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## GUIDANCE NOTE

on the entitlement of victims of trafficking, and persons at risk of being trafficked, to international protection

### GRETA

Group of Experts on Action against Trafficking in Human Beings



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le droit des victimes de la traite, et des personnes  
risquant d'être victimes de la traite,  
à une protection internationale*

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## Introduction

1. GRETA has adopted this guidance note to further strengthen the implementation of the obligation to provide international protection to victims of trafficking. The guidance note highlights the criteria that may entitle victims of trafficking, as well as those at risk of being trafficked, to international protection, including complementary protection. It further aims to provide guidance for relevant authorities, agencies and organisations in their dealings with trafficked people and those at risk of being trafficked, with the objective that no such person should be compelled to return to their own country if such return would threaten their lives or freedom and jeopardise their rights, in particular the right not to be subjected to slavery, forced labour or servitude and the right not to be subjected to torture, inhuman or degrading treatment.

2. People who have been trafficked, or who are at risk of being trafficked in the future, may have an entitlement to international protection in a State of which they are not a citizen or permanent resident. The entitlement to international protection arises because of a serious risk to the life or fundamental rights of any person who is outside the State of their citizenship or country of former habitual residence, or any State where they possess the rights and obligations attached to the possession of nationality of that State, should that person be compelled to return to that State.

3. A person who has been trafficked to another country may be at risk in their own country, should they be compelled to return there. Apart from their own country, within the Dublin Regulation<sup>1</sup>, this risk could be also established in the country where a trafficked person first applied for asylum. Such risk could be that of re-trafficking, retribution by the traffickers (for example, if the person has escaped from the traffickers and/or assisted the authorities in the prosecution of traffickers), lack of assistance or adequate care, or ostracism by the trafficked person's family or community, to the extent that their ability to re-integrate is fatally compromised.

4. A person who has been trafficked within their own country may also be entitled to international protection, should that person have escaped from their situation of exploitation to another country, on the basis that their life or fundamental rights would be at risk should they be compelled to return to their country of origin. In such situations, the past persecution, violence and exploitation suffered by the person is relevant to assessment of future risk.

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<sup>1</sup> 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 (Dublin III Regulation).

## International Protection in International Law

5. International law recognises that, in certain situations, victims of trafficking, or those at risk of being trafficked, may be entitled to refugee status.<sup>2</sup> A refugee is defined as anyone who:

“...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”<sup>3</sup>

6. The principle of *non-refoulement* is a central principle of refugee law and is also enshrined within different human rights treaties. The obligation of *non-refoulement* is contained in Article 33 of the Convention relating to the Status of Refugees (1951), paragraph 1 of which provides:

“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened in account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>4</sup>

7. While paragraph 2 of Article 33 allows refoulement of refugees in limited circumstances, international human rights law includes an absolute prohibition of refoulement. The principle has long been recognised to extend to provide protection to persons who, while they do not meet the Convention grounds of the refugee definition, may nevertheless face particular risks in their country of nationality, in particular where there is a risk of being exposed to treatment that would violate the prohibition of torture and inhuman and degrading treatment or punishment.<sup>5</sup>

8. In such situations, the protection a State offers may amount to complementary, or subsidiary, protection. While subsidiary protection refers to international protection (apart from refugee status) conferred under European Union law, “[c]omplementary protection refers to other forms of protection, created by national law, different from refugee status and from subsidiary protection status, conferred on persons whose return is impossible or undesirable”.<sup>6</sup>

<sup>2</sup> 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 and persons at risk of being trafficked*, 7 April 2006, HCR/GIP/06/07; *AZ (trafficked women) Thailand CG* [2010] UKUT 118 (IAC), especially paragraphs 140-142; *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC), paragraph 219.

<sup>3</sup> Convention relating to the Status of Refugees (1951), 189 UNTS 150, Article 1A(2), as amended by the Protocol relating to the Status of Refugees (1967), 606 UNTS 267, Article 1(2).

<sup>4</sup> Convention relating to the Status of Refugees, 189 UNTS 150. The obligation of *non-refoulement* has become a norm of customary international law, see UNHCR, *UNHCR Note on the Principle of Non-Refoulement*, November 1997.

