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RE: The systematic expulsion of torture victims and other vulnerable asylum seekers under the Dublin Regulation from Switzerland to European Union countries with dysfunctional asylum systems that expose them to a real risk of inhuman and degrading treatment.

Dear Special Rapporteurs,

We write to request your urgent action regarding Switzerland's practice of expelling highly vulnerable asylum seekers under the Dublin III Regulation (the Dublin Regulation) to countries where dysfunctional asylum systems put the persons concerned at risk of inhuman and degrading treatment. The Committee against Torture recently held that the expulsion of an Eritrean torture survivor to Italy, where he risked being deprived of the medical care necessary to treat his physical and psychological trauma, and where he would face street destitution, amounted to breaches of Articles 3, 14 and 16 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, see case of *A.N. v. Switzerland*, Communication no. 742/2016.[1] The Committee noted in its decision of 3 August 2018 that the Swiss

[1] *A.N. v. Switzerland*, Communication no. 742/2016Available at : http://centre-csdm.org/wp-content/uploads/2018/09/A.N.-v.-Switzerland-Com.-No.-742_2016-CSDM.pdf

authorities had failed to properly assess the risks to the complainant, and that the precarious circumstances he would face in Italy would endanger his life and "leave him no reasonable choice but to seek protection elsewhere, exposing him to a risk of chain *refoulement* to his home country."[2]

A.N. v. Switzerland is not an isolated case because the Swiss migration authorities have failed put in place a dedicated mechanism to identify vulnerable individuals in proceedings under the Dublin Regulation.[3] The consequence of this omission is that Dublin expulsion proceedings take place in a "legal vacuum" where the Regulation is applied on a blanket basis to every asylum seeker whose presence was first recorded in a different Member State. Thus, civil society actors continue to document significant numbers of expulsions of vulnerable persons – torture survivors, victims of human trafficking, persons with serious medical conditions, and families with minor children – to countries in Europe that are unable to cater to their basic needs of food, shelter and medical care. In some instances, there is also no effective access to an asylum procedure for purposes of requesting international protection.

The United Nations High Commissioner for Refugees (UNHCR) recently voiced its concern that these circumstances, in the context of Dublin expulsions, create a risk of chain *refoulement* to the country of origin to the extent that they force asylum seekers to move onwards to other states in their quest for international protection.[4] We note the similar concerns of the Special Rapporteur on Torture in the context of readmission agreements which "fall short of the procedural precautions States must take to ensure returnees will not be exposed to torture or ill-treatment" because they automatically equate democratic countries as "safe", thus obviating the need for an individualized assessment of the risk.[5] Moreover, due to the expedited nature of proceedings under the Dublin Regulation and the particular vulnerabilities of asylum seekers in those proceedings, the phenomenon of massive Dublin expulsions raises grave questions regarding effective access to justice for the persons concerned. [6]

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[2] *Supra, A.N. v. Switzerland*, at § 8.7.

[3] See Swiss parlamentarians' request for clarification from the Federal Council on the consequences of the decision of the Committee against Torture in *A.N. v. Switzerland* for torture victims and other vulnerable asylum seekers in Dublin proceedings including in pending and future cases: *Interpellation Parlementaire*, Objet 18.3981 *Auswirkungen des Entscheids des Uno-Ausschusses gegen Folter für zukünftige Dublin-Verfahren von besonders verletzlichen Personen?* https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20183981

[4] See UNHCR August 2017, *Left in Limbo: UNHCR Study on the Implementation of Dublin III*, at p. 17, http://www.refworld.org/docid/59d5dcb64.html

[5] Report on migration of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/37/50 at § 46 at https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session37/Pages/ListReports.aspx

[6] See *Joint Submission of the International Commission of Jurists (ICJ) and of the European Council on Refugees and Exiles (ECRE) to the Special Rapporteur on the Human Rights of Migrants, report on access to justice for migrants*, April 2018, § 4, "Specific obstacles to access to justice for asylum seekers: The inherent vulnerability of asylum seekers lies in their disadvantaged legal position compared to other nationals of a State, insofar as their right to remain on the territory of a country is by definition precarious as long as their refugee status is not formally established, while their likely lack of command of the national language of the host State and the

The situation we describe in this allegation letter raises serious human rights concerns and we write to ask for your intervention with the Swiss authorities urging them to take immediate measures to ensure compliance with international standards in all pending and future Dublin cases involving particularly vulnerable individuals. **We believe that such action 1) <u>is necessary</u> to avoid irreparable harm to the persons concerned and 2) <u>is urgent</u> because Dublin expulsions are ongoing and involve thousands of asylum seekers expelled from Switzerland every year under the Dublin Regulation (5'843 Dublin inadmissibility decisions were taken by Switzerland in 2017).**[7]

We emphasize that we are not taking issue with the general need of Dublin Member States to manage the flows of asylum seekers in the Dublin/Schengen space nor the fact that recent influxes of asylum seekers to Europe have put pressure on the reception capacities of Member States. Our concerns relate to the exceptional cases of highly vulnerable individuals who represent only a small proportion of the total number subject to Dublin expulsions every year. Although precise figures are difficult to come by, these exceptional cases may concern around 1% of the total yearly expulsions from Switzerland to other Member States of the Dublin Regulation (see discussion below).

