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### Article 16

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# ARTICLE 16

## REPATRIATION AND RETURN OF VICTIMS

Ryszard Piotrowicz and Conny Rijken

- 1 The Party of which a victim is a national or in which that person had the right of permanent residence at the time of entry into the territory of the receiving Party shall, with due regard for his or her rights, safety and dignity, facilitate and accept, his or her return without undue or unreasonable delay.
- 2 When a Party returns a victim to another State, such return shall be with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim, and shall preferably be voluntary.
- 3 At the request of a receiving Party, a requested Party shall verify whether a person is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving Party.
- 4 In order to facilitate the return of a victim who is without proper documentation, the Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving Party shall agree to issue, at the request of the receiving Party, such travel documents or other authorisation as may be necessary to enable the person to travel to and re-enter its territory.
- 5 Each Party shall adopt such legislative or other measures as may be necessary to establish repatriation programmes, involving relevant national or international institutions and non-governmental organisations. These programmes aim at avoiding re-victimisation. Each Party should make its best effort to favour the re-integration of victims into the society of the State of return, including re-integration into the education system and the labour market, in particular through the acquisition and improvement of their professional skills. With regard to children, these programmes should include enjoyment of the right to education and measures to secure adequate care or receipt by the family or appropriate care structures.
- 6 Each Party shall adopt such legislative or other measures as may be necessary to make available to victims, where appropriate in co-operation with any other Party concerned, contact information of structures that can assist them in the country where they are returned or repatriated, such as law enforcement offices, non-governmental organisations, legal professions able to provide counselling and social welfare agencies.
- 7 Child victims shall not be returned to a State, if there is indication, following a risk and security assessment, that such return would not be in the best interests of the child.

A. INTRODUCTION	16.01	4. Relation with the United Nations Convention relating to the Status of Refugees	16.27
B. DRAFTING HISTORY	16.05	D. ISSUES OF INTERPRETATION	16.29
1. Preparatory documents	16.06	1. Obligations for non-state Parties	16.31
2. Best interests of the victim	16.07	2. <i>Non-refoulement</i>	16.33
3. Scope of protection	16.09	3. Risk assessment	16.43
4. Prohibition of revealing victimhood	16.13	4. Repatriation programmes and social integration	16.47
5. Terminology	16.14	5. Transferability of victim status	16.50
6. Repatriation programmes	16.15	6. Best interests of the child	16.53
7. Interests of the child	16.16	E. CONCLUSION	16.54
C. ARTICLE IN CONTEXT	16.18		
1. Relation with the Palermo Protocol	16.18		
2. Relation with EU legislation	16.19		
3. Relation with the ECHR	16.25		

## A. INTRODUCTION

**16.01** Article 16 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings<sup>1</sup> sets out the duty of states to accept back into their territory their own citizens or permanent residents who are victims of trafficking in another state. It covers both those who have been trafficked transnationally and those who left their own country before being trafficked. The duty to accept back already exists under international law, at least with regard to citizens.<sup>2</sup> It describes the way in which repatriation and return should take place – ‘with due regard for the rights, safety and dignity’ of the individual,<sup>3</sup> and specifies that it should ‘preferably be voluntary’.<sup>4</sup> This formulation reflects the fact that, in the absence of some international protection obligation or other basis for remaining in the destination country, the trafficked victim, as an alien, has no right to remain there and may be removed, if necessary by force.

**16.02** There is an obligation to cooperate. Article 16(3) of the CoE Convention against Trafficking requires states, when requested by the receiving country, to verify whether an individual is their citizen or has the right of permanent residence. Furthermore, under Article 16(4), the state of citizenship or permanent residence must, if requested by the receiving state, issue travel documents or similar authorisation sufficient to enable the individual to return.

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (hereinafter CoE Convention against Trafficking or Convention).

2 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 46, 16 September 1963, Art 3(2): ‘Nobody shall be deprived of the right to enter the territory of the State of which he is a national.’ This probably applies to permanent residents too: International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966, Art 12(4). This provision is considered to extend the right of entry to permanent residents in at least some cases: Vincent Chetail, *International Migration Law* (Oxford University Press 2019) 93–5.

3 This clearly references basic human rights, and the Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 202 elaborates on this: ‘[s]uch rights include, in particular, the right not to be subjected to inhuman or degrading treatment, the right to the protection of private and family life and the protection of his/her identity’.

4 CoE Convention against Trafficking, Art 16(2).

Article 16(5) requires that states establish repatriation programmes aimed at avoiding re-victimisation, and these should involve relevant international institutions (for example, the IOM) as well as civil society organisations. In other words, it is not enough that the state just accepts people back and leaves them to continue with their lives (unless that is what they want); nor that the returning state simply puts the person on a plane and sends them back home. The provision recognises that trafficked victims may be extremely vulnerable (indeed it may have been their vulnerability that led them to be trafficked in the first place); and that they need support. All states are required to engage in such efforts – both the repatriating and the receiving state. **16.03**

Article 16(6) stipulates that State Parties must adopt measures to enable repatriated or returned persons to get information on support agencies and bodies that might be able to assist them. Finally, in Article 16(7), it is stressed that a child may not be returned to a state if this would not be ‘in the best interests of the child’. **16.04**