<sup>5</sup> Article 3 of the UN Convention against Torture, Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms. See further *Saadi v Italy*, Application No. 37201/06, 28 February 2008; European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law relating to Asylum, Borders and Immigration* (2015), 64-67. See also, UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, para 17, 26 January 2007; UNHCR, *UNHCR Note on the Principle of Non-Refoulement* and UNHCR, *Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”)*, June 2005.

<sup>6</sup> European Council on Refugees and Exiles, *Complementary Protection in Europe* (2009), p 4.

## **International Protection and the Council of Europe Convention on Action against Trafficking in Human Beings<sup>7</sup> (“the Convention”)**

9. The purposes of the Convention are to prevent and combat trafficking in human beings, to protect the human rights of victims of trafficking, as well as to ensure effective investigation and prosecution, and to promote international co-operation on action against trafficking in human beings.<sup>8</sup>

10. More specifically, the Convention stipulates grounds upon which a trafficked person, or person who may have been trafficked, may not be removed from the State’s territory. Article 10(2) provides, in part: “[e]ach Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of ... (trafficking in human beings) has been completed by the competent authorities ...”. Furthermore, Article 13 provides that “it shall not be possible to enforce any expulsion order” against persons with regard to whom there are reasonable grounds to believe that the person concerned is a victim of trafficking, during the recovery and reflection period that has been granted to such person.

11. Where a State does return a trafficked person to another country, “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”.<sup>9</sup> The Explanatory Report to the Convention acknowledges that return may involve risk to the trafficked person.<sup>10</sup> Accordingly, “due regard for the rights, safety and dignity” of the person concerned includes “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 dignity”.

12. The Explanatory Report makes specific reference to case law of the European Court of Human Rights regarding Article 3 of the European Convention on Human Rights (ECHR).<sup>11</sup> It notes that, where there is a risk of a violation of Article 3, there may be an obligation not to return a person against their will to their country of origin; furthermore, the responsibility of the State would also be engaged where the risk “did not follow directly or indirectly from public authorities of the destination country”.<sup>12</sup>

13. Finally, and specifically with regard to possible international protection obligations, Article 40(4) provides:

“Nothing in this Convention shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* contained therein.”

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<sup>7</sup> Council of Europe Convention on Action against Trafficking in Human Beings 2005, CETS No. 197.

<sup>8</sup> Article 1 of the Council of Europe Convention on Action against Trafficking in Human Beings.

<sup>9</sup> Article 16(2) of the Council of Europe Convention on Action against Trafficking in Human Beings.

<sup>10</sup> Council of Europe Convention on Action against Trafficking in Human Beings 2005, *Explanatory Report*, Paragraph 202.

<sup>11</sup> Convention for the Protection of Human Rights and Fundamental Freedoms 1950, CETS No.5. Article 3 provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

<sup>12</sup> Council of Europe Convention on Action against Trafficking in Human Beings 2005, *Explanatory Report*, Paragraph 203.

14. The Explanatory Report, with regard to this provision, notes:

“The fact of being a victim of trafficking in human beings cannot preclude the right to seek and enjoy asylum and Parties shall ensure that victims of trafficking have appropriate access to fair and efficient asylum procedures. Parties shall also take whatever steps are necessary to ensure full respect for the principle of *non-refoulement*.”<sup>13</sup>

15. The Convention recognises that trafficked people may have international protection needs, and it requires Parties to duly assess such protection needs. The essence of international protection is to provide relief from a potential future danger. Accordingly, the duty of international protection applies not only to victims of trafficking, but also to those at risk of being trafficked, should they return to their country of origin. Any removal of a person to a territory where they are at risk of being trafficked will constitute a violation of the principle of *non-refoulement*.

### **International Protection for Victims of Trafficking, and Persons at Risk of Being Trafficked**

16. In the context of trafficking in human beings, to meet the definition of a refugee, the trafficked person must be outside their country of nationality. There are distinct sets of circumstances in which this can take place. Victims of trafficking may have been trafficked to a place outside their country of nationality, may have escaped their traffickers and may seek protection in the country where they are now. They may have been trafficked after leaving their country of nationality to another country, may have fled that country and may be seeking protection in the country where they are now. Alternatively, they may have been trafficked within their own country, were able to escape and fled to another country, seeking to avoid trafficking-related threats. A further example is that a person may not have been trafficked but may fear becoming a victim of trafficking and has fled abroad.<sup>14</sup> In each case, there must be a well-founded fear of persecution on one of the qualifying grounds in the 1951 Convention, if returned to their country of nationality, and the persons must be unable or unwilling to avail themselves of protection in the country of nationality, which can include for instance the lack of specialised assistance in that country.

