality. It is the same presumption as that considered in *Saadi v Italy* (2008) at [147], namely that Tunisia would comply with its international obligations. *MSS* at [354] establishes that the presumption in the context of a Dublin II removal is no different. What matters is the practical reality, established by the evidence, not the theory: the formal existence of legal provisions is only relevant where they are implemented in practice.

(6) Where breaches of fundamental rights are alleged, the existence of remedies in the receiving country is only relevant if those remedies are (a) available in practice and (b) effective, that is to say *preventative*, and avert the harm feared. This is particularly the case where Article 3 is concerned.

(7) The particular status of and risks to vulnerable individuals are always relevant and may be determinative, and the best interests of any children affected will be effectively the controlling consideration in decisions made under the Dublin II Regulation.

(8) Removal to a breach of the right to respect for moral and physical integrity protected by Article 8 which is unjustified in the circumstances should prevent transfer. In a Dublin II context (and unusually in the context of cross-jurisdictional return), there is no requirement for an additional test of 'flagrancy'. The basic rationale for the flagrancy test - to avoid human rights imperialism and the imposition of Convention standards world-wide does not apply when the receiving state is itself a state party to the Convention. Nor does it apply where the sending and receiving state are subject to the same body of supra-national (EU) law stipulating minimum standards designed to protect asylum seekers' basic rights. The time has come for the Court to recognise this.

(9) There is no basis for a categorical distinction between asylum-seekers and refugees, both of which are *prima facie* vulnerable groups.

The Common European Asylum System ("CEAS") [1]

2. The Preamble to the Dublin II Regulation establishes that it is intended to provide a "clear and workable method for determining the member state responsible for the examination of an asylum application" (para 3), to be "based on objective, *fair criteria* both for the Member States *and for the persons concerned*", making it possible "to determine rapidly the Member State responsible, *so as to guarantee effective access to the procedures for determining refugee status* and not to compromise the objective of the rapid processing of asylum applications (para 4) (emphasis supplied), and to observe "the fundamental rights and principles which are acknowledged in particular in the Charter of Fundamental Rights of the European Union", especially the rights to human dignity and to asylum

(para 15). A similar objective of respect for fundamental rights and principles appears in all of the instruments of the CEAS.[2] Even in the absence of such express preambular aims, the Dublin II Regulation, as secondary EU law, would fall to be interpreted, as far as possible, so as to protect asylum seekers' fundamental rights: Cases C-402/05P and C-415/05P *Kadi v Council of the European Union* [2009] AC 1225. Indeed, respect for human rights treaties has always been a condition of EU competence to legislate in asylum matters, since the Treaty of Amsterdam entered into force in 1999 (see Article 63(1) TEC, under which the Dublin II Regulation was adopted[3]; and see now Article 78(1) of the Treaty on the Functioning of the European Union ("TFEU"))[4].

3. Article 13 of the Reception Conditions Directive (Annex 1) requires that EU states provide "*material reception conditions*" such as to "*ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence*".

4. The Qualification Directive (Annex 2) grants refugees in the EU (and beneficiaries of subsidiary protection) the right to be provided "*without discrimination in the context of social assistance the adequate social welfare and means of subsistence*", in order to "*to avoid social hardship*".

5. Many Schengen and EU Member States now accept that they have to undertake an individuated assessment of Dublin transfers in the light of fundamental rights (for details of this see Annex 9).[5]

6. Moreover, the new Dublin III Regulation contains more extensive procedural safeguards than Dublin II, and specifically stresses the need for an effective remedy within the Dublin system, which should "cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred" (recital 19).[6] The Regulation expressly refers to the fact that "deficiencies in, or the collapse of, asylum systems, often aggravated or contributed to by particular pressures on them" can "jeopardise the smooth functioning" of the Dublin system and could "lead to a risk of a violation of the rights of applicants" under the CEAS, the Charter, or other international human rights and refugee rights (recital 21). It also stresses the need "to strike a balance between responsibility criteria in a spirit of solidarity" (recital 25). Both family life and the best interests of the child have now been given a more prominent position (see recitals 13-17, and Art. 6, Art. 8, but also Arts. 9-11, Arts. 16-17) and respect for the rights under the Convention and under Articles 1, 4, 7, 24 and 47 of the Charter is emphasised (recitals 32, 39).[7]

Article 3 of the Convention

7. Article 3 states: "no one shall be subjected to torture or to inhuman or degrading treatment or punishment "This treatment must attain a minimum level of severity[8], the assessment of which is "relative, depending on all the circumstances of the case"[9], including its physical or mental effects, and the age, sex, vulnerability and state of health of the victim. [10]

8. A state party will violate Article 3 by removal "where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country". This is the classic *Soering* test, which applies to Dublin II transfers: see e.g. *MSS* at [365].