## B. DRAFTING HISTORY

The different elements of Article 16 remained largely the same throughout its drafting history. There were no real key issues discussed during the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) meetings. The aspects that were considered and which led to the final wording of Article 16 are discussed below. **16.05**

### 1. Preparatory documents

Recommendation No. R (2000)11<sup>5</sup> introduces a right of return and rehabilitation. The Explanatory Memorandum in the appendix to the Recommendation notes that, apart from the trauma, indebtedness often creates a barrier to re-integration in the country of origin, as may the cost of the return journey. Victims run the risk of being rejected by their families or the community, especially if they are victims of sexual exploitation. Therefore, Recommendation No. R(2000)11 proposed some mitigating strategies which include means to settle their debts in the form of a compensation scheme, social support provided upon return and occupational re-integration measures.<sup>6</sup> **16.06**

### 2. Best interests of the victim

During the 1st meeting of the CAHTEH, experts discussed repatriation in view of the victim’s trauma, and considered that return should not take place immediately. Here, the idea of a reflection period and a subsequent residence permit gained ground.<sup>7</sup> **16.07**

During this 1st CAHTEH meeting, it was stressed that the best interests of the victim should always prevail when taking repatriation decisions, and that the victim should not be repatriated **16.08**

5 Committee of Ministers, Recommendation to Member States on action against trafficking in human beings for the purpose of sexual exploitation No. R(2000)11, 19 May 2000.

6 Ibid., paras 39, 40 and 41.

7 See on this the Commentary on Arts 13 and 14.

if there is a risk of falling again into the hands of the traffickers. This text was included in paragraph 5 of the draft (para 2 of the final text) but later dropped.<sup>8</sup>

### 3. Scope of protection

- 16.09** The scope of the protection in case of repatriation and return was discussed during the 3rd CAHTEH meeting. It was decided that the *Soering* case law<sup>9</sup> on extradition also applied in situations of deportation. This means that the scope of protection is determined by Article 3 of the ECHR, which protects against torture and inhuman or degrading treatment or punishment. However, the draft text at that time referred to ‘the safety of that person’ and ‘the best interests of the victim’.<sup>10</sup>
- 16.10** The phrase ‘best interests of the victim’ was later deleted, since the ‘best interest’ was considered to be related to provisions dealing with children.<sup>11</sup>
- 16.11** During the 6th CAHTEH meeting, and on a proposal from NGOs, it was decided that the reference to taking due regard for ‘the safety’ of the victim in relation to repatriation and return, as referred to in the drafts of paragraph 1 and 2, be replaced with due regard to the rights, dignity and safety of the victim.<sup>12</sup>
- 16.12** Various NGOs suggested to include a risk assessment prior to repatriation or return, e.g. Amnesty International and Anti-Slavery International, as well as the Committee on Equal Opportunities for Women and Men.<sup>13</sup> However, it was decided not to include a risk assessment for adults in the text of Article 16.

### 4. Prohibition of revealing victimhood

- 16.13** Included in an early version of the Article was the prohibition of the home state to reveal that the returned person is a trafficking victim.<sup>14</sup> During the 3rd CAHTEH meeting, it was decided that such a provision was difficult to uphold, and actually fell within the scope of Article 12 on the protection of victims’ private life (now Art 11 of the Convention). Therefore, it was decided to delete this paragraph.<sup>15</sup>

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8 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, paras 53–57.

9 *Soering v. the United Kingdom* App no 14038/88 (ECtHR, 7 July 1989).

10 CAHTEH, *3rd meeting (3–5 February 2004) – Meeting Report*, CAHTEH(2004)RAP3, 6 April 2004, paras 25–41 and 44.

11 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings – Contribution by the delegation of the Commission of the European Communities*, CAHTEH (2004)17, Addendum II, 30 August 2004, 6.

12 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH(2004)RAP6, 11 October 2004, paras 51–61.

13 Amnesty International and Anti-Slavery International, *Joint NGO Statement on the draft European Convention against Trafficking in Human Beings*, IOR 61/001/2005, January 2005, 14; CAHTEH, *Council of Europe Draft Convention on action against trafficking in human beings: Comments by the Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men*, CAHTEH(2004)23, 24 November 2004, 8.

14 CAHTEH, *Revised preliminary draft – European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 9, para 4 in the draft.