17. People are not generally trafficked because of their religion, nationality, race or political opinions.<sup>15</sup> As is recognised by the UNHCR Guidelines, victims of trafficking are likely to be targeted above all because of their perceived or potential commercial value to the traffickers rather than persecution on a Refugee Convention ground. This overriding economic motive does not, however, exclude the possibility of Refugee Convention-related grounds in the targeting and selection of victims of trafficking. Thus, members of a certain ethnic group or minority in a given country may be especially vulnerable to trafficking and/or less effectively protected by the authorities in the country of nationality.<sup>16</sup>

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<sup>13</sup> Council of Europe Convention on Action against Trafficking in Human Beings 2005, *Explanatory Report*, Paragraph 377.

<sup>14</sup> 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 and persons at risk of being trafficked*, 7 April 2006, HCR/GIP/06/07, paragraph 13.

<sup>15</sup> However, an exception to this might be Yazidi women who have been trafficked by members of the Islamic state group for sexual exploitation: Independent International Commission of Enquiry on the Syrian Arab Republic, *“They came to destroy”: Isis Crimes against the Yazidis*, 15 June 2016, A/HRC/32/CRP.2, paragraphs 42-80. See as further example in the context of enslavement as crime against humanity of Muslim women, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T (ICTY, Trial Chamber II, 2001, paras. 541 et seq.).

<sup>16</sup> 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 and persons at risk of being trafficked*, 7 April 2006, HCR/GIP/06/07, paragraphs 29-40. An example of this are members of the Roma communities, who are particularly

18. As noted by the Inter-Agency Coordination Group against Trafficking in Persons (ICAT):

"[...] the persecution feared by an individual or group can include, for example, exploitation on the basis of one's ethnicity or minority group or reprisals and/or re-trafficking by their traffickers in their country of origin. It can also result from severe ostracism, discrimination or punishment by State authorities or community members for having been a victim of trafficking - whether at home or abroad. This risk is particularly pertinent among those who were trafficked for sexual exploitation."<sup>17</sup>

19. It is possible that some people who have been trafficked may be "members of a particular social group", and that they fear persecution because of this.<sup>18</sup> The members of the group must "share a common characteristic other than their risk of being persecuted or are perceived as a group by society. The shared characteristic will often be one that is innate, unchangeable or otherwise fundamental to identity, conscience or the exercise of one's human rights".<sup>19</sup>

20. Women may themselves, because of being treated differently than men or due to stereotyped gender roles, constitute a particular social group in some countries, or parts of countries, that might be vulnerable to being trafficked in future.<sup>20</sup> Furthermore, it has been held that:

"...women who have been the victims of sexual violence in the past are linked by an immutable characteristic which is independent of and the cause of their current ill-treatment. They are certainly capable of constituting a particular social group".<sup>21</sup>

21. Such a group could include at least some people who have been trafficked for sexual exploitation and fear further such risk in the future, should they be returned to their country of nationality. Furthermore, women who have been trafficked in the past could, in certain societies, be regarded as a particular social group: they would have a distinct identity because they are likely to be perceived as being different from the surrounding society.<sup>22</sup>

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vulnerable to trafficking due to structural forms of ethnic and gender discrimination, poverty and social exclusion which result in low educational achievement, high levels of unemployment, domestic violence and difficult living conditions. See on this European Roma Rights Centre (ERRC) and People in Need, *Breaking the Silence: Trafficking in Romani Communities*, Budapest, March 2011, p.12.

<sup>17</sup> ICAT Issue Brief No. 3, *Trafficking in Persons and Refugee Status* (09/2017).