9. As for the assessment of risk: first, it "inevitably requires that the Court assess the conditions in the receiving country against the standards of Article 3 of the convention"[11]. Secondly, it must be "a rigorous one"[12]. Thirdly it is in principle for the applicant to adduce evidence "capable of proving" the classic *Soering* test[13]. But, fourthly, the decision-maker must "assess the issue in the light of all the material placed before it and, if necessary, material obtained of its own motion"[14]. Fifth, where evidence "capable of proving" such risk is adduced, "it is for the Government to dispel any doubts about it". Sixth, where the situation in the receiving state is notorious so that the removing state has constructive knowledge of it, the latter is under a duty of enquiry, to verify that a person will be safe before removal[15]. Seventh, the assessment must focus on the foreseeable consequences of the removal of the applicant to the country of destination" and "[t]his in turn must be considered in the light of the general situation there *as well as* the applicant's personal circumstances"(emphasis supplied).[16]

10. Because of its importance, non-derogability and absolute character, Article 3 extends, not only to preventing deliberate harm by state agents but additionally to protecting against living conditions giving rise to ill treatment for which the State bears responsibility. As the Court put it in *Sufi and Elmi v UK* at [279]: "the responsibility of the state under Art. 3 might be engaged in respect of treatment where an applicant, who was wholly dependent on state support, found himself faced with local indifference in a situation of serious deprivation or want incompatible with human dignity".

11. The Grand Chamber in *MSS* focused on the combination of the applicant's actual experiences and the actual conditions in Greece. In assessing the applicant's experiences, it considered that it "must take into account that the applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously". The Grand Chamber thus adopted a presumption of vulnerability for asylum seekers[17].

The Court of Justice of the European Union ("CJEU")

12. In Case C-411/10 *NS* (2011), the CJEU, drew heavily on the reasoning and conclusions of the Grand Chamber in *MSS*. The CJEU was of course not competent to modify or undercut the classic *Soering* test, as applied in *MSS* (Article 52(3), EU Charter), and nor did it intend to do so. The CJEU first underscored the primacy of fundamental rights and the Charter ([76]-[77]). It then observed that the principle of mutual confidence between member states meant that it was possible to assume that they observe fundamental rights ([79]-[80]). A conclusive presumption of such compliance would, however, (a) be "incompatible with the duty of member states to interpret and apply [the Dublin II Regulation] in a manner consistent with fundamental rights"; and (b) undermine the safeguards "intended to ensure compliance with fundamental rights by the EU and its member states." ([99]-[100]).

13. The applicant in *NS* relied upon systemic flaws in Greece. Accordingly, the CJEU concluded at [94] that:

> "*in situations such as that at issue in the main proceedings* ... the member states, including the national courts, may not transfer an asylum seeker to the "member state responsible" within the meaning of [the Dublin II Regulation] where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that member state amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter." (Emphasis supplied[18].)

14. The presence of systemic deficiencies was thus a sufficient *route* to demonstrating the *Soering* test in that case, not a necessary condition for its satisfaction. What matters is that the *Soering* test *is* met, not *how* it is met. As the Court concisely put it in *Sufi and Elmi v UK* at [218]:

> "If the existence of such a risk is established, the applicant's removal would *necessarily* breach Article 3, *regardless* of whether the risk emanates from a general situation ..., a personal characteristic of the applicant, or a combination of the two." (Emphasis supplied.)

15. This is unsurprising: (a) The relevant right at issue is not to the right to be free from systemic deficiencies causing degrading treatment, but to be free from that treatment *simpliciter*. (b) Insisting on systemic deficiency as a necessary *cause* of the harm protected by Article 4 of the Charter (or Article 3 of the Convention) introduces a qualification into an absolute, non-derogable and unqualified right. (c) Requiring systemic deficiency also undermines the practical and effective protection of fundament rights and is contrary to the right to dignity: for instance it is no answer to an individual to say that the real risk of rape she faces does not count because it does not emanate from a systemic flaw.

16. Assessment of potential Article 3 violations has always fixed on the individual circumstances of applicants, and the approach of the Grand Chamber in *MSS* has been followed by this Court in *Hussein v Netherlands* and *Daytbegova et al v Austria*. In these cases, the Court considered proposed removals to Italy and directed itself to "examine the foreseeable consequence of sending the applicants to Italy, bearing in mind the general situation there *and their personal circumstances*" (*Hussein* at [69]; *Daytbegova* at [61])[19]. But there are other passages in these decisions which focus on systemic deficiencies. The interveners accordingly invite the Court to clarify that proof of individual risk,

irrespective of whether it emanates from systemic or non-systemic deficiencies, and irrespective of the precise form of that proof, is sufficient. What matters is that the individual is at risk; not the reason for it, nor the method of proof.