15 CAHTEH, *3rd meeting*, CAHTEH(2004)RAP3, para 35.

## 5. Terminology

Concerning the use of ‘repatriation’ and ‘return’ it was decided to use the same terminology as in Article 8 of the Palermo Protocol.<sup>16</sup> In the final text, both terms are used without being further explained. During the 6th CAHTEH meeting, it was decided to amend the title of the provision from ‘Repatriation of Victims’ to ‘Repatriation and Return of Victims’, to not only cover voluntary return (repatriation), but also non-voluntary return (return).<sup>17</sup> **16.14**

## 6. Repatriation programmes

The content of the repatriation programmes was discussed during the 3rd CAHTEH meeting, where it was agreed to include the strengthening of women’s life skills and the mechanisms of child protection.<sup>18</sup> During the 6th CAHTEH meeting, references to the repatriation programmes were thoroughly discussed. It was agreed that the purpose of such programmes was to prevent re-victimisation after return, and that, with that in view, re-integration into society should be promoted. Some delegations felt that education and employment were key factors in social re-integration.<sup>19</sup> **16.15**

## 7. Interests of the child

During the 3rd CAHTEH meeting, it was noted that the situation regarding children was special compared with other victims, and it was agreed to deal with the return and repatriation of children in a separate paragraph, now Article 16(7) of the Convention, with a general reference that return and repatriation should only take place if this is in the best interests of the child.<sup>20</sup> **16.16**

During the 3rd CAHTEH meeting, the draft Directive 2004/81 EC was discussed, and it was recognised that it was necessary for EU countries to coordinate the negotiations on Article 16 of the Convention in the CAHTEH with those for draft Directive 2004/81/EC.<sup>21</sup> **16.17**

## C. ARTICLE IN CONTEXT

### 1. Relation with the Palermo Protocol

The first four paragraphs of Article 16 of the CoE Convention against Trafficking are almost identical to Article 8 of the Palermo Protocol. As with the definition of human trafficking, which the Convention copies almost verbatim from the Palermo Protocol, this reduces the scope for confusion because of conflicting obligations. **16.18**

16 CAHTEH, *3rd meeting*, CAHTEH(2004)RAP3, para 26, see further below, ‘Article in context’.

17 CAHTEH, *6th meeting*, CAHTEH(2004)RAP6, para 52.

18 CAHTEH, *3rd meeting*, CAHTEH(2004)RAP3, para 30.

19 CAHTEH, *6th meeting*, CAHTEH(2004)RAP6, para 58.

20 CAHTEH, *3rd meeting*, CAHTEH(2004)RAP3, para 31.

21 *Ibid.*, para 8.

## 2. Relation with EU legislation

### (a) Directive 2004/81/EC<sup>22</sup>

**16.19** Dir 2004/81/EC provides for the granting of residence permits to victims of trafficking who agree to cooperate with the competent authorities. The UK, Ireland and Denmark did not take part in the adoption of the Directive and were not bound by it. The essence of this Directive is that the residence permit is only granted in return for cooperation by the victim with the investigation or judicial proceedings with regard to THB; in other words, it is not for the direct benefit of the victim, whose purpose here is purely to facilitate the work of the police and the prosecution. This is quite the opposite of the human rights-based approach adopted by the Council of Europe and, later, the Directive 2011/36/EU.<sup>23</sup> In fact, anyone granted a residence permit in accordance with Dir 2004/81/EC might be at even greater risk later, since the permit could be withdrawn for a variety of reasons after they have cooperated,<sup>24</sup> or simply not renewed if the relevant proceedings have terminated.<sup>25</sup> Support programmes for victims who cooperate can be aimed at preparation of their assisted return to their country of origin.<sup>26</sup> No further references to return are included in this Directive.

### (b) Directive 2008/115/EC<sup>27</sup>

**16.20** Dir 2011/36/EU does not address return and repatriation; at the EU level, this is covered by the so-called 'Returns Directive'. That instrument is in a sense narrower than Article 16 of the CoE Convention against Trafficking, since it applies only to 'illegally staying third-country nationals' whose states have not negotiated free movement agreements with the EU.<sup>28</sup> Furthermore, all trafficked non-citizens are addressed in Article 16 of the CoE Convention against Trafficking, both those staying legally and illegally.

**16.21** Under Article 6(1) of Dir 2008/115/EC, Member States 'shall issue a return decision to any third-country national staying illegally in their territory', subject to certain exceptions. Most notably, Article 6(4) of Dir 2008/115/EC allows a state to grant an autonomous residence permit or some other authorisation of a right to stay 'for compassionate, humanitarian or other reasons'. Under Article 5 of Dir 2008/115/EC, when implementing the Directive, states must

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22 Directive 2004/81/EC of the Council of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ L261/19) (thereinafter Dir 2004/81/EC). For commentary, see Ryszard Piotrowicz, 'European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers' (2002) 14 *International Journal of Refugee Law*, 263.

23 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1) (thereinafter Dir 2011/36/EU).

24 Dir 2004/81/EC, Art 14.

25 *Ibid.*, Art 8.

26 *Ibid.*, Art 12(1).

27 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348/98) (thereinafter Returns Directive).

28 Returns Directive, Art 3(1); Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L77/1), Art 2(5).



take ‘due account’ of the best interests of the child, family life and the state of health of the persons concerned, and they must ‘respect’ the principle of *non-refoulement*.

