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*Monitoring the Unknown:*

*Improving adherence to the principle of non-refoulement through a proposed 'monitoring network'*

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This is paper is part of the author's thesis towards the degree of Mphil in Human Rights Law at the University of Cape Town. It also is a development to the article, co-authored with Leana Podeszfa, *Avoiding Refoulement: The Need to Monitor Deported Failed Asylum Seekers*, for the Oxford Monitor of Forced Migration.

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## **Abbreviations**

ACCORD	Austrian Centre for Country of Origin and Asylum Research and Documentation
CAT	Convention Against Torture
ComAt	Committee Against Torture
COI	Country of Origin Information
COI-CG ExCom	COI Country Guidance Working Group <i>Executive Committee</i> of the High Commissioner's Programme
FRLAN	Fahamu Refugee Legal Aid Network
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
LRC	Legal Resources Centre
OAU Convention	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa
RSD	Refugee Status Determinations
RSDO	Refugee Status Determination Officer
UDHR	Universal Declaration on Human Rights
UNHCR	United Nations High Commissioner for Refugees

*Returned failed asylum seekers 'deserve security and protection upon their arrival and return, access to legal representation and the support of an independent monitoring body committed to discovering the truth.*

(Bernadette Iyodu 'Uganda: The silent practice of deportations' *Pambazuka News* (6 May 2012).

*The status of the refugee has developed from the beneficiary of a paternalistic system of certification to the claimant of rights.*

(Guy Goodwin-Gill 'Refugee Identity and Protection's Fading Prospect' *Refugee Rights and Realities* (Cambridge University Press, 1999).

## **Introduction**

What happens to failed asylum seekers<sup>1</sup> that are removed? *Non-refoulement* has been discussed and analysed a thousand times over by academics and judges alike. But the fate of returned failed asylum seekers remains an eerily dark and under-researched void. Indeed, it has been 'recognized repeatedly as a major gap in the global refugee framework'.<sup>2</sup> Many people who have been removed have 'disappeared', and what's more, there is often no way to find out what became of them. Existing knowledge is anecdotal. *Unsafe Return* documents a female asylum seeker from Congo DRC, taken to the infamous *Tolérance Zero* prison upon her return, where she was tortured and raped.<sup>3</sup> Such cases should no longer remain anecdotal, but should contribute to a body of Country of Origin Information (COI), which can be used in legal cases. Such COI could serve to better improve States' adherence to *non-refoulement*. This paper asserts that this can be achieved through a 'monitoring network'.

A monitoring network would be comprised of several participating organisations in countries of origin. Those managing the network would be alerted to planned returns, and, with the permission of the returnee, participating organisations in countries of origin would be notified of their return. Ideally, representatives of the participating organisations would monitor the returnees once in their country of origin. This might consist of meeting them at the airport, contacting the returnee, or visiting

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<sup>1</sup> 'Returnees' are referenced in this paper as failed asylum seekers who have been forcibly returned to their country of origin following denial of refugee status by the host state.

<sup>2</sup> Letter from editors of Oxford Forced Migration to co-author of Fahamu Deportation Project (9 October 2011).

<sup>3</sup> Catherine Ramos *Unsafe Return* (2011, Justice First) 27. She was released after paying a hefty bribe.

them in detention, if necessary. Information regarding the returnee would then feed back into the monitoring network. Thus, whilst seeking to build a relevant body of COI, the monitoring network would also seek to ensure the safety and welfare of returnees once they are returned.

This paper's structure is guided by a series of questions. Firstly, what constitutes *refoulement*, and what State obligations exist in terms of avoiding, and monitoring, *refoulement*? This sets the legal backdrop upon which the feasibility of a monitoring network can be assessed. Secondly, why is a monitoring network needed? Emerging cases of *refoulement*, increases in deportations and inadequate refugee status determination (RSD) procedures contribute to this 'need'. Finally, what would a monitoring network look like? How can we ensure it serves its legal purpose? And what difficulties would it encounter?

This paper takes inspirations from the proposed deportation project of the Fahamu Refugee Legal Aid Network (FRLAN)<sup>4</sup> and from experiences working at the Legal Resources Centre (LRC) in Cape Town. Many Congolese clients have expressed concern at post-return treatment. Some have experienced it, and are claiming asylum for the second time. Due to its immediate relevance, this paper will use removals from South Africa to Congo DRC as a way of exemplification.

### ***Non-refoulement as a 'cornerstone' of refugee law***

*Non-refoulement*, as found at Article 33 of the 1951 UN Convention Relating to the Status of Refugees (Convention), is 'the undisputed cornerstone of refugee law'.<sup>5</sup>

Article 33 of the Convention states that

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 on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>6</sup>

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<sup>4</sup> FRLAN 'Deportation of Failed Asylum Seekers' *FRLAN*, <http://frlan.org/content/deportation-failed-asylum-seekers-0> last accessed 22 May 2012.