17. In *NS*, the CJEU used the term "systemic deficiencies" (or "systemic flaws" ([86]), to refer to no more than "operational problems" which affect the system. The word "systemic" is not a term of art, was not used by the Grand Chamber in *MSS* when considering Greece's breach of Article 3, and simply connotes the type of general, operational failure which fell to be considered in *NS*, and which may affect a sufficient proportion of asylum-seekers to create a risk to any given individual. Thus if there is a general, operational shortage of accommodation for asylum seekers so that 50% do not have homes, that is systemic flaw. If the state improves its provision, leaving 20% without homes, again that is a systemic flaw. Or if the state simply does not know what the shortage is (but it is clear that there is one), yet again that is a systemic flaw. Provided that the individual is at real risk of sufficiently severe ill treatment in these situations – which is all that matters - his transfer would be prevented under *NS*. This was the powerful analysis of the Frankfurt Administrative Court in Case no. 7 K 560/11.F.A.[20]

The presumption of compliance and systemic deficiency

18. The Grand Chamber in *MSS* considered the presumption of compliance. It expressly adopted (at [353]) the approach to a presumption of compliance which the Grand Chamber had taken, in respect of Tunisia, in *Saadi v Italy* (2008) at [147]: "the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention". By adopting the same approach as in *Saadi*, the Grand Chamber made clear that there is no difference in the forensic exercise to be applied to evidence of ill-treatment whether the destination state is a member state or not.

19. It follows that the presumption of compliance is exactly that: a mere presumption, rebuttal by evidence of the practical position, and containing no threshold condition of exceptionality.

20. Demonstration of systemic flaws or general problems of the scale considered in *MSS* not only rebuts that presumption, it reverses it. That is clear from *MSS*. The scale of the problems in Greece meant that Belgium was under a positive duty to "first verify" for itself whether removal would violate the classic Strasbourg test [359]. In such circumstances, "the individual could not be expected to bear the entire burden of proof" [352]. It was therefore no answer, contrary to Belgium's submissions, that the applicant had not particularised his complaint. In effect, the presumption of compliance had been replaced by a presumption of non-compliance, with Belgium being required to "first verify how the Greek authorities applied their legislation on asylum in practice" [359], even where the individual had not articulated his challenge.

21. But there will be cases where the situation is not as clear or not near-unanimous. In such a situation all relevant evidence must be considered. Thus the reference in *NS* to the types of evidence available in *MSS* was descriptive, not prescriptive ("such as" (*NS* at [91])). In Case C-394/12 *Abdullahi v Bundesasylamt* (2013) the CJEU did not make any reference to the "cannot be unaware" formulation in *NS*. Evidence of which the state has actual knowledge (because it has been adduced by the applicant) is just as relevant as evidence of which the state has constructive knowledge (of which "it cannot be unaware"). Courts are not expected to cease behaving as courts, simply because transfer is to an EU member state rather than to, say, Tunisia. The same approach applies in both cases.

22. Any other approach would be inconsistent with the effective judicial protection of rights conferred by EU law, long recognised as a general principle and now codified in Article 47 Charter, which is itself derived from Articles 6 and 13 of the Convention. As Dr Costello notes[21],

> "If the requirements on the types and volume of evidence are too strict, it will infringe the EU general principle of effectiveness ... rigid evidential requirements are a dereliction of judicial authority. The notion of effective judicial protection requires judges to make a fulsome assessment of all types of available evidence rather than establishing rigid requirements which in effect delegate authority to other organisations."

Effective Remedy in the receiving state

23. The Grand Chamber in *MSS* regarded the availability of local remedies in Greece as potentially relevant to the applicant's complaint to Belgium about the relevance of onward *refoulement,* but not to his complaint regarding detention and living conditions. In the former context, that was not an answer because access to Greek asylum procedures was "illusory" ([357]); in the latter, the issue did not arise at all ([362]-[368]).

24. This is consonant with principle. Article 3 contains a *prohibition* on ill-treatment, but in view of its importance, also has a *preventative* component. Thus the UN Human Rights Committee in its General Comment 20 (1992) on Article 7 ICCPR (the international analogue of Article 3 ECHR) stated:

> "... it is not sufficient for the implementation of article 7 to *prohibit* such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to *prevent* and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction." (Emphasis supplied.)

25. The classic *Soering* test is itself an application of that *preventative* duty, as the ICTY recognised in *Prosecutor v Furundzija* [1998] ICTY 3, 10 December 1998 at [148] (emphasis supplied):

> "States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. *As was authoritatively held by the European Court of Human Rights in Soering, international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment).*"

26. This is also why the Court has developed its case law in the expulsion context to the effect that a remedy against an Article 3 complaint will only be effective if it is *suspensive*: see *MSS* at [293][22].

27. If a sending state was permitted to conclude that an applicant faced no real risks of ill treatment because he could access a remedy in the receiving state *after* an Article 3 breach had occurred, that would cut across the preventative logic of the classic *Soering* test. It would be inconsistent with that test. The same applies with respect to breaches of other fundamental rights protected by the Convention, such as Article 8. Prevention is not only better than cure: it is legally necessary.

28. It follows that the summary suggestion at the end of the admissibility decision in *KRS v UK* that local remedies were an answer to a complaint concerning detention that violated Article 3 standards was wrong as a matter of principle, and inconsistent with the approach later developed in *MSS.* Local remedies – if effective – are only an answer to a claim of onward *refoulement,* as *MSS* establishes. If they are illusory, they will not be an answer even to such a claim.