Article 11 of Dir 2008/115/EC provides for mandatory and optional entry bans for those who have been removed. However, there is an exception for most victims of trafficking in human beings who have entered the country illegally and who, having agreed to cooperate with the authorities, have been issued a residence permit pursuant to Council Dir 2004/81/EC. Again, the UK, Ireland and Denmark opted out. **16.22**

(c) *Directive 2011/95/EU*<sup>29</sup>

While the UK, Ireland and Denmark are not bound by the Qualification Directive, the first two states did agree to be bound by its predecessor, adopted in 2004. The Qualification Directive is significant because it clearly establishes a right to international protection for trafficked persons, or persons at risk of being trafficked, in certain situations.<sup>30</sup> **16.23**

(d) *Directive 2012/29/EU*<sup>31</sup>

The Victims’ Rights Directive sets out basic minimum rights for victims of crime, as well as standards for how they are treated and protected by state authorities. Recital 57 provides: **16.24**

Victims of human trafficking (...) tend to experience a high rate of secondary and repeat victimisation, of intimidation and of retaliation. Particular care should be taken when assessing whether such victims are at risk of such victimisation, intimidation and of retaliation and there should be a strong presumption that those victims will benefit from special protection measures.

In conducting risk assessments prior to returning a victim of trafficking or person at risk, or considering whether such person might be entitled to international protection, their status as a victim of crime will be relevant, and will need to be taken into account by the decision maker.

### 3. Relation with the ECHR

A person’s right to enter the territory of the state of which he or she is a national was enshrined in Article 3(2) of Protocol No. 4 to the ECHR.<sup>32</sup> While Article 16 of the CoE Convention against Trafficking does not mention the ECHR, the requirement specified in Article 16(1), that return must be with due regard for the rights, safety and dignity of the individual, clearly acknowledges the human rights obligations of both the returning and the receiving states. **16.25**

29 Directive 2011/95/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), (OJ L 337/9) (thereinafter Qualification Directive).

30 See below section E.

31 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/22/JHA, (thereinafter Victims’ Rights Directive).

32 This right is noted also in the Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 201.



**16.26** Return would not be lawful were it to result in exposure to a possible violation of the ECHR, in particular Articles 4 and 3. The relevance of Article 4 is obvious. While it does not mention trafficking, but rather the duty to prevent slavery, forced labour and servitude, there has been no doubt, since the *Rantsev* case at least, that trafficking in human beings is covered by Article 4.<sup>33</sup> The return of a person to a territory where they are at real risk of being the victim of a violation of Article 4 would itself be an indirect violation of that provision. It might also violate Article 3 of the ECHR by exposing that person to the risk of inhuman or degrading treatment, or even torture.<sup>34</sup> Article 3 prohibits expulsion of an alien where there is a real risk ('substantial grounds') of that person being exposed to torture or to inhuman or degrading treatment or punishment in the receiving country.<sup>35</sup> Exposing a person to re-victimisation, re-trafficking and social exclusion might in some cases qualify as such.

#### 4. Relation with the United Nations Convention relating to the Status of Refugees

**16.27** Although neither the drafting history nor the Explanatory Memorandum refers to the 1951 Refugee Convention, GRETA in its evaluations does consider that instrument relevant, especially in relation to Article 40(4) of the CoE Convention against Trafficking, and particularly in relation to the application of the principle of *non-refoulement*.<sup>36</sup> In fact, GRETA has consistently for several years, in the context of Article 16, reminded states of the obligation of *non-refoulement*; and has furthermore called upon states to give 'full consideration' to the UNHCR's Guidelines on the application of the Refugee Convention to trafficked people.<sup>37</sup>

**16.28** The OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking<sup>38</sup> also addressed return several years before the Convention was adopted. Principle 11 provides:

Safe (and, to the extent possible, voluntary) return shall be guaranteed to trafficked persons by both the receiving State and the State of origin. Trafficked persons shall be offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families.

33 *Rantsev v. Cyprus and Russia*, App No 25965/04, (ECtHR, 7 January 2010), para 282.

34 *MSS v. Belgium and Greece*, App No 30696/09, (ECtHR, 21 January 2011).

35 *Ibid.*, para 365, citing, amongst others, *Soering v. United Kingdom*, paras 90–91 and *Vikvarajah and Others v. United Kingdom*, (ECtHR, 30 October 1991) para 103. The Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 203 made explicit reference to the *Soering* judgment as well as other relevant judgments, in noting the clear duty not to expose a person to a violation of Art 3 by removing them from the territory.

36 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 377.

37 UNHCR, *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victims of Trafficking*, HCR/GIP/06/07, 7 April 2006. States have been reminded of their obligation to respect the principle of *non-refoulement* as far back as 2014: GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 172. References to the UNHCR's Guidelines appear at least as far back as 2016. See, e.g.: GRETA, *Report on the United Kingdom*, II GRETA(2016)21, para 255.