<sup>5</sup> James Hathaway, *Refugee Rights: Report on a Comparative Study* (York Lane Press, 1995) 5.

<sup>6</sup> UN General Assembly, *Convention Relating to the Status of Refugees* (28 July 1951) Art. 33(1).

International consensus on the principle of *non-refoulement* has been 'systematically reaffirmed' at UN level,<sup>7</sup> and has generally been considered as international customary law.<sup>8</sup> This has been questioned, however, as States continue to *refoule*.<sup>9</sup>

The protection of Article 33 'extends to every individual having a well-founded fear of persecution',<sup>10</sup> regardless of whether or not they have been granted refugee status.<sup>11</sup> Such persons may not be returned 'in any manner whatsoever'<sup>12</sup> to *any* territory where there is a likelihood of further *refoulement*.<sup>13</sup> The non-derogability of *non-refoulement* is inherent to the Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention)<sup>14</sup> and caselaw serves to prove its non-derogability under the Refugee Convention.<sup>15</sup>

The burden of proof in *refoulement* cases and RSD is shared between the applicant and the State.<sup>16</sup> The Executive Committee (ExCom) clarifies that both parties must have access to 'sufficiently objective and accurate information'.<sup>17</sup> Wouters finds an inherent disadvantage within this, as refugee claimants are unable to access the same amount of information.<sup>18</sup> Duffy claims this burden is at odds with the Convention's principles.<sup>19</sup> These concerns are later addressed within the proposal of a monitoring network.

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<sup>7</sup> UNHCR, *UNHCR Note on the Principle of Non-Refoulement* (1997) 1 and Executive Committee, *Conclusion Number 6 (XXVIII) Conclusions on the international protection of refugees adopted by the Executive Committee of the UNHCR Programme*, 14.

<sup>8</sup> UNHCR, *Agenda for Protection* (2003) 24 and UNHCR (n7).

<sup>9</sup> Aoife Duffy 'Expulsion to Face Torture? Non-Refoulement in International Law' *International Journal of Refugee Law* (2008) 20, 3, 377.

<sup>10</sup> Guy Goodwin-Gill *The principle of non-refoulement: its standing and scope in international law* (1993) 2.

<sup>11</sup> UNHCR (n7) 1.

<sup>12</sup> Goodwin-Gill (n10) 16.

<sup>13</sup> Kees Wouters *International Legal Standards for the Protection from Refoulement* (Intersentia, 2009). This is known as 'indirect refoulement'.

<sup>14</sup> *Ibid.* 3. and S Kapferer 'The Interface between Extradition and Asylum' *UNHCR Department of International Protection* (2003) 76.

<sup>15</sup> As set in *Chahal v. The United Kingdom*, 70/1995/576/662, European Court of Human Rights, 15 November 1996, for example.

<sup>16</sup> Wouters (n13) 94.

<sup>17</sup> UN High Commissioner for Refugees *General Conclusion on International Protection* (1993) No. 71, para.44 - quoted in Wouters (n13) 95.

<sup>18</sup> Wouters (n13) 96.

<sup>19</sup> Duffy (n9) 381.

The Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR) further cover *non-refoulement*, and will be discussed in due course.

### **Obligations under *non-refoulement* in international law**

In this section of the paper, the abovementioned legal instruments will be analysed in their standard of risk constituting *refoulement* and the standard of proof required in proving such a risk. This allows analysis of the legal potential of information generated by a monitoring network.

The Convention,<sup>20</sup> the Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention),<sup>21</sup> and the Refugees Act of South Africa (Refugees Act)<sup>22</sup> will be looked at together before analysing the ICCPR<sup>23</sup> and CAT<sup>24</sup> in turn. The first group of legal instruments are selected because of their direct relevance to refugees, and because the Refugees Act derives from them.<sup>25</sup> The ICCPR and CAT are selected as they are often evoked in caselaw in arguing against a proposed removal. States' post-removal obligations will also be explored.

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<sup>20</sup> Article 33 is quoted above.

<sup>21</sup> Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa* ("OAU Convention"), 10 September 1969, Art 2(3): No person shall face measures which would compel him to return to territory 'where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1'. Article 1 sets the grounds for refugee status, that is those persons 'persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' or 'owing to external aggression, occupation, foreign domination or events seriously disturbing public order' respectively.

<sup>22</sup> Refugees Act (1998) Number 130 of 1998, s.2: Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where

- a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
- b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.'

<sup>23</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Art. 7: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'

<sup>24</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, Art. 3: No State can return someone to another State 'where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

<sup>25</sup> Refugees Act (n22) Preamble.

## Refugee Convention, OAU Convention and Refugees Act of South Africa

The standards of persecution that constitutes *refoulement* in the Convention, the OAU Convention and the Refugees Act are the respective standards that constitute refugee status. For example, Article 33 of the Convention states that if a person faces treatment amounting to persecution as set out in Article 1 (grounds for refugee status), that person cannot be returned. Weis confirms these levels of persecution are the same.<sup>26</sup> Indeed, there would exist a logical inconsistency within the Convention if they were to be different.<sup>27</sup> It is important to remember that these legal frameworks protect *refugees*.<sup>28</sup> Those that have been denied refugee status (i.e. returnees) are no longer protected by these legal frameworks. This will be discussed in more detail below.