The *Centre Suisse pour la Défence des Droits des Migrants (CSDM)* is a Swiss non-profit association based in Geneva with a mandate to promote respect for the fundamental rights of migrants through advocacy before international bodies. We have litigated cases of expulsions of vulnerable persons before the European Court of Human Rights (ECtHR) and the Committee against Torture.[8] In 2015 we submitted an alternative report to the Committee against Torture in the context of its review of Switzerland's periodic report which highlighted our concerns regarding Switzerland's practice under the Dublin Regulation.[9]

<u>Background</u>: the Dublin Regulation and International Human Rights Law

The Dublin Regulation is a European Union (EU) instrument for managing flows of asylum seekers in the Schengen/Dublin area and forms part of the Common European

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lack of any support network further contribute to their predicament. **Nevertheless, European State practice reveals a range of barriers on access to justice in asylum proceedings, whereby protection seekers encounter expedient procedures, often subject to lower safeguards than those available to other groups of claimants.**" (our emphasis) available at <u>https://www.icj.org/joint-submission-on-the-state-of-access-to-justice-for-migrants-in-europe/</u>

[7] See <u>https://www.sem.admin.ch/dam/data/sem/publiservice/statistik/asylstatistik/2017/stat-jahr-2017-kommentar-f.pdf</u> ; this figure does not represent the number of expulsions that were actually executed in 2017.

[8] <u>See</u> *inter alia*, *M.P.E.V. and Others v. Switzerland*, Application no. 3919/2013; *A.S. v. Switzerland*, Application no. 39350/13; *A.N. v. Switzerland*, UNCAT, CAT Communication no. 742/2016.

[9] <u>See</u> CSDM, *Rapport Alternatif sur l'application des articles 14 et 16 de la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants par la Suisse, dans le cadre des renvois « Dublin » des requérants d'asile vers l'Italie*, 10 juillet 2015 available at <u>http://centre-csdm.org/rapports-juridiques/</u> .

Asylum System (CEAS).[10] The Dublin Regulation is applied in Switzerland since December 2008 by virtue of an association agreement.[11] The association agreement with the EU enshrines a commitment by Switzerland to follow the Schengen/Dublin *acquis* on Dublin matters which includes the jurisprudence of the Court of Justice of the European Union (CJEU).[12]

The purpose of the Dublin Regulation is to provide Member States with a set of criteria for determining which Member State is responsible for the examination of an application for international protection made by a third country national. Its objective is to ensure that applicants for international protection have swift and effective access to an asylum procedure while avoiding the phenomenon of "refugees in orbit" where successive applications are submitted by the same applicant in different Member States.

The Dublin Regulation stipulates generally that it is the first country the asylum seeker has contact with that is responsible for deciding his or her application for international protection. A set of hierarchical criteria to this effect are set out in Chapter III of the Regulation, including provisions relating to which Member State the applicant first entered or where he or she was first registered, or if the applicant had obtained an entry visa for a particular Member State, and so on. Other criteria for the assignment of responsibility include the presence in a Member State of family members with which the applicant has a relationship of dependency (Art.16), a "sovereignty clause" (Art. 17(1))[13] which allows the Member State to derogate from the criteria of Chapter III for any reason[14] and a "humanitarian clause (Art. 17(2)) allowing for derogation on humanitarian or compassionate grounds.

The Regulation also requires Member States to assume responsibility for an application that would otherwise not be their responsibility under Chapter III, if there is evidence of

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[10] 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). Available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF

[11] Dublin Association Agreement (DAA) with the EU, SR 142.31, available at https://www.admin.ch/opc/en/classified-compilation/19995092/index.html

[12] *Supra*, Dublin Association Agreement (DAA).

[13] Article 17(1) of the Dublin Regulation provides: "By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation." Recital 17 of the Preamble provides: "Any Member State should be able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations and examine an application for international protection lodged with it or with another Member State, even if such examination is not its responsibility under the binding criteria laid down in this regulation".

[14] The exercise of this clause is not subject to any condition whatsoever and can be applied at the discretion of the Member State concerned, see Case C-528/11, *Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet*, CJEU judgment of 30 May 2013, § 36, at http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130dc0584acc35a2142e88d80d593e6d7298b.e34KaxiLc3eQc40LaxqMbN4Pbh0Qe0?text=&docid=137826&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=21355

"systemic flaws in the asylum procedure and in the reception conditions for applicants" in the responsible Member State "resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union" (Art. 3(2)).

In the case *C.K., H.F., A.S. v. Republika Slovenija* involving an applicant with a serious medical condition facing a Dublin expulsion to Croatia, the CJEU clarified that independently of any risk emanating from "systemic" problems in reception conditions of the country of destination, the analysis of a potential violation of the absolute prohibition on inhuman and degrading treatment is always an individualised one. Therefore, Member States of the Dublin Regulation cannot abdicate responsibility for considering the personal risks to the applicant on the basis that the destination state does not suffer from a general or systemic flaw.[15] In this regard, the CJEU followed the approach taken by the Grand Chamber of the ECtHR in *Tarakhel v. Switzerland*[16] involving an Afghan couple and their six minor children subject to a Dublin expulsion from Switzerland to Italy. In *Tarakhel*, the ECtHR reaffirmed that the *Soering*[17] test for ill-treatment – *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* – applies equally in Dublin proceedings and that the source of the risk, i.e. "systemic deficiencies" does nothing to alter the level of protection guaranteed under the European Convention on Human Rights, nor the requirement of an individualised examination of the risk.[18]

The Dublin Regulation itself explicitly recognizes that it must be applied in a manner consistent with the fundamental rights of asylum seekers. Recital 32 of the preamble

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[15] Case *C.K., H.F., A.S. v. Republika Slovenija*, C-578/16 CJEU 16 February 2016, provides that « a reading of Article 3(2) of the Dublin III Regulation (which excludes the possibility that considerations linked to real and proven risks of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, might, in exceptional situations, have consequences for the transfer of a particular asylum seeker) would be, first, irreconcilable with the general character of Artile 4 of the Charter, which prohibits inhuman or degrading treatment in all its forms. **Secondly, it would be manifestly incompatible with the absolute character of that prohibition if the Member States could disregard a real and proven risk of inhuman or degrading treatment affecting an asylum seeker under the pretext that it does not result from a systemic flaw in the Member State responsible** (our emphasis)." Available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=187916&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=22233

[16] *Tarakhel v. Switzerland* [GC], Application no. 29217/12, at § 104, the source of the risk does not exempt the State "from carrying out a thorough and individualised examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established". See also Report on migration of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/37/50 at p. 13 "[T]he mere existence of domestic laws or the ratification of human rights treaties does not disprove an individual risk of torture or ill-treatment. The decisive criteria for identifying such a risk will always be the particular circumstances and prospects of the affected individual."