38 UN Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002.

## D. ISSUES OF INTERPRETATION

Article 16 seeks to promote a coordinated response by states to a transnational issue. It aims to reduce the possibilities for a trafficked person to be stranded in the destination country (by requiring the state of citizenship to facilitate return), while aiming also to avoid the risks that may confront victims of trafficking returning to their own country. Furthermore, it clearly requires states to cooperate with relevant international organisations and civil society in these endeavours. This is important not only because it engages the specialised expertise of such organisations, but also because it may help to reassure traumatised victims who do not trust state authorities. **16.29**

GRETA in its evaluations has not hitherto paid significant attention to Article 16, and often reiterates the text of the provision. For instance, in relation to the best interests of the child, it does not further explain how this should be addressed, and what this entails in relation to repatriation and return. **16.30**

### 1. Obligations for non-state Parties

It is of course stating the obvious, that the Convention binds only the Parties to it. This means that only those states are obliged by Article 16 to cooperate in return and repatriation. However, many victims of trafficking come from countries that are not Parties: from outside Europe, as well as the Russian Federation. The Council of Europe has no authority to bind these third states; however, general international law requires that states admit their own citizens when they present themselves at the border.<sup>39</sup> This duty is narrower than the obligation under Article 16, because that requires states to admit the person, but additionally imposes certain duties with regard to their welfare and re-integration. The general duty under international law to admit citizens and, probably, residents, does not include any obligations regarding reception conditions, nor any duty regarding the provision of welfare.<sup>40</sup> **16.31**

Article 8 of the Palermo Protocol is of more importance in these situations. In case the requested or the victim's home state is not a party to the CoE Convention against Trafficking and thus not bound by its Article 16, it might be bound by the same or similar obligations under Article 8 of the Palermo Protocol, if it is a party thereto. However, the provisions in Article 8 are less far-reaching and less detailed, especially in relation to reintegration programmes. That said, the sending state, party to the Convention, remains bound by Article 16, including the provisions in Article 16(5). **16.32**

### 2. *Non-refoulement*

Noting the significance of the principle of *non-refoulement* and the possible entitlement of trafficked persons to international protection, including refugee status, GRETA has systematically reiterated its view that states should give full consideration to this possibility, and called upon states, in doing so, to give full consideration to the UNHCR's Guidelines on the application of the Convention relating to the Status of Refugees to trafficked persons and **16.33**

<sup>39</sup> See footnote 2, above.

<sup>40</sup> But, see ICCPR, Art 7, which, like Art 3 of the ECHR, prohibits inhuman and degrading treatment.

persons at risk of being trafficked,<sup>41</sup> when considering applications for asylum.<sup>42</sup> The need to screen effectively to identify victims of trafficking amongst undocumented migrants and unaccompanied minors has been noted because of the risk of victims being returned without sufficient efforts being made to identify them.<sup>43</sup>

- 16.34** GRETA takes the view that the principle of *non-refoulement* should apply when a victim of trafficking is at risk of being re-trafficked.<sup>44</sup> It furthermore states that, if a country cannot comply with Article 16(5) and (6) of the Convention, either because of lack of capacity or lack of cooperation from the authorities of the country of return, the execution of forced removals may run contrary to the obligation of *non-refoulement* referred to in Article 40(4) of the Convention. This means that lack of opportunities for social re-integration, including re-integration in the educational and labour system, need to be taken into account in return and repatriation decisions. Here GRETA has referred to the case of *Hirsi Jamma and others v. Italy*.<sup>45</sup>
- 16.35** The obligation of *non-refoulement* is wider than the obligation not to return refugees. The Convention relating to the Status of Refugees allows limited exceptions to the principle. However, human rights law stipulates that there are certain situations in which a person can never be returned to their own country, principally where they are at risk of a serious violation of their human rights, including a threat to their lives.<sup>46</sup>
- 16.36** Those trafficked persons, or those at risk of being trafficked, who meet the criteria for refugee status should be permitted to remain in the destination country because of the threat they might face in their home states. As noted above, GRETA has routinely called upon states to take into account the UNHCR's Guidelines on the application of the Convention relating to the Status of Refugees to victims of trafficking or to persons at risk of being trafficked, as a means of reminding states of this duty or, in certain cases, perhaps seeking to make them aware of it.<sup>47</sup>
- 16.37** However, the numbers of trafficking victims who qualify for refugee status are likely to be limited.<sup>48</sup> For those who do not meet these criteria, which will be most trafficked persons or

41 Convention Relating to the Status of Refugees, 189 UNTS 137, July 28, 1951, entered into force April 22, 1954 as amended by the Protocol Relating to the Status of Refugees, 606 UNTS 267, 31 January 1967, entered into force 4 October 1967.

42 For instance, GRETA, *Report on Belgium*, II GRETA(2017)26, para 168.

43 For instance, GRETA, *Report on Norway*, II GRETA(2017)18, para 148.

44 Ibid and GRETA, *Report on Denmark*, II GRETA(2016)7, para 143.

45 GRETA, *Report on Italy under Rule 7 of the Rules of Procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings*, GRETA(2016)29, 30 January 2017.

46 Chetail, 186–99.

47 GRETA, *Report on Belgium*, II GRETA(2017)26, para 168; GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 146; GRETA, *Report on Denmark*, II GRETA(2016)7, para 143; GRETA, *Report on Estonia*, I GRETA(2018)6, para 176; GRETA, *Report on France*, II GRETA(2017)17, para 224; GRETA, *Report on Montenegro*, II GRETA(2016)19, para 134.