29. It also follows that if a real risk of living conditions in breach of Article 3 (or Article 8) is otherwise made out, the potential availability of judicial remedies in the receiving state is only relevant if such remedies provide prompt, accessible effective relief – a very rapid injunction for example - capable of the speedy amelioration of those living conditions.

30. In Italy, the claim that effective remedies exist with preventative potency is untenable. (a) There are 640,000 matters outstanding in the very administrative courts that are supposed to provide a remedy: see the Council of Europe's Committee of Ministers condemning procedures for institutional failings in their Interim Resolution of 2009, CM/ResDH(2009)42 addressing the 2183 cases against Italy "concerning the excessive length of judicial proceedings" "since the early 1980s".[23] (b) The Council of Europe Committee of Ministers Annual Report 2010 confirms that the situation is not improving, noting "a structural problem linked with the duration of court proceedings in Italy, which remains to be settled despite the numerous measures adopted ... where administrative proceedings are concerned, a rise in the number of pending cases was recorded in 2008".[24] (c) See also the report dated 18 September 2012 following a visit to Italy by Mr Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, where serious concern was expressed as to the excessive length of court proceedings in Italy.[25]

Best interests of children

31. International, EU and Convention law[26] all recognise that the best interests of the child are a primary consideration in all state actions affecting children. Child asylum seekers form part of a (doubly) vulnerable group – *qua* children and *qua* asylum seekers - and therefore the bests interests principle applies with particular strength in the context of a Dublin transfer.

32. The effect of conditions on children can amount to inhuman and degrading treatment, even where the same treatment would not do so for an adult.[27] In assessing the compatibility with ECHR provisions, such as Articles 3, 5 and 8 ECHR, the Court pays particular attention to the UNCRC (see AIRE Centre's intervention in *MA*[28]).

33. Indeed the Dublin II Regulation, together with the CJEU's decision in *MA and Others*[29], recognises that the best interests of children separated from their families, or those who are unaccompanied, are not only a primary consideration in any proposed Dublin transfer, but controlling. The Interveners submit that it is indeed difficult to see how a consideration of sufficient countervailing strength could arise in a Dublin transfer so as to displace the best interests of the child.

34. The CEAS itself reflects the importance attached to the best interests of the child. Recital 12 to the Dublin II Regulation recalls that Member States remain bound by obligations under instruments of international law to which they are party. Article 24 of the Charter, with which *MA* was concerned, is based on the UNCRC, in particular, its Articles 3, 9, 12 and 13 (see the Explanatory Notes). The recast Dublin Regulation is now in force across the EU and in Switzerland since 1st January 2014. It enshrines in Art. 6 and Recital 13 the best interests of the child as a primary consideration in all Dublin cases involving accompanied and unaccompanied children, and provides that due account needs to be taken of the child's well-being and social development as well as safety and security considerations in Art. 6(3). Art. 18 (1) of the Reception Conditions Directive (2003/9/EC) provides that the best interests of the child shall be a primary consideration when implementing the Directive in relation to children and recital 18 of the recast Qualification Directive (2011/95/EU) provides the same in relation to the Qualification Directive. Whether Dublin returns taking place after 1st January 2014 are partly regulated by Dublin II or Dublin III is immaterial (see **Annex 10**, *Inter-Environnement Wallonie*).

35. The UN Committee on the Rights of the Child ("the Committee") clarified in its General Comment No. 14 on Art. 3 UNCRC[30] ("GC No. 14") that Art. 3(1) CRC contains substantive, interpretative and procedural obligations. Substantively children have the right to have their best interests assessed and taken into account as a primary consideration, and procedurally Art. 3 requires that any decision-making process affecting children must include an evaluation of the possible impact of the decision on the child and any decision must expressly refer to this (at [6], [14]).[31] The UNCRC further requires a special regime be adopted in respect of asylum procedures distinct from that applicable to adults (GC No. 6 [64-78]) [32] and the best interests of asylum-seeking or migrant children be assessed in their specific context and their living situation, or when living in street situations (GC No. 14 at [30] and [75]). [33] This applies to administrative and judicial decisions on Dublin transfers or other intra-European transfers on safe third country grounds, which affect children. Indeed, the Committee urged Denmark to "only apply [...] the Dublin II Regulation in cases where it is in keeping with the child's best interest" (Concluding Observations on Denmark at [58]).[34] The following further provisions of the CRC are of particular relevance in the instant case: Art. 2, Art. 6, Art. 19, Art. 22, Art. 24, Art. 26, Art. 27, Art. 31, Art. 37 and Art. 39 UNCRC (see Annex 20).[35]

36. The Interveners submit that the universally accepted need to give individuated consideration to the best interests of children means that children should only be transferred to other EU Member States under Dublin II if it is in their best interests.