<sup>18</sup> 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 and persons at risk of being trafficked*, 7 April 2006, HCR/GIP/06/07, paragraphs 37-39. The ground established with reference to a "particular social group" is frequently intersecting with discrimination on grounds of "race" or ethnicity, see on this the report on the conference "The Interface between Trafficking in Human Beings and Asylum" (23-24 June 2015), co-organised by the Bulgarian National Commission for Combatting Trafficking in Human Beings, the Council of Europe and UNHCR, Annex I, <https://rm.coe.int/international-conference-sofia-2015/1680710a17> (20 November 2019).

<sup>19</sup> 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 and persons at risk of being trafficked*, 7 April 2006, HCR/GIP/06/07, paragraph 37; UNHCR, *Guidelines on International Protection: Membership of a Particular Social Group within the context of Article 1A(2) of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/02, 7 May 2002, paragraph 11.

<sup>20</sup> 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 and persons at risk of being trafficked*, 7 April 2006, HCR/GIP/06/07, paragraph 38. See, for instance, *R v Immigration Appeal Tribunal and another, ex parte Shah (United Nations High Commissioner for Refugees intervening)*, *Islam and others v Secretary of State for the Home Department (United Nations High Commissioner for Refugees intervening)*, (1999) 2 All ER 545.

<sup>21</sup> *Hoxha and Another v Secretary of State for the Home Department*, [2005] UKHL 19, paragraph 37.

<sup>22</sup> *AM and BM (Trafficked women) Albania* CG [2010] UKUT 80 (IAC), paragraphs 160-166. See also *SB Moldova v. Secretary of State for the Home Department* CG [2008] UKAIT 00002, where the tribunal determined that "former victims of trafficking for sexual exploitation" from Moldova form a particular social group. See also Commission Permanente de



22. Of relevance also is the consideration of sexual orientation and gender identity in identifying victims of trafficking, ensuring access to asylum, and protecting against *refoulement*. Lesbian, gay, bisexual, transgender, and intersex (LGBTI) individuals experience discrimination, serious human rights violations and other forms of persecution due to their actual or perceived sexual orientation and/or gender identity. Such violations may include being trafficked and may give rise to a claim to asylum.<sup>23</sup> There is increasing recognition by States of the principle that “people fleeing persecution for reasons of their sexual orientation and/or gender identity can qualify as refugees”.<sup>24</sup>

23. “Membership of a particular social group” may also relate to people with disabilities (physical or intellectual), who are sometimes targeted by traffickers, in particular for the purpose of the exploitation of begging. Further examples for factors that could qualify as “particular social group” are, for instance, age or health status.<sup>25</sup>

24. In relation to the definition of persecution, trafficking in human beings framed as gender-based violence can be recognised as a form of persecution. The UNHCR Guidelines on Gender-Related Persecution recognise that, in individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threats of harm.<sup>26</sup> Where a State is failing to take effective measures to prevent and prosecute trafficking, such as the measures outlined in the Convention, this may also indicate that it is unable or unwilling to provide protection against such threats or harm.

25. Further, the UNHCR Guidelines on Armed Conflict and Violence recognise human trafficking as a form of sexual and gender-based violence and as a common form of persecution in many situations of armed conflict and violence:

“Sexual and gender-based violence may be used as an unlawful and criminal tactic, strategy or policy during situations of armed conflict and violence, in order to overwhelm and weaken the adversary directly or indirectly, by victimizing women and girls and/or men and boys.”<sup>27</sup>

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Recours des Refugies Xc/C.G.R.A, no. 03-0582/F1611/cd (Belgium, 2004). See, on a real risk of being trafficked upon return based on a detailed assessment, *HD (Trafficked women) Nigeria CG* [2016] UKUT 00454 (IAC).

<sup>23</sup> U.S Department of State, Office to Monitor and Combat Trafficking in Persons, *The Vulnerability of LGBT Individuals to Human Trafficking* (2014).

<sup>24</sup> UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, paragraph 1.

<sup>25</sup> See on this UNHCR, UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004), p 23, <https://www.refworld.org/docid/4200d8354.html>.

<sup>26</sup> *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/0201, 7 May 2002, paragraph 18.

<sup>27</sup> *Guidelines on International Protection: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, HCR/GIP/16/12, 2 December 2016, paragraph 26.

26. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention),<sup>28</sup> which refers in its preamble to the Convention on Action against Trafficking in Human Beings, defines violence against women in such a way that clearly could include trafficking in women:

“Violence against women” is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”<sup>29</sup>

27. The Istanbul Convention explicitly recognises gender-based claims to asylum, requiring that parties “take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection”.<sup>30</sup> Women are also at higher risk of other exploitation that may amount to gender-based violence, for instance in domestic servitude.

28. Men and boys may also be victims of trafficking for the purpose of sexual exploitation. Recognising the gender dimension of human trafficking requires also that attention be paid to the particular risks of trafficking for the purpose of sexual exploitation faced by men and boys, including in conflict situations.

29. While trafficking for the purpose of sexual exploitation is more frequently recognised as giving rise to an asylum claim, it is essential to recognise that the trafficking definition applies to other forms of exploitation that may also give rise to an asylum claim. As shown in *Chowdury and Others v Greece*, exploitation through work is one of the forms of exploitation covered by the definition of human trafficking”.<sup>31</sup> The risk of being exposed to trafficking for labour exploitation may also found claims to asylum.<sup>32</sup> Factors for assessing the risk of being re-trafficked were, for instance, that internal relocation would not be possible, as well as being in debt bondage.<sup>33</sup>

30. The crime of trafficking in human beings is generally perpetrated by private individuals, unless State officials become involved, for example through corruption, in facilitating trafficking. Eligibility for asylum can also arise because of a threat from non-State actors, such as traffickers, where the State is unable or unwilling to offer effective protection against such risk.<sup>34</sup>

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<sup>28</sup> Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 2011, CETS No. 210.

<sup>29</sup> Article 3 (a).

<sup>30</sup> Article 60(1). See further Louise Hooper, *Gender-Based Asylum Claims and Non-refoulement: Articles 60 and 61 of the Istanbul Convention* (Council of Europe, 2019).

<sup>31</sup> *Chowdury and Others v Greece*, ECtHR, Application no. 21884/15, 30 March 2017, paragraphs 85-86.

<sup>32</sup> A trafficked Vietnamese man in the UK was exploited in the production of cannabis and was granted asylum due to the fear of being re-trafficked upon return to Vietnam. Relevant factors for assessment are, for instance, lack of family support, lack of education and outstanding debt. *SSH D v TAN* [2017] UKUT PA/04075/2017.

<sup>33</sup> In the context of a man trafficked from China, see *JFK and Secretary of State for the Home Department* [2018] UKUT PA/06854/2016.

<sup>34</sup> 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 and persons at risk of being trafficked*, 7 April 2006, HCR/GIP/06/07, paragraphs 21-24. See also 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 and persons at risk of being trafficked*, 7 April 2006, paragraphs 21-24 and 30.

31. Trafficking in human beings can also trigger the State's obligation of *non-refoulement*, which may lead to a requirement to offer complementary or subsidiary protection. The possibility of being re-trafficked, ostracised in their country of nationality, or being subjected to acts of revenge by their traffickers or the traffickers' associates due to a lack of specialised assistance and protection available, could amount to a real risk of a serious violation of trafficked persons' human rights should they be returned.<sup>35</sup> The subsequent paragraphs illustrate this danger. Hence, despite their not qualifying for refugee status or any other formal protection status, in light of the principle of *non-refoulement*, a State cannot return trafficked persons or persons at risk of being trafficked to their country of nationality.

32. The risk of being re-trafficked would in itself trigger a State's obligation to protect against the possibility of being subjected to slavery, servitude or forced labour. The removal of a person to a territory where they are at risk of being trafficked or re-trafficked would expose the person to a risk of being subjected to a violation of Article 4 of the European Convention on Human Rights:

- "1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour."<sup>36</sup>

33. Trafficking in human beings often entails the subjection of the victims to substantial physical, sexual and/or psychological violence. The level of such violence in some cases is so severe that it could amount to inhuman or degrading treatment, or torture.<sup>37</sup> The enforced removal of a person to a territory where they are at risk of being trafficked or being re-trafficked could therefore also constitute a violation of Article 3 of the European Convention on Human Rights: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".<sup>38</sup>

## **Application of the Principles of International Protection in the Context of Human Trafficking**

### *Non-punishment*

34. The Refugee Convention recognises that individuals may on occasion be compelled by circumstances to do certain acts in relation to access and presence in a State's territory that violate national law, and requires States not to punish those who commit such acts. Article 31(1) provides:

"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

<sup>35</sup> 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 and persons at risk of being trafficked*, 7 April 2006, paragraph 17.