48 UNHCR, *Guidelines on International Protection No.7: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, 7 April 2006, HCR/GIP/06/07. Ryszard Piotrowicz, 'Victims of People Trafficking and Entitlement to International Protection' (2005) 24 *Australian Yearbook of International Law*, 159.

persons at risk, subsidiary protection may be available. Subsidiary protection is available to any third-country national or stateless person:

who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm ... and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.<sup>49</sup>

‘Serious harm’ is defined in Article 15 of the Qualification Directive to include the death penalty or execution; serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict; and torture or inhuman or degrading treatment or punishment in the country of origin. When one considers the various types of physical, sexual and psychological violence to which trafficked persons are regularly subjected, and to which they might be subjected again by their traffickers if returned to their home state, it is clear that they could be at risk of serious harm. **16.38**

Furthermore, the threat does not have to come from the state. Article 6 of the Qualification Directive specifies that actors of persecution can be the State Parties or organisations controlling the state or a substantial part of the territory of the state, or else non-state actors, where it can be demonstrated that the state or body controlling part of the state, including international organisations, ‘are unable or unwilling to provide protection against persecution or serious harm’. This clearly could encompass traffickers. **16.39**

Many parties to the Convention are of course not bound by EU law and hence the Qualification Directive. However, the notion of subsidiary, or complementary, protection has been recognised outside the EU.<sup>50</sup> At the very least, states must not remove those whose lives are at risk or who are at risk of a violation of their basic human rights.<sup>51</sup> Accordingly, states will have to carry out some form of risk assessment to establish whether a person can be returned. **16.40**

(a) *Forced returns*

GRETA has expressed significant concern about the negative effects that forced returns can have on victims of trafficking, in particular when there is a lack of follow-up after their return and risks of re-victimisation and re-trafficking.<sup>52</sup> **16.41**

Also, in fulfilment of their obligations under Article 16, states have been enjoined to develop cooperation with the authorities and relevant NGOs in countries of origin of victims of trafficking, so as to ensure proper risk assessments prior to return or repatriation, as well as effective rehabilitation and re-integration.<sup>53</sup> Thus, through this obligation to cooperate, the obligations under Article 16 have effect in non-state parties. **16.42**

49 Qualification Directive, Art 2(f).

50 Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, Oxford University Press 2007), 285 et seq.

51 Ibid, especially at 301 et seq.

52 GRETA, *Report on Italy under Rule 7 of the Rules of Procedure*, para 69.

53 For instance, GRETA, *Report on Belarus*, I GRETA(2017)16, para 148.

### 3. Risk assessment

- 16.43** As mentioned in GRETA reports, return in line with rights, safety and dignity includes informing victims about existing programmes, protecting them from re-victimisation and re-trafficking and, in the case of children, fully respecting the principle of the best interests of the child.<sup>54</sup> Furthermore, GRETA recommends state parties to ensure proper or comprehensive risk assessment prior to the return/repatriation of the victims,<sup>55</sup> even though such a risk assessment is not part of the text of Article 16, but only made explicit in Article 16 in relation to child victims.
- 16.44** However, a risk assessment must be seen as indispensable for compliance with the principle of *non-refoulement* and return or repatriation with due regard for the victim's rights, safety and dignity. This also includes threats from individuals and groups, and is not limited to threats by governmental authorities. Thus, a risk assessment for trafficking victims should specifically focus on the risk of re-victimisation and re-trafficking, and, if such risk exists, it should be enough to prevent forced repatriation.
- 16.45** As mentioned above, a risk assessment is an important provision in both Dir 2011/36/EU and the Victims' Rights Directive. Dir 2011/36/EU in Article 12(3) provides for an individual risk assessment to identify protection needs. Similarly, Article 22 of the Victim's Rights Directive aims to identify vulnerable victims and victims with special protection needs, based on an individual assessment, and to determine whether a victim is particularly vulnerable to secondary and repeat victimisation.<sup>56</sup> However, these provisions only apply in criminal investigations and proceedings and before and after such proceedings, thus not in relation to repatriation and return. Furthermore, only a few Member States have implemented these provisions.<sup>57</sup>
- 16.46** Even if such risks exist, states seem to be reluctant to consider them to be sufficient to justify non-repatriation or non-return.<sup>58</sup> Within the EU, this mechanism is further exacerbated by

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54 GRETA, *Report on Albania*, II GRETA(2016)6, para 149; GRETA, *Report on Croatia*, II GRETA(2015)33, para 142; GRETA, *Report on Estonia*, I GRETA(2018)6, para 177; GRETA, *Report on France*, II GRETA(2017)17, para 224; GRETA, *Report on Georgia*, II GRETA(2016)8, para 158; GRETA, *Report on Italy*, I GRETA(2014)18, para 175; GRETA, *Report on Latvia*, II GRETA(2017)2, para 155; GRETA, *Report on Malta*, I GRETA(2012)14, para 159; GRETA, *Report on Norway*, II GRETA(2017)18, para 148; GRETA, *Report on Germany*, I GRETA(2015)10, para 186; GRETA, *Report on Greece*, I GRETA(2017)27, para 196; GRETA, *Report on Lithuania*, I GRETA(2015)12, para 148.