[17] *Soering v. United Kingdom*, Application no. 14038/88 at § 91.

[18] See also Report on migration of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/37/50 at p. 13 "[T]he mere existence of domestic laws or the ratification of human rights treaties does not disprove an individual risk of torture or ill-treatment. The decisive criteria for identifying such a risk will always be the particular circumstances and prospects of the affected individual."

provides: "With respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by their obligations under instruments of international law, including the relevant case-law of the European Court of Human Rights".

The ECtHR has recognized that asylum seekers belong to a particularly vulnerable group of persons deserving of special protection. In *M.S.S. v. Belgium and Greece* involving an applicant, a single man with no known medical problems in Dublin expulsion proceedings from Belgium to Greece, the Grand Chamber made the following observation at § 251:

> *The Court attaches considerable importance to the applicant's status as an asylum-seeker, and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection ... It notes the* ***existence of a broad consensus at the international and European level*** *concerning this need for special protection, as evidenced by the Geneva Convention, the remit and activities of the UNHCR and the standards set out in the [EU] Reception Directive* (our emphasis).

The Grand Chamber concluded that the applicant's situation of complete material destitution "with no resources or access to sanitary facilities, and without any means of providing for his essential needs" and with no guarantee that his asylum application would actually be examined by the Greek authorities, amounted to a violation of Article 3 of the Convention. The "particular vulnerability" status of asylum seekers was twice reaffirmed by the Grand Chamber in the cases of *Tarakhel v. Switzerland* and *V.M. v. Belgium.*[19]

Of further relevance is *Paposhvili v. Belgium* involving a Georgian national with a serious medical condition and subject to expulsion from Belgium due to his criminal convictions.[20] In *Paposhvili* the Grand Chamber reappraised its previous case-law deriving from *N. v. United Kingdom*[21] where it had set an extremely high threshold for a finding of a violation of Article 3 in cases of applicants with serious medical conditions, namely that Article 3 would be engaged only in "exceptional cases" where the applicant was in the final stages of a terminal illness and therefore, close to death.

In *Paposhvili*, the ECtHR clarified that "exceptional cases" also included situations where the expulsion would expose the applicant, to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or a significant reduction in life expectancy, even in situations where the applicant was not close to death or terminally ill.[22] In doing so, it explicitly rejected its previous "close to death" standard stating that

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[19] See *Tarakhel v. Switzerland* [GC], Application no.29217/12 at § 97; *V.M. v. Belgium* [GC], Application no. 60125/11 at § 136.

[20] *Paposhvili v. Belgium*, Application no. 41738/10.

[21] *N. v. United Kingdom*, Application no. 26565/05; also *D. v. United Kingdom*, Application no. 30240/96.

[22] *Paposhvili v. Belgium*, § 183.

"the application of Article 3 of the Convention only in cases where the person facing expulsion is close to death, which has been its practice since the judgment in *N. v. the United Kingdom*, **has deprived aliens who are seriously ill, but whose condition is less critical, of the benefit of that provision"** (our emphasis).[23]

Furthermore, the *Paposhvili* judgment clarified that the analysis of a potential breach of Article 3 must include a proper assessment of whether access to sufficient and appropriate medical care is available in practice, not merely in theory and that the impact of removal on an applicant must be evaluated by considering how an applicant's condition would evolve after the expulsion to the receiving state.[24] In ensuring that Article 3 is respected, the Court highlighted that appropriate national procedures need to be put in place allowing the individual to adduce evidence of the potential risk upon return to the country of origin[25] and for the state to examine the foreseeable consequences of return with regard to both the general situation and the individual's circumstances.[26] The ECtHR concluded that the Belgium had not satisfied these criteria and that Mr. Paposhvili's expulsion would constitute a violation of Article 3.

It is worth noting that the applicant in *Paposhvili* was not an asylum seeker and thus was not a member of a "particularly vulnerable group deserving of special protection." Therefore, he did not have a status that would automatically trigger a lower threshold for a finding of a violation of Article 3 of the Convention. Also, the applicant in *Paposhvili* suffered from a naturally occurring illness and was not a victim of persecution, torture, trafficking or other "human inflicted" trauma as would be the case for a vulnerable asylum seeker.[27] In light of these combined factors, we submit that the ECtHR's revised standard in medical cases applies *à plus forte raison* in expulsion proceedings under the Dublin Regulation because the persons concerned are asylum seekers. Put differently, the threshold for a finding of a violation should logically be lower given the particular vulnerability of the persons concerned and the fact that the origin of the vulnerability is qualitatively different, i.e. not due to a naturally occurring illness.[28]

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[23] *Paposhvili v. Belgium*, § 181.

[24] *Paposhvili v. Belgium*, § 189.

[25] *Paposhvili v. Belgium*, § 185, "[In] cases of this kind, the authorities' obligation under Article 3 to protect the integrity of the persons concerned is fulfilled primarily through appropriate procedures allowing such examination to be carried out ..."

[26] *Paposhvili v. Belgium* at § 188, "[T]he impact of removal on the person concerned must be assessed by comparing his or her state of health prior to removal and how it would evolve after transfer to the receiving State."

[27] The International Rehabilitation Council for Victims of Torture (IRCT) has highlighted the specific difficulties facing refugees who have been tortured: "Numerous studies have shown that refugees who have experienced torture are particularly susceptible to mental health problems, such as post-traumatic stress syndrome (PTSD), anxiety, suicidal thoughts and depression. This affects all areas of a person's life, their family's life and their community. For many clients of IRCT member centers, torture trauma leads to intense feelings of disassociation, disorientation and isolation, compounded by the stress of experiencing long periods of uncertainty. They urgently need rehabilitation and to be able to live in safety."