Vulnerable persons

37. In *MA, BT and DA*[36] the CJEU held that unaccompanied minors should not be transferred between Member States, because they "form a category of particularly vulnerable persons" for whom it was "important not to prolong more than is strictly necessary the procedure for determining the Member

State responsible" at [55]. The interveners submit that the same is true by analogy for other groups of particularly vulnerable asylum seekers.

38. The Court has frequently referred to the special consideration that has to be given to members of vulnerable groups and has noted that any margin of appreciation in relation to the rights of such individuals is much narrower than in relation to other people (see .e.g. *Kiyutin v. Russia* (2011), *Hajduova v. Slovakia* (2010), *BS v. Spain* (2012), *Winterstein v. France* 2013, *Rupa v. Romania* (2008), *Renolde v. France* (2008), *B v. Romania* (2013), *Aswat v. UK* (2013), *Alajos Kiss v. Hungary* (2010), *Bjedov v Croatia* (2012) and most recently just a few days ago in *Gorelov v Russia* (2014). This principle applies equally to those whose return under the Dublin Regulation is proposed: the Court has recently communicated the complaint in *A.S. v. Switzerland* (39350/13) which is a case precisely on this point. In particular, the need for an individuated assessment of individual circumstances applies to all categories of particularly vulnerable persons and, when considering whether a transfer to another EU member state would breach Article 3 or Article 8 ECHR on an individual assessment, the Court should have regard to the specific situation of particularly vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, families with children, and persons who have been subjected to torture, rape or other forms of psychological, physical or sexual violence, including victims of trafficking. (See by analogy Article 20(3) QD and Article 32(1) Dublin III.)

Infringement and flagrancy

39. The CJEU in *NS* considered that it did not follow that "any infringement of a fundamental right by the member state responsible will affect the obligations of the other member states to comply with the [Regulation]"[82]. The Interveners make three points. First, by referring to "infringement", it is not at all clear that the CJEU meant "violation", rather than "interference" (see the table of different language versions at Annex 20)[37]. Second, even if the CJEU meant "violation" rather than "interference", the Charter of course goes considerably further than the Convention. The CJEU can thus be taken to have meant that a minor or technical violation of, say, the right to protection of personal data (Article 8(1)), or to freedom of arts and sciences (Art 13), or to consumer protection (Art 38) would not prevent transfer of an asylum seeker from one Member State to another.

40. The Interveners submit that removal to a breach of the right to respect for moral and physical integrity protected by Article 8 which is unjustified in the circumstances should prevent transfer. In a Dublin II context (and unusually in the context of cross-jurisdictional return), there is no requirement for an additional test of 'flagrancy'. The time has come for the Court to recognise this. The basic rationale for the flagrancy test - to avoid human rights imperialism and the imposition of Convention standards world-wide (as the Court said in *Soering* at [86], "the Convention does not govern the actions of States not parties to it") - does not apply when the receiving state is itself a state party to the Convention. Nor does it apply where the sending and receiving state are subject to the same body of supra-national (EU) law stipulating minimum standards designed to protect asylum seekers' basic rights.

41. Switzerland is not a member of the EU, but has opted in to the Dublin II Regulation by the Dublin Association Agreement (Dublin Association Agreement of 26 October 2004 (SR 0.142.392.68) (DAA)).[38] The preambular references in the Dublin II Regulation to the Charter mean that Switzerland is (indirectly) subject to the Charter in the context of Dublin transfers. A condition of Switzerland's participation in the Dublin II Regulation is in effect that it will follow the jurisprudence of the CJEU: legal developments in the case law of the CJEU are transmitted to the Mixed EU-Swiss Committee, and any dispute about the interpretation of the Dublin II Regulation between Swiss courts and the CJEU is subject to the Mixed Committee dispute resolution procedure, failing which the DAA ceases to apply.[39] So far case law of the CJEU drawing on the Charter has been followed by the Swiss Federal Administrative Court.[40]

Parallels with other international instruments regulating transfers of individuals

42. The Dublin II and Dublin III Regulation (DRII and DRIII) schemes have parallels in other international instruments which regulate transfer of individuals between jurisdictions. Thus under the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention"), there is a similar presumption that a prompt transfer will be ordered to the responsible jurisdiction.

43. In *Neulinger and Shuruk v. Switzerland* (2010) at [137] the Grand Chamber noted that the Hague Convention in principle requires – and presumes- the prompt transfer of children, but not if there is a grave risk that the children would be exposed to "physical or psychological harm or otherwise placed in an intolerable situation" [41] (which does not need to cross the threshold of severity for Article 3). The question before the Court was whether the proposed transfer was compatible with Article 8. It held that the transfer was subject to the best interests principle, with the domestic courts being required to conduct "an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person" (at [139]). There were parallels with the Court's case law on expulsions, and it was necessary to consider the seriousness of the difficulties which the child, and the accompanying family members, would face in the destination state (at [146]).[42]

44. The Interveners submit that the same principles apply *mutatis mutandis* to Dublin returns. In Dublin, as in Hague, a grave risk of harm – arising under Article 3 *or* the right to respect for moral and physical integrity or family life under Article 8 – should constitute a bar to a Dublin transfer. An "in depth examination" (*Neulinger* at [139]. See also *X v. Latvia* (2013) at [107]) will be required of the domestic authorities.