### *Standard of risk and standard of proof in refoulement*

The ground for refugee status (and therefore the level of persecution constituting *refoulement*) is a 'well-founded fear of persecution', as appears in all three legal frameworks.

### *Well-founded fear*

A 'well-founded' fear must manifest itself subjectively and objectively. This requires the use of objective evidence and 'a decision on the relative weight to be assigned to different forms of evidence',<sup>29</sup> as corroborated by the UNHCR Handbook.<sup>30</sup> Thus, the varied and correct use of COI in deciding on *refoulement* is vital.

### *Persecution*

Having surveyed other academic's thoughts on persecution, Hathaway defines persecution - now infamously - as a 'sustained or systemic violation of basic human

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<sup>26</sup> Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires* (1995) 33.

<sup>27</sup> Elihu Lauterpacht and Daniel Bethlehem 'The scope and content of the principle of *non-refoulement*' in Erika Feller and Volker Türk (eds.) *Refugee Protection in International Law* (Cambridge University Press, 2003) 125.

<sup>28</sup> Convention (n6) Preamble, OAU Convention (n21) Preamble, Refugees Act (n22) Preamble.

<sup>29</sup> University of Michigan Law School *The Michigan Guidelines on Well-Founded Fear* (2004), 3.

<sup>30</sup> UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1992) para.42.

rights demonstrative of a failure of state protection.<sup>31</sup> Indeed, the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD) stress in their guidelines that Hathaway's definition of persecution is to be kept in mind when using and gathering COI information.<sup>32</sup>

Such 'basic human rights' are, according to Hathaway, outlined in the Universal Declaration on Human Rights (UDHR); the 'first group' of such rights (non-derogable) include freedom from deprivation of life, torture or cruel, inhuman or degrading treatment and the right to freedom of thought, conscience and religion.<sup>33</sup> Freedom from arbitrary detention is also included, although both Conventions make provision for this within their *non-refoulement* articles, whereby if liberty would be threatened, *refoulement* cannot take place. With regards to the OAU Convention, if 'events seriously disturbing public order' are likely to be encountered on return, this too engages obligations of *non-refoulement*.<sup>34</sup> This widens the situations whereby obligations under *non-refoulement* can be engaged.

The standard of proof required to evoke *non-refoulement* is widely considered to be one of 'a reasonable degree' of persecution on return.<sup>35</sup> That is, 'more than mere conjecture concerning a threat but less than proof to a level of probability or certainty.'<sup>36</sup> This standard has been held in caselaw. Indeed, *Sivakumaran* held the standard of 'a reasonable degree of likelihood'.<sup>37</sup>

### *Obligations after removal*

As abovementioned, these legal frameworks do not protect failed asylum seekers. Accordingly, there are no obligations on States once a person has been removed.<sup>38</sup> However, Lauterpacht and Bethlehem argue that

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<sup>31</sup> J Hathaway *The law of refugee status* (Butterworths Law, Canada 1993) 101.

<sup>32</sup> ACCORD, *Researching Country of Origin Information: A Training Manual*, April 2006, 37.

<sup>33</sup> Hathaway (n31) 109-111. Hathaway groups further rights (derogable rights) which, if denied on any of the five convention grounds, can constitute persecution

<sup>34</sup> Oliva Bueno, 'Perspectives on Refoulement in Africa', *International Refugee Rights Initiative* (2006) 2.

<sup>35</sup> Lauterpacht (n27) 126.

<sup>36</sup> *Ibid.*

<sup>37</sup> *R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening)*, [1988] AC 958, [1988] 1 All ER 193, [1988] 2 WLR 92, [1988] Imm AR 147, United Kingdom: House of Lords (Judicial Committee), 16 December 1987.

<sup>38</sup> Wouters (n13) 164.

The responsibility of the Contracting State for its own conduct and that of those acting under its umbrella is not limited to conduct occurring within its territory. Such responsibility will ultimately hinge on whether the relevant conduct can be attributed to that State and not whether it occurs within the territory of the State or outside it.<sup>39</sup>

This is, they continue, attributed to Article 2(1) of the ICCPR which covers all individuals subject to States' jurisdiction.<sup>40</sup> *Loizidou v Turkey*<sup>41</sup> evaluated State responsibility regarding Turkish troops' behaviour outside of Turkey. The Court held that

according to established caselaw...the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3 [of the CAT], and hence engage the responsibility of that State under the Convention.<sup>42</sup>