[28] The CJEU appears to have followed this logic of a lower Article 3 threshold in Dublin cases, in the case of *C.K., H.F., A.S. v. Republika Slovenija, supra*, which concerned an applicant with serious medical problems subject to a Dublin expulsion to Croatia, holding that Article 4 of the Charter of Fundamental Rights of the European

In the specific case of asylum seekers who are torture survivors, the Committee against Torture has recently held that the deprivation of specialized medical treatment necessary for the rehabilitation of the victim constitutes ill-treatment for purposes of Article 16 of the Convention against Torture, engaging the State Party's *non-refoulement* obligations.[29]

In *A.N. v. Switzerland*, the Committee was of the opinion that the underlying Dublin proceedings required an individualized assessment of the risks involved for Mr. A.N. given his personal circumstances and the situation in Italy (at § 8.6):

> *The Committee considers that it was incumbent on the State party to undertake an individualized assessment of the personal and real risk that the complainant would face in Italy, in particular considering his specific vulnerability as an asylum-seeker and victim of torture, rather than relying on the assumption that he is not particularly vulnerable and would be able to obtain adequate medical treatment there.*

The above review of the case-law establishes unambiguously that an individualized assessment against the absolute prohibition on torture and ill-treatment is necessary in expulsion proceedings under the Dublin regulation, and that such an assessment involves consideration of the personal circumstances of the applicant and the conditions in the country of destination. When properly conducted, such an analysis would allow the national decision maker to determine what the foreseeable consequences are of the expulsion and therefore, to avoid expulsions that violate the applicants' fundamental rights.

In this light, the UNHCR has made specific recommendations to Member States of the Dublin Regulation in respect of the application of the discretionary clauses in line with fundamental rights obligations. According to the UNHCR, the sovereignty and humanitarian clauses "should be flexibly interpreted and applied by Member States in **light of their observance of the fundamental rights of applicants under European and International law**" (our emphasis).[30] Furthermore, given the humanitarian

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Union must be interpreted to mean that "in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned, that transfer would constitute inhuman and degrading treatment, within the meaning of that article."[28] We note that the standard articulated by the CJEU of a "proven risk of a significant and permanent deterioration" is less onerous than the *Paposhvili* standard of "serious, rapid and irreversible decline ... resulting in intense suffering or a significant reduction in life expectancy".

[29] *Supra A.N. v. Switzerland* at § 8.8; see also CAT General Comment No. 4, 9 February 2018, at § 22, "States parties should take into account that victims of torture and other cruel, inhuman or degrading treatment or punishment suffer physical and psychological harm **which may require sustained specialized rehabilitation services**. Once their health fragility and need for treatment have been medically certified, they should not be removed to a State where adequate medical services for their rehabilitation are not available or guaranteed" (our emphasis) ; available at https://www.ohchr.org/Documents/HRBodies/CAT/CAT-C-GC-4_EN.pdf

[30] *Supra* UNHCR August 2017 at p. 132.

purpose of the the dependency clause, that provision "should be applied in a flexible and inclusive manner to keep or bring together family members and other family relations who are dependent on one another."[31]

The jurisprudential and institutional developments described above represent the current state of international consensus in respect of the procedural and substantive protections that must be afforded to vulnerable persons in Dublin proceedings. As we show below, Switzerland's Dublin practice is not consistent with this consensus and urgently needs to be reformed.

Switzerland's Dublin practice raises serious human rights concerns

Despite the safeguards built into the Dublin Regulation, its implementation in practice by the Swiss authorities raises serious human rights concerns. Specifically, the said authorities have consistently applied the Regulation on a quasi-automatic basis, without the necessary individualized consideration of the circumstances of each case. Those circumstances – by the express terms of the Regulation as described above – include the personal situation of the asylum applicant, his or her state of health, the presence of psychological or physical trauma, the presence of family members on Swiss territory or in other Member States, and the reception conditions in the country of destination. The blanket application of the Regulation has led to breaches of international law in numerous expulsion cases where vulnerable individuals such as torture survivors, victims of human trafficking[32], persons with serious medical conditions and families

[31] *Supra* UNHCR August 2017 at p. 114. ECtHR jurisprudence on refugees and family reunification supports this position, see *Tanda Muzinga v. France*, Application No. 2260/10 at §75, holding that family reunification is a "fundamental element in enabling persons who have fled persecution to resume a normal life" noting the broad international and European consensus that refugees should "benefit from a more favourable family reunification procedure than that foreseen for other foreigners" due in part to the involuntary nature of the separation and the impossibility of enjoying family life in a country other than the refugee's host country. See also *Mugenzi v. France*, Application No. 52701/09, § 54.

[32] As regards the situation of victims of trafficking in Dublin procedings, see the *FIZ Alternative Report on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings in Switzerland*, 4 June 2018, at provides at p. 12, "1.1.2. No Functioning Victim Protection in the Dublin Procedure : The Dublin procedure, which is accelerated in comparison to the national asylum procedure, remains a key challenge to securing a human rights approach and providing adequate assistance to victims, especially where the short interview about the identity (Befragung zur Person BzP) already reveals that another Dublin state is "responsible" for the dossier. **In this accelerated procedure, deportation and return of victims are often arranged so quickly that many potential victims go unnoticed. Even when a potential victim is identified, the Dublin procedure is continued, which means that the person is transferred to the country of their first entry, at best with a note to the responsible state authorities that he or she might be a victim of (Trafficking in Human Beings) THB, but without safeguarding effective reception, protection and support in the Dublin country**. There is no cooperation with specialized NGOs to arrange contact with a specialized victim organization in the Dublin country. These transfers are usually justified by the fact that the Dublin state responsible has signed the relevant conventions to combat (Trafficking in Human Beings) THB and that it is thus deemed "safe" to transfer the victims there, without assessing whether that assumption is true in the individual case. Victim protection and assistance is, in these cases, not seen as at the responsibility of Switzerland, but as that of the Dublin state. Rather, the Dublin procedure is given priority over victim

with minor children have been exposed, in the country of destination, to inhuman and degrading reception conditions.