55 GRETA, *Report on Belarus*, I GRETA(2017)16, para 167; GRETA, *Report on Italy*, I GRETA(2014)18, para 175; GRETA, *Report on Malta*, I GRETA(2012)14, para 160; GRETA, *Report on Norway*, II GRETA(2017)18, para 148; GRETA, *Report on Portugal*, I GRETA(2012)17, para 158; GRETA, *Report on Germany*, I GRETA(2015)10, para 186; GRETA, *Report on Lithuania*, I GRETA(2015)12, para 148; GRETA, *Report on Moldova*, I GRETA(2011)25, para 139.

56 See on this also Art 28 in this Commentary.

57 Emanuela Biffi et al., *IVOR-Report. Implementing Victim-Oriented Reform of the criminal justice system in the European Union* (2016), 151–63.

58 For instance Andreas Schloenhardt and Mark Loong, 'Return and Re-integration of Human Trafficking Victims from Australia' (2011) 23 *International Journal of Refugee Law*, 143–73.

the Dublin-regime,<sup>59</sup> based on which the state responsible for the examination of an asylum request is determined, with the result that the state of first entry is often responsible.<sup>60</sup> Thus, anyone who claims to be a trafficking victim, risks being transferred to the state of first entry without further consideration of their victim status.<sup>61</sup> GRETA has stressed that such application runs counter to the obligation to assist and protect trafficking victims.<sup>62</sup> However, some states do make an exception to the application of the Dublin regime. For instance, Belgium does not transfer a person under the Dublin regime while the procedure for identifying a possible victim of trafficking is in progress, and such transfer will not be carried out in case of identification of a person as a victim of trafficking.<sup>63</sup>

#### 4. Repatriation programmes and social integration

GRETA has regularly called upon states to ensure that return of trafficked persons to their home states is in fact carried out with due regard to their rights, safety and dignity. This has been stated to include a substantial number of practical measures. Victims need to be informed about programmes that can help to protect them from re-victimisation and re-trafficking; and the best interests of the child must be fully respected. National authorities are also called upon to develop international cooperation in order to ensure proper risk assessment and return, as well as effective re-integration of victims of trafficking, and to ensure full compliance with the principle of *non-refoulement*.<sup>64</sup> Furthermore, in some cases, GRETA has called upon national authorities to ensure that funds are available to pay for return, as part of the duty arising out of Article 16(5).<sup>65</sup> This is important because it is unlikely that victims of sexual or labour exploitation will have any financial means to pay for themselves. **16.47**

GRETA has noted that repatriation assistance arrangements should be suitable for all victims of trafficking, however without further explaining what these arrangements should include.<sup>66</sup> Here we can find inspiration in the work of organisations such as IOM,<sup>67</sup> OSCE<sup>68</sup> and UNODC,<sup>69</sup> which have developed concrete guidelines to be taken into account in cases of return or repatriation of trafficking victims. **16.48**

59 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 (OJ L 180/31) (Dublin III Regulation).

60 European Migration Network, *Synthesis Report – Identification of Victims of Trafficking in Human Beings in International Protection and Forced Return Procedures* (March 2014), 13–14.

61 For instance, in the Netherlands an amendment of the Aliens Circular has been made on 1 August 2019 to facilitate such return based on the Dublin Regulation even if the victim has reported the trafficking to the police.

62 For instance, GRETA, *Report on Switzerland*, II GRETA(2019)14, para 136. Although a non-EU state, it has signed the Dublin III Regulation.

63 GRETA, *Report on Belgium*, II GRETA(2017)26, para 167.

64 For instance, GRETA, *Report on Albania*, II GRETA(2016)6, para 149.

65 For instance, GRETA, *Report on Malta*, I GRETA(2012)14, para 159.

66 GRETA, *Report on Belgium*, I GRETA(2013)14, para 196.

67 IOM, *Enhancing the Safety and Sustainability of the Return and Re-integration of Victims of Trafficking* (IOM 2017).

68 OSCE, *Guiding Principles on Human Rights in the Return of Trafficked Persons* (OSCE/ODIHR 2014).

69 UNODC, *Toolkit to Combat Trafficking in Persons* (UNODC 2008).



**16.49** The importance of states having in place repatriation programmes that work effectively by providing assistance and protection to trafficked persons who are returning (whether voluntarily or not) has been noted by GRETA on several occasions.<sup>70</sup> Protection in the home country should not be dependent on whether or not the victim participated in the criminal proceedings in the country where the victim was identified.<sup>71</sup>

#### 5. Transferability of victim status

**16.50** Return and repatriation with due regard for the rights, safety and dignity of the victim can only take place if both the requesting and requested state recognise the victim status. This however is a competence of each state individually, which means that a victim status granted in one state does not automatically have effect in another. This might lead to the denial of victim status by the requested state and consequently a denial of protection, re-integration and re-socialisation after return or repatriation. Automatic recognition of the victim status granted in one of the State Parties by other State Parties would be an important step in terms of victim protection and a human rights-based approach to human trafficking.

**16.51** Within the EU, such automatic recognition could fairly easily be realised based on the principle of mutual recognition as adopted in Article 67(4) TFEU. This provides that (judicial) decisions taken in one Member State also apply in another Member State as if the decision was taken in the latter, because EU Member States evaluate their decision-making bodies or systems as equal.<sup>72</sup> This would mean that recognition of victim status in one EU Member State would also be recognised in other EU Member States. More broadly, it would be interesting to see if such automated recognition of victim status could be introduced among State Parties to the CoE Convention against Trafficking, as they are all bound by it and thus provide for equal guarantees and safeguards in the combating of human trafficking, including victim protection.