Wouters recommends a State obligation to monitor the application of Article 33.<sup>43</sup> He further claims that 'not having any responsibility would de facto nullify effective protection from *refoulement*'.<sup>44</sup> Indeed, the only cases of post-return monitoring that the UNHCR implement are those of diplomatic assured returns.<sup>45</sup> Furthermore, post-removal monitoring would ensure the Convention is being applied in 'good faith'<sup>46</sup> as it will adhere to the 'relevant rules of international law'<sup>47</sup> - that is, to ensure the realisation of human rights.<sup>48</sup>

Furthermore, a 'proper and complete' RSD is vital to the realisation of the rights within the Convention.<sup>49</sup> *Refoulement* in an 'absence of a review of individual circumstances' would therefore be 'inconsistent with the prohibition of *refoulement*', and should be appealable.<sup>50</sup> In the South African case of *Tantoush v RAB*, the judge condemned the Refugee Status Determination Officer's (RSDO) lack of reference to COI,

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<sup>39</sup> Lauterpacht (n27) 110.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Loizidou v. Turkey*, 40/1993/435/514, Council of Europe: European Court of Human Rights, 23 February 1995.

<sup>42</sup> *Ibid.* 62.

<sup>43</sup> Wouters (n13) 164.

<sup>44</sup> *Ibid.*

<sup>45</sup> UN High Commissioner for Refugees, *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, August 2006, 10.

<sup>46</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, Art 31(1).

<sup>47</sup> *Ibid.* Art 31(2)(c).

<sup>48</sup> As held in the Universal Declaration of Human Rights (UDHR), which – according to the Preamble of the Convention – is to be considered. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, Preamble.

<sup>49</sup> UN High Commissioner for Refugees, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, Para.(e)(i).

<sup>50</sup> Lauterpacht (n27) 118.

and the fact that the Refugee Appeal Board did not address it.<sup>51</sup> He stressed that ‘objective facts must be used to decide if a well-founded fear exists’.<sup>52</sup> Furthermore, the case of *HD v Switzerland* confirmed that, through the use of a variety of objective information, ‘full proof of the truthfulness of the alleged facts’ is not required.<sup>53</sup> Thus, if unjust RSD procedures are challenged in court (appeal), so should those cases whereby the failed asylum seeker has been returned due to misuse of COI. Such cases have only been approached by Committee Against Torture (ComAT) and the Human Rights Committee (HRC), as discussed below. In the case of *Ahani v Canada*, for example, the counsel of the claimant was unable to contact him after his removal.<sup>54</sup> This instigated the case and the HRC ruled that reparation be made should it be found that Ahani faced torture. The state was also asked to ‘take such steps as may be appropriate’ to ensure he would not be subject to torture in the future.<sup>55</sup> The granting of refugee status upon Ahani’s reapplication in Canada could constitute ‘such a step’ of protection, if his situation was proven to so require it. In such cases, the obligations of the Refugee Convention are re-engaged.

Linked to this point is the fact that many returnees, despite not having valid claims to refugee status, are persecuted when returned due to their *imputed* political opinion. For example, leaving Eritrea and applying for asylum elsewhere is considered by the authorities as an act of treason, and carries punishments of torture and imprisonment.<sup>56</sup>

These points serve to illustrate the continuation of Convention obligations that can exist with States after removal. The monitoring network would seek to instigate such obligations.

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<sup>51</sup> *Ibrahim Ali Abubaker Tantoush v. Refugee Appeal Board and Others*, 13182/06, South Africa: High Court, 14 August 2007, 94.

<sup>52</sup> *Ibid* 102.

<sup>53</sup> Wouters (n13) 480.

<sup>54</sup> *Mansour Ahani v. Canada*, CCPR/C/80/D/1051/2002, UN Human Rights Committee (HRC), 15 June 2004, 6.1.

<sup>55</sup> *Ibid*. 12.

<sup>56</sup> Amnesty International (2009) *Eritrea: Sent Home to Detention and Torture*, Amnesty International Publications, London, 4.

## CAT and ICCPR

The protection offered by ICCPR and CAT is wider in that they do not require that an individual is persecuted on Convention grounds. Furthermore, what constitutes *refoulement* within the ICCPR and CAT is wider than that of the Convention. The non-derogability of *non-refoulement* within CAT and the ICCPR ensure this wide protection is absolute.<sup>57</sup> These wide-reaching obligations, and the post-removal obligations within the ICCPR and CAT, make them important bodies of law when exploring the legal feasibility of monitoring *refoulement*.

### *Standard of risk and standard of proof in refoulement*

As abovementioned, the CAT prohibits return where torture might occur. The CAT defines torture as ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person’.<sup>58</sup> Under the ICCPR, Article 7 further adds that ‘no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.’<sup>59</sup> Article 6 of the ICCPR ensures the right to life.<sup>60</sup> General Comment 6 of the Human Rights Committee points out that the treatment of Article 7 ‘allows of no limitation’<sup>61</sup> and that the ‘dignity and the physical and mental integrity of the individual’ is also protected therein.<sup>62</sup>

In terms of standard of proof, ComAT confirms that ‘substantial grounds’ must be provided in order to prevent return.<sup>63</sup> *Chahal v UK* exemplifies the use of this standard – according to the Court, there were ‘substantial grounds’ to believe that a ‘real risk’ of Article 3 violations would occur on his return.<sup>64</sup>

As echoes the wording of Article 3 of the CAT, such persecution must form part of a ‘consistent pattern of gross and systematic violation of fundamental human rights’

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<sup>57</sup> As set down in cases like *Chahal v UK* (n15).