According to Amnesty International, Switzerland is the European country that has used the Dublin Regulation to expel the highest number of individuals compared to other Member States and proportional to the number of applications lodged here. According to Amnesty International, since 2009, 25'000 persons have been expelled to other European countries representing 15% of all asylum applications lodged in Switzerland since the entry into force of the Regulation (up until 2017). The equivalent figure for Germany – a country ten times the size of Switzerland – is 3%[33]. In the year 2016 alone, more than 30% of asylum seekers having lodged an application for international protection in Switzerland, were ordered expelled under the Dublin Regulation.[34]

According to *Vivre Ensemble*,[35] a Geneva-based NGO, Switzerland has very rarely made use of the discretionary clauses to assume responsibility for asylum applications on humanitarian or other grounds. Their analysis reveals that the overwhelming majority of cases where Switzerland claims to have invoked the sovereignty clause for humanitarian reasons involved cases where it either had no discretion to do otherwise because of the ECtHR judgement in *M.S.S. v. Belgium and Greece* which blocked all Dublin transfers to Greece,[36] or cases where the expulsion could not be executed within the applicable deadlines (6 or 18 months depending on the circumstances). In the cohort analysed by *Vivre Ensemble*, the vulnerable individuals who actually managed to avoid expulsion were persons who were either first registered in Greece, or individuals resourceful enough to mobilize grass roots or political support at the Cantonal level to block their expulsion or to "disappear" for a period long enough to allow the transfer deadline to expire. According to *Vivre Ensemble*, it is therefore no exaggeration to speak about the "blind application" of the Dublin Regulation by the Swiss authorities.[37]

In November 2017, a coalition of NGOs issued an *Appeal against the Blind Application of the Dublin Regulation* (the "Dublin Appeal"). The petition was signed by 33'000 persons and more than 200 rights organisations including Amnesty International and the Swiss Council for Refugees (OSAR) and numerous political figures representing all parties on the political spectrum with the only exception of the extreme right wing party.[38] The

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protection considerations." (our emphasis). Available at https://www.fiz-info.ch/images/content/Downloads_DE/Publikationen/Monitoring/2018_GRETA_alternative_report.pdf

[33] See https://www.amnesty.ch/fr/themes/asile-et-migrations/le-reglement-dublin-et-la-suisse/le-reglement-dublin-et-la-suisse (last accessed on 18.09.2018).

[34] For analysis of Dublin statistics, see https://asile.ch/statistiques/suisse/#toc4

[35] See https://asile.ch/

[36] Resumed progressively since 2017 for non-vulnerable asylum seekers and against guarantees of appropriate reception, by decision of the European Commission, available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20161208/recommendation_on_the_resumption_of_transfers_to_greece_en.pdf

[37] See https://asile.ch/2017/12/04/fact-checking-clause-de-souverainete-sem-de-lintox-delegitimer-lappel-dublin/

[38] See list of signatory organisations (200) and non-exhaustive list of persons at: https://www.dublin-appell.ch/fr/

petition was submitted to the Swiss Federal Council on 20 November 2017 calling for reforms in the way the Dublin Regulation was applied.[39] According to the text of the petition, "Switzerland is one of the countries that apply the Dublin regulation most strictly. This excessive formalism not only puts at grave risk the physical and psychological health of the persons concerned, but leads also to fundamental rights violations and violations of the rights of the child."[40]

The petitioners pointed out that Dublin expulsions often separate nuclear family members, leaving children in single-parent households. They called on the federal government to "make use of all possibilities under Article 17 of the Dublin Regulation to avoid violating international conventions on the rights of the child and conventions on fundamental rights." In its official reaction to the Dublin Appeal on the following day, the SEM confirmed that they "did not intend to change their practice".[41]

In subsequent discussions on 1 March 2018 with Ms. Simonetta Sommaruga (the cabinet minister with the migration portfolio), the organisations behind the Dublin Appeal submitted a list of 48 cases[42] of vulnerable persons and families – a list that they compiled in a short period of time and with limited resources, and therefore non-exhaustive – with final expulsion orders, asking her department, the State Secretariat for Migration (SEM)[43] to intervene to stop the expulsions from taking place.

We reiterate that according to Swiss government statistics, in 2017 Switzerland took 5'843 Dublin inadmissibility decisions ("NEM Dublin") where the person was ordered expelled to a different Member State pursuant to that Member State's acceptance.[44] **Therefore, the non-exhaustive case list of 48 vulnerable individuals and families, submitted by the organisations behind the Dublin Appeal, represents less than 1% of all the Dublin expulsion decisions taken by Switzerland in 2017. It is evident from these figures that only an extremely small number highly exceptional cases are at issue.** Although it is impossible to ascertain precisely the number or overall proportion of vulnerable individuals in Dublin proceedings, we consider this estimation to be valid on an indicative basis.