Refugees and Asylum Seekers

45. The *MSS* case was concerned with the plight of an asylum seeker. Some applicants to the Court have been granted refugee status by the authorities in the state of proposed transfer. This should make no difference to the outcome of an Article 3 assessment with respect to them:

(1) They too are an extremely vulnerable population;

(2) They too face conditions that may cross the minimum level of severity: indeed their future, where the grant of status has not improved their plight, is in a sense more barren than that of the asylum seekers, who can at least hope for an end to their uncertainty as to immigration status;

(3) They too are people to whom there are affirmative duties owed under EU law, and in respect of whom there is an international consensus as to a need for special protection (see above at [5]).

46. Indeed, it is evident from the Court's approach in its decision in *Hussein v. The Netherlands* that it (rightly) does not draw any relevant distinction between asylum seekers and those who have been granted international protection for these purposes (see [75] where the applicant's position as an asylum seeker and as an alien having been granted international protection is referred to).

47. It would be anomalous were there to be a different test, but the Chamber decision in *Hassan v Netherlands and Italy* intimated that such might be the case: "The Court is nevertheless of the view that the situation of asylum seekers cannot be equated with the lawful stay of a recognised refugee who has been explicitly granted permission to settle in the country of refuge, such as the applicants in case no. 7903/13 whose Italian asylum-based residence permit put them on a par, as regards rights and obligations under Italian domestic law, with the general population in Italy." This is with respect unpersuasive. A person might be destitute and homeless one day as an asylum seeker, and still destitute, homeless and without effective remedy, notwithstanding the grant of status (of which they may not yet be aware). In each case, the individual is owed obligations, either under the RCD (asylum seekers) or the QD (recognised refugees). It is antithetical to the practical and effective protection of fundamental rights to treat the two differently.

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[1] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (Reception Conditions Directive) **Annex 1**; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive) **Annex 2**; Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee Status (Procedures Directive) **Annex 3**; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Recast Reception Conditions Directive) **Annex 4**; Directive 201395/EU of the European

Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Recast Qualification Directive) **Annex 5**; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (Recast Procedures Directive) **Annex 6**. See also the Dublin II and II Regulation; Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II Regulation) **Annex 7;** Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) **Annex 8.** Also see **Annex 26** Note on Member State participation in CEAS measures.

[2] See e.g. **Annex 1** Directive 2003/9/EC Preamble para. 5; **Annex 2** Directive 2004/83 Preamble para. 10; **Annex 3** Directive 2005/85/EC Preamble para. 8.

[3] "The Council ... shall within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: (1) measures on asylum, in accordance with the [Refugee Convention] *and other relevant treaties*, within the following areas ... (a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States." (Emphasis supplied.) See AG Trstenjak in *NS* at [88].

[4] Consolidated version of Treaty on the functioning of the European Union (C/326/13 of 26/10/2012 (OJ 2012 L 55 p.13) "1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the [Refugee Convention] *and other relevant treaties*. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: ... (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;" (Emphasis supplied.)

[5] **Annex 9** Relevant Extracts from Selected ECRE Research on Practice and Caselaw on Dublin II Regulation Transfers in Europe.

[6] **Annex 8** Regulation EU No. 604/2013; see also the more extensive procedural safeguards for Dublin proceedings contained in Arts. 4, 5 and 27.

[7] For the relationship between Dublin II and Dublin III see Case C-129/96 *Inter-Environnement Wallonie ASBL and Région Wallone* **Annex 10.**

[8] *Ireland v UK* (1980) 2 EHRR 25 at [162].

[9] *Hilal v UK* (2001) 33 EHRR 2 at [60]; *Sufi and Elmi v UK* (2012) 54 EHRR 9 at [213].

[10] *Ireland v UK* (above) at [162]; *MSS.* at [219].

[11] *Sufi and Elmi v UK* 8319/07 11449/07, 28 June 2011 at [213]; *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25 at [67].

[12] *Sufi and Elmi v UK* at [214]; *Chahal v UK* 22414/93 27 June 1995 at [96]; *Saadi v Italy* 37201/06, 28 February 2008 at [128].

[13] *Sufi and Elmi v UK* at [214].

[14] *N v Finland* (2006) 43 EHRR 12 at [160]; *Hilal v UK* (above) at [60]; *Vilvarajah and Others v UK* (1992) 14 EHRR 248 at [107].

[15] *Sufi and Elmi v UK* (above) at [214].

[16] *Sufi and Elmi v UK* (above) at [216]; *Vilvarajah v UK* (above) at [108].

[17] *MSS* at [232]; compare [251].

[18] See also [106] and p.166H.