<sup>36</sup> In *Rantsev v Cyprus and Russia*, ECtHR, Application no. 25965/04, 7 January 2010, paragraph 282, the Court stated clearly that trafficking in human beings falls within the scope of Article 4, although not specifically mentioned in that provision.

<sup>37</sup> See also, Organization for Security and Cooperation in Europe, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Trafficking in Human Beings Amounting to Torture and Other Forms of Ill-Treatment* (2013).

<sup>38</sup> In *Ahmed v Austria* the ECtHR stated that it would be necessary for the individual to demonstrate that there a "substantial grounds [...] for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Art 3 [ECHR] in the receiving country", see *Ahmed v Austria*, ECtHR, Application no. 25964/94, (17 December 1996), paragraph 39.

35. The Convention follows and extends this principle. Persons who have been trafficked may have been compelled to enter a country irregularly, or to carry out unlawful acts as a consequence of being trafficked, as part of being exploited. Such acts may be revealed only when a trafficked person applies for international protection.<sup>39</sup> In that situation, States should act in accordance with their obligation under Article 26 of the Convention:

“Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.”

36. Article 26 recognises that the trafficked person is not acting of their own volition, and that their apparent responsibility for unlawful activities should be assessed in light of all the circumstances, including the degree of compulsion exercised over them by the traffickers.<sup>40</sup>

#### *Access to Asylum for Victims of Trafficking*

37. All States Parties to the Convention should allow for asylum applications to be made while presumed victims of trafficking are in an identification procedure. The human rights-based approach enshrined in the Convention requires States Parties to take into account the risk of persecution of victims of trafficking, as well as to ensure that all foreign nationals identified as victims of trafficking are informed about their right to request international protection and have access to fair and efficient asylum procedures.<sup>41</sup>

38. Access to fair and efficient asylum procedures, early legal counselling and specialised assistance in accordance with Article 12 of the Convention is essential if victims of trafficking are to be enabled to present an asylum claim effectively. Any linkage between the evaluation of the merits of a claim to asylum and the willingness of the victim to give evidence in proceedings against the traffickers should be avoided. Given the complex nature of the crime of trafficking, and the trauma endured by victims or presumed victims of trafficking, such asylum claims require an examination on their merits in regular procedures. Therefore, claims based on the harms associated with human trafficking are particularly unsuited to accelerated processing and may impede identification of victims.<sup>42</sup>

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<sup>39</sup> As noted in GRETA's first report on Belgium, some victims may be forced by their traffickers to lodge false asylum claims: GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium, GRETA(2013)14, 25 September 2013, para 133.

<sup>40</sup> See also, Organization for Security and Cooperation in Europe, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and Legislative Recommendations towards the Effective Implementation of the Non-punishment Provision with Regard to Victims of Trafficking* (2013).

<sup>41</sup> GRETA, *Fifth General Report on GRETA's Activities*, covering the period from 1 October 2014 to 31 December 2015 (2016), paragraph 118. See further also 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 and persons at risk of being trafficked*, paras 45-50.

<sup>42</sup> *Ibid.*, paragraph 116.

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*Identification of Victims of Trafficking amongst Asylum Seekers and amongst Irregular Migrants Facing Forced Removal or Expulsion*

39. States have a positive obligation under Article 4 of the European Convention on Human Rights to identify presumed victims of trafficking.<sup>43</sup> The positive obligation on States to identify presumed victims of trafficking arises in the context of receiving persons seeking asylum, in determining applications for asylum and in resettlement procedures. Unreasonable delays in identification and referral for assistance may heighten the risks of re-trafficking, and lead to violations of a victim's rights to specialised assistance and protection.