Our subsequent discussions with the NGOs behind the Dublin Appeal, have revealed that while some of the cases were resolved on a discretionary basis mostly at the Cantonal

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[39] See https://www.dublin-appell.ch/fr/ (our translation from the original in French).
[40] See https://www.dublin-appell.ch/fr/
[41] See https://www.rts.ch/play/radio/la-matinale/audio/le-secretariat-detat-aux-migrations-sem-ne-va-pas-revoir-sa-pratique-de-renvoi-des-requerants?id=9103662&station=a9e7621504c6959e35c3ecbe7f6bed0446cdf8da
[42] See Solidarité Tattes, News Letter 18 March 2018, for the list of the cases discussed with Ms. Simonetta Sommaruga, at https://solidaritetattes.ch/1424-2/#more-1424
[43] The State Secretariat for Migration (SEM) is the federal authority in charge of migration matters in Switzerland (while the Cantons are responsible only for the execution of SEM's expulsion orders). The SEM's homepage is at: https://www.sem.admin.ch/sem/fr/home.html
[44] See SEM Statistique en matière d'asile 2017 at p. 7, Dublin : décisions de non entrés en matière (art. 31.a.1.b) https://www.sem.admin.ch/dam/data/sem/publiservice/statistik/asylstatistik/2017/stat-jahr-2017-kommentar-f.pdf

level, no systematic review of the 48 case files submitted by the organisations behind the Dublin Appeal had taken place by the federal authorities since the petition was submitted. Moreover, lawyers of the legal aid services working in the asylum field have noted no change in Swiss Dublin practice subsequent to the Dublin Appeal because they continue to deal with cases of highly vulnerable asylum seekers with well-documented medical conditions and/or trauma, who have first instance or final Dublin expulsions orders.[45]

We conclude that no internal review or overhaul of the SEM's decision-making process in vulnerable cases has taken place, and that no review case files submitted subsequent to the Dublin Appeal, has been done.

Dublin Expulsions to Italy

It is now well recognised that reception conditions in Member States of the Dublin Regulation can vary widely, and that some states have dysfunctional asylum systems incapable or unwilling to meet the basic reception needs of asylum seekers or to provide effective access to an asylum procedure. Asylum seekers expelled to these countries can generally expect to face either street destitution without access to basic services such as food, housing and medical care (Italy and Greece[46]) and/or to be detained under inhuman and degrading conditions (Bulgaria and Hungary). According to the UNHCR, these circumstances create a risk of onwards *refoulement* to the country of origin:[47]

> *The Dublin Regulation is based on the premise that all Member States respect the principle of non-refoulement and can thus be considered as 'safe' for third country nationals and that applicants are able to enjoy comparable levels of procedural and substantive protection, pursuant to harmonized laws and practices, in all Member States.* ***In practice, however, significant divergences exist in reception conditions and in the approach to the granting of international protection across the Member States. UNHCR is concerned that the lack of harmonization may lead to direct or indirect refoulement in view of the inconsistent interpretation of the refugee definition contained in Article 1A of the Refugee Convention and/or the risk of inhuman or degrading treatment in violation of Article 3 of the European Convention on Human rights (ECHR) and Article 4 of the Charter of Fundamental Rights of the European Union (EU Charter).*** *Given the primacy of fundamental rights, the Dublin Regulation, as secondary EU legislation, must always be interpreted and applied in a manner which is compliant with international refugee and human rights law (our emphasis).*

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[45] Our contacts with the two platforms which include all legal aid service providers in the area of asylum law in Switzerland and which meet every 6 weeks to exchange on current practice of the State Secretariat for Migraiton and the Federal Administrative Court are the COPERA (French and Italian-speaking Cantons) and the Rechtsberatungsstelle Treffen RBS (German-speaking Cantons).

[46] See *supra Tarakhel v. Switzerland*, and *M.S.S. v. Belgium and Greece*.

[47] UNHCR August 2017, *Left in Limbo: UNHCR Study on the Implementation of Dublin III*, at p. 17, http://www.refworld.org/docid/59d5dcb64.html

Because of Switzerland's geographic location and the fact that Italy is one of the major entry points for asylum seekers heading to northern European countries, Dublin expulsions to Italy constitute a large part of Switzerland's Dublin practice and involves thousands of individuals every year. Swiss government statistics show that during the first eight months of 2018, Switzerland engaged 4'926 Dublin expulsion procedures to other Member States of which 1'918 concerned transfers to Italy.[48] Transfers to Italy therefore represented 39% of all Dublin procedures during the first eight months of the year.

According the OSAR, in 2016 Switzerland expelled more than 40 families with minor children to Italy with no certainty that the persons concerned would be housed properly. Despite the ECtHR's judgment in *Tarakhel v. Switzerland*[49] where the Court found that reception conditions in Italy were highly problematic for vulnerable asylum seekers and which required Switzerland to obtain specific guarantees[50] in the case of families with minor children, a subsequent joint investigation of the OSAR and the Danish Refugee Council revealed that on arrival in Italy, a large number of the families and other vulnerable persons were accommodated in emergency shelters that were clearly inappropriate for minor children and that their medical needs were neglected. Their report concluded that "it cannot be guaranteed that families and persons with specific reception needs who are being transferred to Italy under the Dublin III Regulation are being received adequately and in respect of their basic human rights. Therefore, these persons are at risk of violation of their rights according to Article 3 of the ECHR and Article 4 of the EU Charter."[51]

Several other institutions and rights organizations including the Council of Europe (CoE), *Medecins Sans Frontières* (MSF), the Asylum Information Database (AIDA), the International Rehabilitation Council for Torture Victims (IRCT) and Amnesty International Switzerland, have also raised concerns about Italian reception conditions for quite some time.

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[48] See https://www.sem.admin.ch/dam/data/sem/.../08/7-50-Mouv-Dublin-m-f-2018-08.xlsx

[49] In *Tarakhel v. Switzerland* [GC], App. no. 29217/12 at § 115, the Court found " ... in the Court's view, the possibility that a significant number of asylum seekers may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, cannot be dismissed as unfounded."