[19] For an example of a carefully reasoned judgment which was decided differently on similar facts, see Frankfurt Administrative Court in Case no. 7 K 560/11.F.A. The Interveners respectfully submit that approach in that judgment is to be preferred.

[20] **Annex 11** Frankfurt Administrative Court in Case no. 7 K 560/11.F.A

[21] **Annex 12** *The Ruling of the Court of Justice in NS/ME on the Fundamental Rights of Asylum Seekers under the Dublin Regulation: Finally, an End to Blind Trust Across the EU?'* (2012) 2 Asiel & Migrantenrecht 83, 88-89.

[22] See also *Conka v Belgium* (2002) 34 EHRR 54 at [81]-[83]*; Gebremedhin v France* (2010) 50 EHRR 29 at [66]-[67]*; Hirsi v Italy* (2012) 55 EHRR 21 at [199]-[200]

[23] **Annex 13** CM/ResDH(2009)42

[24] *Supervision of the execution of judgments of the European Court of Human Rights* (Council of Europe Committee of Ministers Annual Report 2010: Appendix 16 item 31 **Annex 14.**

[25] See **Annex 15** Note on country material concerning Italy, **Annex CM1.**

[26] Article 10(3) ICESCR, Article 24(1) ICCPR and General Comment No.17 Rights of the Child (Article 24), Council of Europe Conventions including the Convention on Action Against Trafficking in Human Beings Article 5, 10, 16(7), EU Charter Article 24, and see Convention caselaw, endnote 27.

[27] *Muskhadzhieyava and others v. Belgium*, 41442/07, 19 January 2010; *Mubilanzila Mayeka* 13178/03, 12 October 2006 *at* [81] and [83]; see *Popov v. France* 39472/07 and 39474/07, 19 April 2012; see *Kanagaratnam and others v Belgium* 15297/09, 13 December 2011; *Neulinger and Shruk v. Switzerland*, 41615/07, judgment [GC] 6 July 2010.

[28] **Annex 16** AIRE Centre's Third Party Intervention in *MA, BT and DA* [2013] 3 C.M.L.R. 49.

[29] **Annex 17** *MA, BT and DA* [2013] 3 C.M.L.R. 49

[30] **Annex 18** UN CRC, General Comment No. 14 (2013), *The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* of 2 May 2013.

[31] In addition Art. 3 requires that the best interests of all children, including those in a vulnerable situation, be taken into account when adopting implementation measures and there has to be a continuous process of child rights impact assessment (at [33], [35]). This also applies to national legislation and policy implementing or giving effect to the Dublin II Regulation.

[32] **Annex 19** Committee on the Rights of the Child, *General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin* (2005), Thirty-ninth session, 17 May-3 June 2005 CRC/GC/2005/6, 1 September 2005 at [64-78].

[33] **Annex 18** "30. The Committee emphasizes that the scope of decisions made by administrative authorities at all levels is very broad, covering decisions concerning education, care, health, the environment, living conditions, protection, asylum, immigration, access to nationality, among others. Individual decisions taken by administrative authorities in these areas must be assessed and guided by the best interests of the child, as for all implementation measures"; and

"(e) Situation of vulnerability

75. An important element to consider is the child's situation of vulnerability, such as disability, belonging to a minority group, being a refugee or asylum seeker, victim of abuse, living in a street situation, etc. The purpose of determining the best interests of a child or children in a vulnerable situation should not only be in relation to the full enjoyment of all the rights provided for in the Convention, but also with regard to other human rights norms related to these specific situations, such as those covered in the Convention on the Rights of Persons with Disabilities, the Convention relating to the Status of Refugees, among others.

76. The best interests of a child in a specific situation of vulnerability will not be the same as those of all the children in the same vulnerable situation. Authorities and decision makers need to take into account the different kinds and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child's uniqueness. An individualized assessment of each child's history from birth should be carried out, with regular reviews by a multidisciplinary team and recommended reasonable accommodation throughout the child's development process."

[34] General 7 April 2011 Original: English GE.11-41962 Consideration of reports submitted by States parties under article 44 of the Convention.

[35] **Annex 20** Articles of the UNCRC.

[36] **Annex 17** *MA, BT and DA* [2013] 3 C.M.L.R. 49.

[37] **Annex 21** Table of different language versions of the meaning of the word "infringement" in *NS*.

[38] **Annex 22** Dublin Association Agreement of 26 October 2004 (SR 0.142.392.68).

[39] **Annex 22** Dublin Association Agreement, Arts. 5-7.

[40] **Annex 23** Decision of the Federal Administrative Court of 5 December 2013, E-5220/2012, consid. 4.4 and 5.7 applying the CJEU decision of *MA, BT, DA* C-648/11 under Swiss law. Also see **Annex 24** Note on provisions of Swiss law.

[41] Article 13b Hague.