40. States are required to ensure that all persons responsible for determining asylum claims are trained in the identification and referral of victims of trafficking to specialised assistance. All persons involved in asylum determination, reception systems for asylum seekers, and relevant support organisations, including lawyers and civil society, should co-operate effectively to ensure timely identification of victims and referral for assistance. Identification of victims of trafficking amongst irregular migrants and asylum seekers requires also clear, binding procedures to be followed.<sup>44</sup>

*Assistance to Victims of Trafficking*

41. Victims of trafficking, who are also seeking asylum, must be provided with specialised support measures, to assist them in their physical, psychological and social recovery. The assistance shall include at least a standard of living capable of ensuring their subsistence, through such measures as appropriate and secure accommodation, psychological and material assistance (Article 12 of the Convention). GRETA has stressed the importance of ensuring specialised accommodation and counselling services to victims of trafficking.<sup>45</sup> Hence, despite possibly different levels of assistance entitlements for victims of trafficking and asylum seekers, States Parties must ensure that specialised assistance measures for victims of trafficking are accessible also when the person is seeking asylum.<sup>46</sup>

42. In the provision of assistance measures, States are required to ensure that services are provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and the rights of children to accommodation, education and appropriate health care (Article 12(7) of the Convention). Furthermore, assistance to victims of trafficking, including in the asylum process, should be provided in co-operation with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims, as required by Article 12 (5) of the Convention).

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<sup>43</sup> See for instance *Chowdury and others v. Greece*, ECtHR, Application no. 21884/15, 30 March 2017, paragraph 110 et seq.

<sup>44</sup> *Ibid.*, paragraph 96.

<sup>45</sup> GRETA, *Eighth General Report on GRETA's Activities*, covering the period from 1 January to 31 December 2018 (2019), paragraph 126.

<sup>46</sup> See GRETA, *Fifth General Report on GRETA's Activities*, covering the period from 1 October 2014 to 31 December 2015 (2016), paragraph 117.

43. The Recommended Principles and Guidelines on Human Rights and Human Trafficking<sup>47</sup> stipulate that it should be ensured that “trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody”.<sup>48</sup> According to Article 10(2) of the Convention, also presumed victims of trafficking are entitled to appropriate and secure accommodation. Therefore, accommodating presumed victims of trafficking in a holding centre for foreigners in which they are confined until receiving a residence permit does not fulfil the obligations of the Convention.<sup>49</sup> Trafficked persons should have access to specialised shelters and accommodation should be separate from the immigration system.<sup>50</sup> Accommodation centres for asylum seekers do not fulfil the standard of ‘appropriate and secure accommodation’ if the conditions they offer are not gender-sensitive, do not protect victims from intimidation by other residents, and if they are not staffed with persons who are aware of the needs of victims of trafficking, since this type of accommodation might not be gender-sensitive, not protect victims from intimidation by other residents, or not be staffed with persons who are aware of the needs of victims of trafficking. Furthermore, when the addresses of these centres are publicly known, accommodation is not secure and traffickers can contact victims causing further distress to victims.<sup>51</sup>

#### *The Return and Repatriation of Victims of Trafficking*

44. In order to comply with the duty of *non-refoulement*, there must be effective implementation of pre-removal risk assessments, and the principle of safe and preferably voluntary return. The return should ensure due regard for the rights, safety and dignity of the victim of trafficking (Article 16 of the Convention). Host countries must have procedures in place that identify those whose enforced return would violate the principle of *non-refoulement*, so that they can fulfil their obligation not to enforce return. A full and competent risk assessment must be carried out before anyone is returned.<sup>52</sup> Risk assessments should include an assessment of at least the risk of re-victimisation and re-trafficking, and options for reintegration and societal participation, including access to the labour market and education.

45. Conducting risk assessments is also essential in cases of victims of trafficking falling under the Dublin Regulation.<sup>53</sup> Risk assessments are necessary in order to prevent victims of trafficking being returned to the country where they first applied for asylum, but where they face the risk of being re-trafficked.<sup>54</sup> GRETA’s reports refer to examples in which Dublin Regulation procedures have been suspended in cases of trafficked persons.<sup>55</sup> GRETA notes that Article 17.1 of the Dublin Regulation III permits States to unilaterally take responsibility for the determination of an asylum

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<sup>47</sup> 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.

<sup>48</sup> 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, Guideline 2.6.