<sup>58</sup> CAT (n24) Art.1.

<sup>59</sup> ICCPR (n23) Art.7.

<sup>60</sup> *Ibid.* Art.6.

<sup>61</sup> HRC *CCPR General Comment No. 20: Article 7 Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment* (1992) para.3.

<sup>62</sup> *Ibid.* para.2.

<sup>63</sup> *Mutombo v. Switzerland*, Communication No. 13/1993, UN Committee Against Torture, U.N. Doc. A/49/44 at 45 (1994), para.9.3, for example.

<sup>64</sup> *Chahal v UK* (n15) 80 and 107.

to evoke *refoulement*.<sup>65</sup> This standard has been confirmed in caselaw<sup>66</sup> including ComAT cases.<sup>67</sup> ComAT points out that the *personal* risk of Article 3 violations must be proved.<sup>68</sup> (Under the OAU Convention, however, refugee status applies to those fleeing due to 'events seriously disturbing public order'<sup>69</sup> and proof of personal risk is not required.)

### *Obligations after removal*

The ICCPR and CAT include more post-return obligations than the Conventions. The HRC and ComAT are respectively attached to these legal frameworks, and have both addressed post-return *refoulement*. Article 2(3) of the ICCPR and Article 14 of the CAT provides redress and fair and adequate compensation for victims of torture. Wouters interprets the open-ended nature of Article 14 to include the rights of victims of torture on removal to another State.<sup>70</sup>

The HRC concluded that, should a State commit *refoulement*, that State should make appropriate compensation and guarantees of non-repetition,<sup>71</sup> as occurred in *Ahani v Canada*.<sup>72</sup> In the case of *Brada v France*, the fact that the Algerian asylum seeker (already removed to Algeria) 'had not exhausted domestic remedies' prior to removal instigated the case.<sup>73</sup> ComAT demanded that they be informed of his whereabouts and that he be adequately compensated.<sup>74</sup> It must be kept in mind, that the committees' judgements are not enforceable.

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<sup>65</sup> IAT decision as quoted in *Harari v Secretary of State for Home Department* [2003] EWCA Civ 807, 4.

<sup>66</sup> *Harari v Secretary of the State Department* [2003] EWCA Civ 807.

<sup>67</sup> *Seid Mortesa Aemei v. Switzerland*, CAT/C/18/D/34/1995, UN Committee Against Torture, 29 May 1997, para.9.3.

<sup>68</sup> *Ibid.* para.9.4.

<sup>69</sup> OAU (n21) Art 1(2).

<sup>70</sup> Wouters (n13) 513.

<sup>71</sup> *Ibid.* 409.

<sup>72</sup> *Ahani v Canada* (n54).

<sup>73</sup> *Mafhoud Brada v. France*, CAT/C/34/D/195/2002, UN Committee Against Torture (CAT), 24 May 2005 para.15.

<sup>74</sup> *Ibid.*

## Why a new monitoring network is required

This section focuses on three main reasons as to why a monitoring network is needed, particularly at present.

### *States' conduct*

There has been a marked rise in the use of deportations as a method of immigration control.<sup>75</sup> States claiming certain countries of origin to be 'safe' results in more people with genuine asylum claims facing return.<sup>76</sup> The UNHCR has expressed its concern at 'accelerated' RSD procedures and 'manifestly-unfounded claims' where appeal rights are limited.<sup>77</sup> Under-resourced or overly-strict asylum systems have permitted further *refoulement*.<sup>78</sup> In light of such phenomena, a monitoring system is required.

### *Recent developments in COI*

Recent developments in COI creation have challenged States' return policies. Such reports have used innovative forms of technology and have exploited the ability to track and research returnees, and hold promise for the prospect of a monitoring network.

*Unsafe Return*<sup>79</sup> was compiled following the organisation's concerns that Congolese returnees had 'disappeared'. Interviews were undertaken in Congo DRC. The methodology is explained at length including the attempts to legally verify information gathered in the DRC.<sup>80</sup> This report has been used in cases both in the UK<sup>81</sup> and South Africa,<sup>82</sup> and has been published as part of the UK Country of Origin Information Service,<sup>83</sup> thus giving it the 'national seal of approval' to be used in court.<sup>84</sup> *Deported to*

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<sup>75</sup> Matthew Gibney 'Asylum and the expansion of deportation in the United Kingdom' (2008) 43,2 *Government and Opposition*, 146.

<sup>76</sup> *Ibid.* 160.