[50] In view of the disarray of the asylum system in Italy and the overtly anti-migrant policies adopted by the present Italian Government, we believe that any guarantees issued by the Italian government as to the appropriateness of reception arrangements for vulnerable asylum seekers, are worthless. We note that such guarantees suffer from many of the same fatal flaws that "diplomatic assurances" have in the context of expulsion to a state where there is an acknowledged practice of torture and ill-treatment. For a discussion of the problematic nature of "diplomatic assurances", see Report on migration of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/37/50 at §§ 47 – 50.

[51] See *IS MUTUAL TRUST ENOUGH: The Situation of Persons with Special Reception Needs upon Return to Italy*, OSAR and DRC 9 February 2017 available at: https://www.osar.ch/assets/news/2017/drc-osar-drmp-report-090217.pdf (last accessed on 18.09.2018).

According to the AIDA report on Italy, thousands of asylum seekers are accommodated in emergency shelters or are not accommodated at all and left to fend for themselves on the streets or in "informal settlements" with no security and no access to basic services:[52]

> *Despite a continuing increase in the capacity of the SPRAR system, which currently counts over 35,000 funded places, the vast majority of asylum seekers are accommodated in temporary reception centres (CAS). CAS hosted around 80% of the population at the end of 2017. In Milan, for example, the ratio of SPRAR to CAS is 1:10. Destitution also remains a risk of asylum seekers.* ***At least 10,000 persons are excluded from the reception system, among whom asylum seekers and beneficiaries of international protection. Informal settlements with limited or no access to essential services are spread across the entire national territory.***

These concerns were echoed by MSF[53] and the Council of Europe's fact-finding mission to Italy.[54] Because of the systemic deficiencies of the Italian asylum system, the OSAR, which is the Swiss umbrella organisation for NGOs active in the asylum field, has repeatedly called on the Swiss authorities abstain from Dublin expulsions to Italy of vulnerable persons.[55]

In respect of asylum seekers with specific vulnerabilities, the situation is particularly alarming because access to specialized medical services for traumatised persons is deficient or inexistent.[56] According to MSF,[57]

> *Many of the reception centres where the people seeking international protection are accommodated do not have a psychological support service. According to the agreement signed between the Prefectures and the centres, healthcare should be guaranteed through the facilities of the Sistema Sanitario Nazionale (SSN), or national health system, and the companies managing the centres should facilitate the connection between the residents and the local services. The contractual terms signed between each Prefecture and the provinces are highly variable, and the presence of medical centres and psychological services is not always guaranteed. The*

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[52] Asylum Information Database (AIDA), Country Report 2017 for Italy, March 2018 at p. 14: http://www.asylumineurope.org/reports/country/italy.

[53] See Médecins Sans Frontières, *FUORI CAMPO, INSEDIAMENTI INFORMALI; marginalità sociale, ostacoli all'accesso alle cure e ai beni essenziali per migranti e rifugiati*, February 2018. Available at (with executive summary in English): http://fuoricampo.medicisenzafrontiere.it/Fuoricampo2018.pdf

[54] Council of Europe (CoE), Rapport de la mission d'information de l'ambassadeur Tomáš Boček, Représentant spécial du Secrétaire Général sur les migrations et les réfugiés, du 16-21 octobre 2016: http://www.unipd-centrodirittiumani.it/public/docs/Report_factfinding_mission_Italy_Tomas_Bocek_mar_2017.pdf

[55] See https://www.osar.ch/news/dossiers-medias/dublin.html

[56] See IRCT regional report 2016, *FALLING THROUGH THE CRACKS: Asylum Procedures and Reception conditions for Torture Victims in the European Union*, pp. 29 - 31 https://irct.org/assets/uploads/pdf_20161120142453.pdf

[57] See Médecins Sans Frontières, *NEGLECTED TRAUMA, Asylum seekers in Italy: an analysis of mental health distress and access to healthcare*, pp. 4 – 5, at https://www.msf.org/sites/msf.org/files/neglected_trauma_report.pdf

lack of a timely monitoring system and sanctions on the part of the funding institution also makes the implementation of these services discretionary.

In Italy, there is no dedicated system for the identification of torture victims, and they face significant hurdles in accessing the medical system. According to the IRCT, "torture victims are not systematically identified in Italy as it largely happens on an ad-hoc basis depending on the competence and training of the relevant authorities. Torture victims may never be identified and may go through the entire (asylum) procedure without ever bringing up their experiences – due to involuntary avoidance and disassociation – both common psychological consequences of torture[58] ... In the past, there used to be specialised centres for vulnerable groups but this is no longer the case."[59]

Because of this situation, several international and national courts have blocked expulsions to Italy or limited the circumstances under which they can take place. In addition to the jurisprudence of the ECtHR discussed above, the U.N. Human Rights Committee has blocked the expulsions of families with minor children on the basis that they would violate Article 7 of the International Covenant on Civil and Political Rights (ICCPR)[60] and the Committee against Torture recently blocked the expulsion of a torture victim on the basis that it would violate Articles 3, 14 and 16 of the Convention against Torture.[61] Similarly, national courts in Luxembourg[62], France[63], Denmark[64], Germany[65], the Netherlands[66], Austria[67] and Belgium[68] have stopped expulsions for human rights reasons (non-exhaustive list).

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[58] *See* IRCT, supra at p. 30.

[59] *See* IRCT, supra at p. 31 "Under the NIRAST project, we noticed a marked improvement in how authorities and health workers dealt with vulnerable asylum seekers. There were positive steps in how health professionals, civil servants and staff of the asylum authority reported on torture victims and how frequently they referred people to our services. Since the project ended due to a lack of funding, we have noticed that standards have dropped again."

[60] U.N. Human Rights Committee, *Raziyeh Rezaifar v. Denmark*, Communication no. 2512/2014; *Y.A.A. and F.H.M. v. Denmark*, Communication no. 2681/2015; *Hibaq Said Hashi v. Denmark*, Communiction no. 2470/2014 and *Warda Osman Jasin et al. v. Denmark*, Communication no. 2360/2014.