<sup>49</sup> See GRETA, *Report on “the former Yugoslav Republic of Macedonia”* (as of 12 February 2019, the official name of the country changed to North Macedonia) (1st round), paragraphs 155-156.

<sup>50</sup> GRETA, *Eighth General Report on GRETA’s Activities*, covering the period from 1 January to 31 December 2018 (2019), paragraph 118.

<sup>51</sup> See GRETA, *Report on Ireland* (2nd round), paragraphs 141-142.

<sup>52</sup> GRETA, *Fifth General Report on GRETA’s Activities*, covering the period from 1 October 2014 to 31 December 2015 (2016), paragraphs 122-123.

<sup>53</sup> 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 (Dublin III Regulation).

<sup>54</sup> See in this context also the practice of traffickers to use asylum claims to make sure that victims of trafficking enter a European country as for instance concerning unaccompanied minors from Nigeria, FRONTEX, *Situational Overview on Trafficking in Human Beings* (2011) 17.

<sup>55</sup> GRETA, *Report on Norway* (2nd round), paragraph 132, and GRETA, *Report on Belgium* (2nd round), paragraph 167.

claim, even where the objective responsibility criteria allow for a request to be submitted to another Member State of the EU.<sup>56</sup> GRETA stresses the obligation to identify victims of trafficking among asylum seekers who are subject to the Dublin Regulation procedure, in order to avoid any risk of reprisals from traffickers or re-trafficking, and to provide them with a recovery and reflection period and assistance, in accordance with Articles 12 and 13 of the Convention.<sup>57</sup>

### *Child Victims of Trafficking and Asylum*

46. States are required to ensure a child-sensitive approach in the development, implementation and assessment of all the policies and programmes adopted to prevent human trafficking (Article 5(3) of the Convention) and to adopt specific measures to reduce children's vulnerability to trafficking, notably by creating a protective environment for them (Article 5(5) of the Convention).

47. States have to ensure that children are identified promptly in border controls and other migration-control procedures and are swiftly referred to child protection authorities.<sup>58</sup> The timely appointment of a legal guardian who can act independently with authority and ensure the child's best interests are respected and fulfilled, is essential to ensure the protection of unaccompanied and separated migrant and asylum seeking children who are identified as victims of trafficking, break the links with traffickers and minimise the risk of children going missing.<sup>59</sup>

48. As stressed in GRETA's Fifth General Report, age assessment must be part of a comprehensive assessment that takes into account both the physical appearance and the psychological maturity of the individual.<sup>60</sup> Such assessments must be conducted in a safe, child- and gender-sensitive manner, with due respect for human dignity. The benefit of the doubt should be applied in such a manner that, in case of uncertainty, the individual will be considered a child. Given that the consequences of an erroneous assessment may lead to children being placed in accommodation with adults with potentially heightened risks of trafficking or re-trafficking, age assessment and the timely identification of children are critical to effective protection.

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<sup>56</sup> See on this CJEU C-578/16 PPU – C.K. and Others (paras 65 and 98) showing that the 'transfer of an asylum seeker (...) can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment'. See also *Tarakhel v. Switzerland*, ECtHR, Application no. 29217/12, 4 November 2014. As shown above, trafficking in human beings or the risk of being exposed to being re-trafficked can amount to torture, inhuman or degrading treatment, see Organization for Security and Cooperation in Europe, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Trafficking in Human Beings Amounting to Torture and Other Forms of Ill-Treatment* (2013).

<sup>57</sup> GRETA, *Report on Switzerland* (2nd round), paragraph 136.

<sup>58</sup> Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22, paragraph 32 (h). See also UN General Assembly, *Global Compact for Safe, Orderly and Regular Migration*, A/RES/73/195, 11 January 2019, Objective 12, paragraph 28 (d).

<sup>59</sup> GRETA, *Sixth General Report on GRETA's Activities*, covering the period from 1 January to 31 December 2016 (2017), paragraph 128. See also Recommendation CM/Rec(2019)11 of the Committee of Ministers to member States on effective guardianship for unaccompanied and separated children in the context of migration (11 December 2019, 1363rd meeting of the Ministers' Deputies).

<sup>60</sup> UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, paragraph 5.11, as quoted in *GRETA's Fifth General Report*, paragraph 105.