<sup>77</sup> UN High Commissioner for Refugees, *Country of Origin Information: Towards Enhanced International Cooperation*, February 2004, 21.

<sup>78</sup> Hathaway, (n5), 7 and 8.

<sup>79</sup> *Unsafe Return* (n3).

<sup>80</sup> *Ibid.* 11-15.

<sup>81</sup> Email from Catherine Ramos to author (17 February 2012).

<sup>82</sup> Appeals recently filed by the LRC, for example.

<sup>83</sup> United Kingdom: Home Office, *Country of Origin Information Report - The Democratic Republic of Congo*, 9 March 2012.

*Danger* is a similar report: 40 returnee interviews took place in eleven countries.<sup>85</sup> The methodology used conformed to the criteria used by the Refugee Review Tribunal in assessing credibility.<sup>86</sup> A recent documentary was crafted by an Afghani returnee documenting his post-removal experience with a camcorder he was given in the UK.<sup>87</sup>

There are many similar reports and newspaper articles that have followed returnees to their country of origin.<sup>88</sup> Organisations and blogs dedicated to this area have unearthed further information.<sup>89</sup> Simultaneously, academics and human rights organisations<sup>90</sup> have raised concern regarding the well-being of returnees.

### *Criticism of existing COI*

UNHCR is, of course, a 'reputable source, if not the best available source...which must be given due weight'.<sup>91</sup> However, even reputable sources can come under criticism as has been noted in caselaw.<sup>92</sup> In their COI guidelines, the Country Guidance Working Group (COI-CG)<sup>93</sup> stresses that judges should know of such criticisms.<sup>94</sup> Whilst researching the treatment of Congolese returnees,<sup>95</sup> conflicting information arose. Personal communication with journalists and NGOs generated opposing information to that of

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<sup>84</sup> UNHCR (n77) 12.

<sup>85</sup> *Ibid.* 51.

<sup>86</sup> *Ibid.* 15.

<sup>87</sup> Sue Clayton *Hamdullah: The Road Home* (2011) <http://www.hamedullahtheroadhome.com> date accessed 20 May 2012.

<sup>88</sup> With regards to the Congo DRC, for example, the following articles are examples of a much wider body of literature: J Cuffe 'Asylum questions for Congo DRC' *BBC News* (1 December 2005), N Tolsi 'South Africa ignores deportee torture claims' *Mail and Guardian* (9 March 2012) and D Taylor 'Refused asylum seekers 'face torture' in Democratic Republic of Congo' *The Guardian* (25 November 2011).

<sup>89</sup> For example, The Association Nationale d'Assistance aux Frontières pour les Étrangers, *De L'Autre Côté de la Frontière Suivi des Personnes Refoulées* (April 2010). The FRLAN Deportation News website records returnees' fates: <http://frlan.tumblr.com/post/22195766619/deportation-news> date accessed 22 May 2012.

<sup>90</sup> Email from Barbara Harrell-Bond to author (director of FRLAN) (6 February 2012) and interview with Theodore Trefon (Congolese affairs analyst for the BBC) (Cape Town, South Africa, 6 April 2012) for example.

<sup>91</sup> *Katshingu v DHA* 2011 HC, case number 19726/2010 (unreported case) 5.

<sup>92</sup> *AH (Sudan) v. Secretary of State for the Home Department*, [2007] EWCA Civ 297, 4 April 2007, 14, for example.

<sup>93</sup> The COI-COG authored the report - COI-CG, 'Judicial criteria for assessing Country of Origin Information (COI): A Checklist' *International Journal of Refugee Law*, 21(1), 2009.

<sup>94</sup> *Ibid.* 159.

<sup>95</sup> As part of specific research for the LRC.

the UNHCR.<sup>96</sup> Perhaps the criticism of UNHCR's COI comes at a time of increased politicisation of the organisation and there is a need, therefore, for refugees to be claimants of their own rights,<sup>97</sup> through their direct generation of COI information.

### **The monitoring network: a proposal**

In light of the above, this paper proposes the monitoring of failed asylum seekers in the form of a monitoring network. Following the proposal, the network's adherence to COI guidelines is addressed before dealing with potential difficulties such a network might face.

FRLAN's proposal of such a project is as follows:

We aim to establish a network that can be used by organisations and individuals to monitor and save failed asylum seekers....We hope to list individuals or organisations from each country of origin that could be alerted by an organisation in the departing country when a failed asylum seeker is being deported to danger.<sup>98</sup>

As stated, this paper focuses on the monitoring network's implications regarding *non-refoulement* adherence. Organisations in countries of origin would ideally meet returnees as they arrive. If this is not possible, attempts to monitor and document the wellbeing of returnees should be made. The emerging information should be corroborated as much as possible and can be fed into a publically-accessible database. If returnees are 'disappeared' on return at least it is documented. Such disappearances can instigate investigations in the host state.<sup>99</sup> Indeed, it was a newspaper report led to the case that suspended removals to Zimbabwe in 2007,<sup>100</sup> which shows the potential of

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<sup>96</sup> UNHCR *Response to Information Request – DRC: Treatment of rejected asylum seekers* (2006).