[42] Since the decision in *Neulinger* the GC has had a further opportunity to examine these matters in the case of *X v Latvia* where it expressly sought to clarify the approach taken in *Neulinger* and set out express procedural requirements "107. In consequence, the Court considers that Article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this respect: when assessing an application for a child's return, the courts must not only consider arguable allegations of a "grave risk" for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted strictly (see Maumousseau and Washington, cited above, § 73), is necessary. This will also enable the Court, whose task is not to take the place of the national courts, to carry out the European supervision entrusted to it. (para 107 X v Latvia)"

NUALA MOLE AND COLLEAGUES
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BEFORE THE GRAND CHAMBER
EUROPEAN COURT OF HUMAN RIGHTS

Application No 29217/12

B E T W E E N:

TARAKHEL

Applicant

- and -

SWITZERLAND

Respondent

LIST OF ANNEXES

TO THE THIRD PARTY INTERVENTION OF THE AIRE CENTRE, ECRE AND AMNESTY INTERNATIONAL

Notes:

(1) The order of the annexes corresponds with the order of appearance in the text and endnotes of the Intervention.
(2) Hard copies of the Annexes referred to follow, except where provided by hyperlink.

Annex	Document
1.	Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (Reception Conditions Directive) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:031:0018:0025:EN:PDF
2.	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML
3.	Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee Status (Procedures Directive) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF
4.	Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Recast Reception Conditions Directive) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0096:0116:EN:PDF
5.	Directive 201395/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Recast Qualification Directive)

	http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF
6.	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (Recast Procedures Directive) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0060:0095:EN:PDF
7.	Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II Regulation) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:050:0001:0010:EN:PDF
8.	Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF
9.	Relevant Extracts from Selected ECRE Research on Practice and Caselaw on Dublin II Regulation Transfers in Europe
10.	Case C-129/96 Inter-Environnement Wallonie ASBL and Région Wallone http://curia.europa.eu/juris/showPdf.jsf?text=&docid=43562&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=824613 '[43] Since the purpose of such a period is, in particular, to give Member States the necessary time to adopt transposition measures, they cannot be faulted for not having transposed the directive into their internal legal order before expiry of that period. [44] Nevertheless, it is during the transposition period that the Member States must take the measures necessary to ensure that the result prescribed by the directive is achieved at the end of that period. [45] Although not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 in conjunction with the third paragraph of Article 189 and from the directive itself that during that period [Member States] must refrain from taking any measures liable seriously to compromise the result prescribed'
11.	Frankfurt Administrative Court in Case no. 7 K 560/11.F.A
12.	The Ruling of the Court of Justice in NS/ME on the Fundamental Rights of Asylum Seekers under the Dublin Regulation: Finally, an End to Blind Trust Across the EU?' (2012) 2 Asiel & Migrantenrecht 83, Dr Costello. http://www.migratieweb.nl/f /2012-03-30,%20A%26MR%202012,%202%20Dublin-case%20NS-ME%20Finally,%20an%20end%20to%20blind%20thrust%20across%20the%20EU%20-%20C.Costello.pdf
13.	Execution of the judgments of the European Court of Human Rights concerning the excessive length of judicial proceedings in Italy: CM/ResDH(2009)42 https://wcd.coe.int/ViewDoc.jsp?Ref=CM/ResDH(2009)42&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383
14.	Supervision of the execution of judgments of the European Court of Human Rights Council of Europe Committee of Ministers Annual Report 2010; Appendix 16 item 31

	http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2010_en.pdf
15.	Note on country material concerning Italy
16.	AIRE Centre's Third Party Intervention in MA, BT and DA [2013] 3 C.M.L.R. 49
17.	MA, BT and DA [2013] 3 C.M.L.R. 49 http://curia.europa.eu/juris/document/document.jsf?text=&docid=138088&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=58615
18.	UN CRC, General Comment No. 14 (2013), The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) of 2 May 2013 http://www.refworld.org/docid/51a84b5e4.html
19.	Committee on the Rights of the Child, General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin (2005), Thirty-ninth session, 17 May-3 June 2005 CRC/GC/2005/6, 1 September 2005 http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf
20.	Note on Articles of the UNCRC
21.	AIRE Centre Note on different language versions of the meaning of the word "infringement" in NS
22.	Dublin Association Agreement of 26 October 2004 (SR 0.142.392.68). http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:053:0005:0017:EN:PDF
23.	Decision of the Federal Administrative Court of 5 December 2013, E-5220/2012 http://www.bvger.ch/publiws/pub/cache.jsf
24.	Note on provisions of Swiss Law including the Constitution
25.	UNHCR observations on the current asylum system in Bulgaria, 2 January 2014 http://www.refworld.org/docid/52c598354.html
26.	Note on Member State Participation in the CEAS
27.	ECRE Statement, ECRE joins UNHCR in a call for the suspension of Dublin transfers to Bulgaria, 8 January 2014 http://ecre.karakasstaging.be/index.php?option=com_downloads&id=215&utm_source=Weekly+Legal+Update&utm_campaign=f300f6ba3a-WLU_10_01_2014&utm_medium=email&utm_term=0_7176f0fc3d-f300f6ba3a-419536185