[61] *Supra, A.N. v. Switzerland.*

[62] Luxembourg, Administrative Tribunal of Luxembourg 10 July 2018 available at: http://www.asylumlawdatabase.eu/en/content/luxembourg-%E2%80%93-administrative-tribunal-stops-dublin-transfer-asylum-seeker-italy-due-country%E2%80%99s

[63] France, Rennes Administrative Tribunal, 5 January 2018 available at: http://www.asylumlawdatabase.eu/en/case-law/france-%E2%80%93-rennes-administrative-tribunal-5-january-2018-application-no-1705747

[64] Denmark, Refugee Appeals Board, 30 November 2017, available at http://www.asylumlawdatabase.eu/en/case-law/denmark-refugee-appeals-board%E2%80%99s-decision-30-november-2017

[65] Germany, Administrative Court of Braunschweig, 12 October 2016, available at http://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-braunschweig-12th-october-2016-5-332-15

[66] The Netherlands, Dutch Council of State, 30 June 2017, available at http://www.asylumlawdatabase.eu/en/content/netherlands-transfers-italy-halted-due-lack-individual-guarantees

[67] Austria, Constitutional Court, 30 June 2016, http://www.asylumlawdatabase.eu/en/content/austria-constitutional-court-rules-dublin-transfer-vulnerable-asylum-seekers-italy-without

Finally, recent political developments in Italy are cause for grave concern. The new Italian government has brought xenophobic sentiment into mainstream political discourse with immediate adverse consequences for asylum seekers and other migrants in general.[69] The Italian government has recently approved a series of hard-line measures awaiting Presidential signature which include measures to dramatically restrict access to international protection by abolishing the status of humanitarian protection. Given that humanitarian protection is the main form of international protection granted by Italy (16'6016 in the first 8 months of 2018) the new legislation would affect a large number of persons and exacerbate the risks of chain *refoulement* of asylum seekers.[70] The new law also envisages dramatic cut-backs in housing for asylum seekers through measures that would exclude them from the System of Protection for Refugees and Asylum Seekers (SPRAR)[71]. Asylum seekers, including the particularly vulnerable, would then only be eligible for housing in first reception and temporary reception centres (CAS) where the conditions are critically deficient.[72]

The U.N. High Commissioner for Human Rights, Michelle Bachelet, in her first major appearance as the new High Commissioner, expressed alarm at the levels of anti-immigrant violence in Italy and Austria, and said that her office will send teams to those countries to "assess the reported sharp increase in acts of violence and racism against migrants, persons of African descent and Roma."[73]

Switzerland's Dublin practice should be considered in light of the dramatically worsening policy environment in respect of asylum seekers in Italy.

Conclusion

We conclude by reiterating that the recent case of *A.N. v. Switzerland* is emblematic of a much wider problem, namely, that of blanket Dublin expulsions which fail to take into account the personal situation of the applicant and the reception conditions in the country of destination. This constitutes a major protection gap that needs to be closed. To the extent that thousands of persons seeking international protection in Switzerland

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[68] Belgium, Council for Aliens Law Litigation, 3 June 2016 available at : http://www.asylumlawdatabase.eu/en/content/austria-constitutional-court-rules-dublin-transfer-vulnerable-asylum-seekers-italy-without

[69] *See* European Council on Refugees and Exilse (ECRE), Editorial, *All eyes on Italy*, May 2018, https://www.ecre.org/op-ed-all-eyes-on-italy/ and https://www.ecre.org/italy-harsh-rhetoric-continues-now-with-a-ministerial-mandate/

[70] *See* Human Rights Watch (HRW), *New Low for Italian Migration Policies: Preventing rescue at sea, Punishing survivors on land*, at: https://www.hrw.org/news/2018/09/26/new-low-italian-migration-policies

[71] See ECRE, Italy : Latest Immigration Decree drops Protection Standards at https://www.ecre.org/italy-latest-immigration-decree-drops-protection-standards/

[72] See ECRE, *supra*, https://www.ecre.org/italy-latest-immigration-decree-drops-protection-standards/

[73] See https://reliefweb.int/report/world/39th-session-human-rights-council-opening-statement-un-high-commissioner-human-rights

every year are subjected to Dublin proceedings, this problem is urgent and calls for your immediate attention.

In light of the above, we ask you to intervene with the Swiss authorities requesting them to:

1. Clarify what concrete action will be taken following the decision of the Committee against Torture in *A.N. v. Switzerland* and pursuant to the Committee's General Comment No. 3 (2012) on the Implementation by States parties of Article 14 of the Convention against Torture[74], to ensure that torture victims' right to rehabilitation under Article 14 are respected; in particular, **the Government should clarify 1) what steps are planned in order to effectively identify torture survivors in proceedings under the Dublin Regulation, 2) to provide them with immediate access to specialized medical care necessary to treat the after-effects of violent trauma and 3) to safeguard the procedural and substantive protections that flow from their status as torture victims.**

2. Ensure that all pending and future cases of torture victims and other vulnerable asylum seekers are assessed in light of the requirement under international law that persons in expulsion proceedings who risk being exposed to inhuman and degrading treatment in the country of destination benefit from an individualized examination of that risk; in cases where the expulsion order is already final but where the expulsion has not yet taken place, the Government should reopen the case files as necessary, and re-examine the claims in light of these requirements;

3. Establish and publish new guidance for the identification of torture victims and other vulnerable asylum seekers in proceedings under the Dublin Regulation;

We are ready to provide you with further information or to clarify any issues in relation to this matter.

We would be grateful if you could please direct any correspondence to Boris Wijkström, CSDM, at bwijkstroem@centre-csdm.org.

Yours sincerely,

Boris Wijkström

p.o

Gabriella Tau

[74] See CAT General Comment No. 3 (2012) CAT/C/GC/3/ at https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session37/Pages/ListReports.aspx