<sup>97</sup> Guy Goodwin-Gill 'Refugee Identity and Protection's Fading Prospect' *Refugee Rights and Realities* (Cambridge University Press, 1999) 222.

<sup>98</sup> FRLAN (n4).

<sup>99</sup> In the mentioned case *Brada v France*, the disappearance of Mr Brada upon his removal was sufficient evidence to instigate the case (n73).

<sup>100</sup> *AA (Zimbabwe) v. Secretary of State for the Home Department*, [2007] EWCA Civ 149, 3.

such information. As Matthews points out, a monitoring network would 'take deportations out of their secrecy'.<sup>101</sup>

On a more conceptual level, information generated by individuals in a bottom-up approach is increasingly accepted as a form of holding states to account. Jeff Handmaker approaches the abilities of civil society to hold governments to account, with regard to refugee matters in South Africa.<sup>102</sup> He notes that since Ignatieff's so-called 'human rights revolution', the international legal sphere has nurtured the ability for 'participation-based human rights'.<sup>103</sup> Accompanying these developments within the civil-legal nexus is the advancement – and legal potential – of media technology. As mentioned in the introduction, recent technological advances have allowed for the popular generation and use of information. The role of social media networks in recent political uprising and change is widely documented.<sup>104</sup> Several clients at the LRC mention internet footage that documents post-return treatment. The legal applicability of such information in terms of COI is an exciting and interesting area that merits real research. Difficulties in verifying such information will have to be addressed. Nevertheless it holds within it a great potential for uncovering and exploring the realities post-returns.

### **The monitoring network's adherence to existing COI guidelines.**

Both the asylum claimant and the State must use,<sup>105</sup> and be able to access,<sup>106</sup> objective COI in deciding upon, or defending, asylum claims. Guidance in the production and use of COI can be garnered from sources such as UNHCR,<sup>107</sup> ACCORD<sup>108</sup> and the

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<sup>101</sup> Interview with Lisa Matthews, National Coalition for Anti-Deportation Campaigns Coordinator (Oxford, UK, 21 October 2011).

<sup>102</sup> Jeff Handmaker *Advocating for Accountability: Civic-State Interactions to Protect Refugees in South Africa* (Intersentia, 2009).

<sup>103</sup> *Ibid.* 29.

<sup>104</sup> NATO Review, *Political change: what social media can- and can't do* (2011)

[http://www.nato.int/docu/review/2011/Social\\_Medias/Social\\_media\\_can\\_do/EN/index.htm](http://www.nato.int/docu/review/2011/Social_Medias/Social_media_can_do/EN/index.htm) date accessed 26 May 2012.

<sup>105</sup> UNHCR Handbook (n30) para.42.

<sup>106</sup> EXCOM Conclusion No. 71 (XLIV) 1993, para. ff.

<sup>107</sup> UNHCR (n77).

<sup>108</sup> ACCORD (n32).

International Association of Refugee Law Judges (IARLJ).<sup>109</sup> Furthermore, academics have approached the topic.<sup>110</sup>

The COI-CG sets out nine criteria which COI must adhere to in order to be legally-acceptable. ACCORD corroborates such guidelines<sup>111</sup> as does the Immigration Advisory Service.<sup>112</sup>

Firstly, COI must be directly relevant to the facts of the asylum case<sup>113</sup> and relevant issues must be adequately covered.<sup>114</sup> The UNHCR confirms that COI must be both case and country specific.<sup>115</sup> As a monitoring network would gather information from the experiences of failed asylum seekers, many of whom would have similar claims to those applying for asylum in host states, such information would indeed be directly relevant to others in a similar position, which is a valid contribution to RSD.<sup>116</sup>

Thirdly, COI must be temporally relevant. Most UNHCR and State generated COI are produced annually or bi-annually.<sup>117</sup> Also, COI should be based on publically available and accessible sources.<sup>118</sup> As the monitoring network would be a 'on-the-ground' network, that can constantly be contributed to by human rights organisations that have face-to-face contact with failed asylum seekers, its temporal relevance will be ensured. Open-access to such information is therefore vital – an easily accessible website, such as FRLAN, may suffice.

The COI-CG Guidelines further suggest that COI material must be satisfactorily sourced: corroboration, multi-sourced reports with accessible sources are recommended.<sup>119</sup> Furthermore, COI should be prepared using sound methodology.<sup>120</sup>

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<sup>109</sup>COI-CG (n93).

<sup>110</sup> Elizabeth Mason 'Update to Guide to Country Research for Refugee Status Determination', *LLRX* (2002), for example.

<sup>111</sup> ACCORD (n32). ACCORD guidelines to COI are – relevance, transparency, reliability and balance, accuracy and currency.