**16.52** An interesting mechanism, proposed by the IOM and ICMPD, is the Transnational Referral Mechanism (TRM), which can serve as a first step in the development towards the adoption of mutual recognition of victim status.<sup>73</sup> It can be defined as:

the concept of a co-operative agreement for the cross-border comprehensive assistance and/or transfer of identified or potential trafficked persons, through which state actors of different countries fulfil their obligations to promote and protect the human rights of trafficked persons. (...) a TRM should be an operational framework linking the different stakeholders from two or more countries involved in identification, referral, assistance, repatriation, and monitoring by defining clear roles for each

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70 For instance, GRETA, *Report on France*, II GRETA(2017)17, para 224.

71 GRETA, *Report on Slovenia*, I GRETA(2013)20, paras 148–149.

72 For further discussion, see Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford Studies in European Law 2014).

73 See IOM, *Enhancing the Safety and Sustainability of the Return and Re-integration of Victims of Trafficking* and ICMPD, *Guidelines for the Development of a Transnational Referral Mechanism for Trafficked Persons in Europe: TRM-EU* (ICMPD 2010).



stakeholder, along with procedures to follow, to ensure the protection of the victims' human's rights all along their re-integration path.<sup>74</sup>

Such a mechanism would ensure a continuum of care and protection of trafficking victims.

## 6. Best interests of the child

GRETA has consistently expressed particular concern for the predicament of children, and this applies to the return and repatriation process too. States have regularly been informed that they should conduct full and effective risk assessments before returning children, and in doing so also take account of the best interests of the child.<sup>75</sup> Guidance on how to conduct such assessments can be found, for instance, in a publication by the OSCE, with concrete steps that states should take in case of return,<sup>76</sup> and the methodology developed by the UNHCR to identify the relationship between risk assessment and the best interests of the child.<sup>77</sup> **16.53**

## E. CONCLUSION

Although GRETA has not paid significant attention to compliance with Article 16, this provision does address a number of issues that are important for the protection of, and assistance to, victims and therefore to a human rights-based approach that the Convention seeks to promote. First, it is interesting that the text of the article overlaps to a large extent with Article 8 of the Palermo Protocol. This means that the same regime of repatriation and return can also be applied by states that are not party to the Convention, which of course is relevant to victims whose country is not a party to the Convention, but which might be party to the Palermo Protocol. **16.54**

Secondly, the principle of *non-refoulement* should be applied in full in relation to repatriation and return of trafficking victims. Based on Article 40 of the Convention, its application should be in line in particular with the Refugee Convention. Moreover, and following the Explanatory Report, Article 3 of the ECHR is fully applicable either directly, or indirectly via Article 4 of the ECHR. In addition, a broader obligation to protect against return and repatriation is in place for EU Member States because the Qualification Directive prohibits return in case of risk of serious harm, and requires the granting of subsidiary protection or refugee status. Following the text of Article 16, a risk and security assessment only needs to be carried out for children. However, in order to comply with all obligations under this provision, a risk and security **16.55**

74 IOM, 47, also referring to OSCE, *Guiding Principles on Human Rights in the Return of Trafficked Persons* (OSCE/ODIHR 2014).

75 For instance, GRETA, *Report on Denmark*, I GRETA(2011)21, para 182. The guiding principle of the Convention on the Rights of the Child (Art 3) is further determined by General Comment No. 14 of the UN Committee on the Rights of the Child (General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 4, para. 1), CRC/C/GC/14 (29 May 2013). The best interest principle applies to all children, also unaccompanied or separated children, see General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6 (1 September 2005).

76 Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Child Trafficking and Child Protection: Ensuring that Child Protection Mechanisms Protect the Rights and Meet the Needs of Child Victims of Human Trafficking* (OSCE 2018) 59 et seq.

77 UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child* (UNHCR 2018).

assessment for all victims has to be conducted. Such assessment includes at least the risk of re-victimisation, risk of re-trafficking, and options for reintegration and societal participation, including access to the labour market and education. Following this interpretation of Article 16 of the Convention, a risk assessment not only with regard to persecution but also for re-trafficking and lack of integration opportunities is an essential part of a correct implementation of Article 16, as is consistently reiterated by GRETA.

- 16.56** Thirdly, a number of organisations, including the IOM, OSCE and UNODC, have developed guidelines for safe return for victims of trafficking. States should be encouraged to use these guidelines when implementing Article 16 and, as such, GRETA could use these guidelines to evaluate states' efforts towards correct implementation and application of this provision.
- 16.57** Finally, and beyond the direct realm of Article 16, a human rights-based approach to human trafficking could be strengthened if State parties would automatically recognise the victim status granted to a trafficking victim by another State party. This could be a mechanism similar to the principle of mutual recognition used in the EU, would avoid duplication of victim determination procedures and prevent a victim from losing protection because of denial of victim status.