<sup>112</sup> Immigration Advisory Service (IAS), *The Use of Country of Origin Information in Refugee Status Determination: Critical Perspectives* (2009).

<sup>113</sup> COI-CG (n93) 155.

<sup>114</sup> *Ibid.*

<sup>115</sup> UNHCR (n77) 3.

<sup>116</sup> UNHCR Handbook (n30) para.43.

<sup>117</sup> COI-CG (n93) 156.

<sup>118</sup> *Ibid.* 160.

<sup>119</sup> *Ibid.* 157.

Information generated by a monitoring network would be qualitative as it would be constituted by several individual returnees' accounts. This form of COI is recognised as it can be 'highly indicative of the real situation'.<sup>121</sup> If the information can be subject to verification by larger human rights organisations or relevant embassies,<sup>122</sup> this will further allow such COI to conform to legal standards. Verification by other organisations will ensure the source will have been checked 'insofar as it is possible to do so',<sup>123</sup> as per COI-CG. This also allows the monitoring network's adherence to the next COI-CG guideline, which is the independent monitoring of such information.<sup>124</sup> It is recognised that anonymous evidence may be relied upon 'where this is necessary to protect the safety of witnesses and the asylum-seekers'.<sup>125</sup> If anonymous information could also be verified whilst protecting the returnee's identity, this would permit for more sound information.

The final COI-CG guidelines are that COI should be balanced<sup>126</sup> and should be subject to judicial scrutiny by other national courts.<sup>127</sup> Adherence to the above COI guidelines will ensure legal applicability, and the information's use in national courts will be widely encouraged as a means of verification and – ultimately – an improvement in State returns policies.

### **Potential difficulties in implementing a monitoring network**

Such a monitoring network will undoubtedly encounter several logistical, ethical and moral challenges. This section seeks to imagine – and counter – such challenges.

Firstly, as abovementioned, the qualitative and anecdotal nature of the information created by a monitoring network may invalidate its legal applicability. However, through corroboration and large volumes of research, such hurdles can be

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<sup>120</sup> *Ibid* 164.

<sup>121</sup> *Ibid* 158.

<sup>122</sup> *Ibid* 153. This method of verification is used in several cases: *BK (Failed Asylum Seekers) Democratic Republic of Congo v. Secretary of State for the Home Department*, CG [2007] UKAIT 00098, 18 December 2007, 12, for example.

<sup>123</sup> COI-CG (n93) 160.

<sup>124</sup> *Ibid.* 164.

<sup>125</sup> UNHCR (n77) 11.

<sup>126</sup> COI-CG (n 93) 166.

<sup>127</sup> *Ibid.* 166.

overcome. The logistical and moral hurdles perhaps pose a greater challenge. As the UNHCR points out, monitoring returnees cannot *assure* torture or death will not occur; and a returnee is 'unlikely to reveal his ill-treatment if he is to remain under the control of his tormentors'.<sup>128</sup> Participating organisation will have to prove their credibility and trustworthiness, especially if they are to have contact with returnees.<sup>129</sup>

Organisations involved in monitoring returnees risk accusations of collaboration with returnees themselves and might face similar treatment. Access to returnees might be limited or prohibited. Furthermore, such monitoring requires resources, which many NGOs simply do not have. These issues will have to be addressed if a monitoring network is to be set-up; safeguards and funding will have to be put in place, both of which are challenging to acquire.

Finally, on a purely theoretical level, if one envisages a fully functioning monitoring network, the legal implications could be tremendous. If the risk faced by returnees is proved to be widespread, States would have to reconsider return policies. Where the standard would therefore be set in terms of what constitutes *refoulement* – especially considering the wide provisions of the ICCPR and CAT is questionable. The demands of human rights and the limits of Article 33 were candidly set out in the case of *ZT V SSHD*, in which an HIV-positive Zimbabwean man faced removal:

the internal logic of the Convention has to give way to the external logic of events when those events are capable of bringing about the collapse of the Convention system.<sup>130</sup>

## **Conclusion**

In conclusion, this paper is of the belief that a monitoring network is required if justice is to be realised for returnees. Instances of *refoulement* cannot remain anecdotal cases for which legal practitioners are struggling to find justice. Such cases – and the organisations involved – need to come together, and crystallise such efforts into a

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<sup>128</sup> UNHCR (n45).

<sup>129</sup> Matthews (n101) interview.

<sup>130</sup> *ZT v Secretary of State for the Home Department* [2006] INLR 256, [2006] Imm AR 84 (CA) 42.

formal, legally-recognised network. This paper ends with the words of Harrell-Bond, whose efforts have put into motion this paper's concepts:

Now we have only anecdotal evidence to show that deportees have been detained, imprisoned and tortured. By systematically gathering information, governments that deported failed asylum seekers will become aware of these realities. This will help on-going asylum claims, and, ultimately, shape fairer asylum policies.<sup>131</sup>

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<sup>131</sup> Email from Barbara Harrell-Bond to author (26 May 2012).