

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

UNIVERSITY OF CAPE TOWN

## Monitoring the Unknown

---

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

Charlotte Joan Ogilvie Manicom (MNCCHA003)

2/1/2013

MPhil in International Human Rights Law

Supervisor: Dr Hannah Woolaver



*Awaiting deportation from Lindela Deportation Centre, South Africa*

*(Photo: FILE)*

## **Referencing and Word Count**

This thesis adheres to the referencing guidelines of the African Human Rights Law Journal. This referencing system has been recommended by professors at the University of Cape Town for use in research papers.

The word count stands at 22,067 words.

## **Declaration**

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the MPhil in International Human Rights Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of MPhil in International Human Rights Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signed, 

Signed by candidate
---------------------

Signature removed

Charlotte Joan Ogilvie Manicom

4 February 2013.

## Contents

<b>1. Introduction</b>	5
<b>2. <i>Non-refoulement</i> as a cornerstone of refugee law</b>	7
<b>3. State obligations of <i>non-refoulement</i> in international law</b>	12
3.1 Standard of risk constituting <i>refoulement</i> and standard of proof	12
(a) Refugee Convention/OAU Convention/Refugees Act	12
(b) CAT and ICCPR	19
3.2 Use of COI in <i>non-refoulement</i> cases – comparative study	21
3.3 States’ obligations post-removal	22
(c) Refugee Convention/OAU Convention/Refugees Act	22
(d) CAT and ICCPR	24
3.4 Conclusions: State’s responsibilities regarding <i>refoulement</i>	27
<b>4. Why a new monitoring network is required</b>	27
4.1 Deportations and removals	28
4.2 Case study I: receiving state – Congo DRC	29
4.3 Case study II – the returned failed asylum seeker	35
4.4 States’ conduct: why a monitoring network is required	36
4.5 Recent developments in COI	45
4.6 Criticism of existing COI	46
<b>5 The monitoring network: a proposal</b>	47
5.1 The monitoring network’s adherence to existing COI guidelines	50

and legal admissibility of information.....	
5.2 Case comparison: evidence use in <i>refoulement</i> cases.....	52
5.3 The monitoring network's adherence to existing COI guidelines.....	
5.4 Harnessing modern technology for human rights.....	59
	60
<b>6. Conclusion</b>	<b>61</b>

University of Cape Town

**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	COI Country Guidance Working Group
ExCom	Executive Committee of the High Commissioner's Programme
FRP	Fahamu Refugee Programme
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
LRC	Legal Resources Centre

NGO	Non-Governmental Organisation
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

## 1. Introduction

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.'<sup>1</sup>

The status of the refugee has developed from the beneficiary of a paternalistic system of certification to the claimant of rights.<sup>2</sup>

What happens to failed asylum seekers<sup>3</sup> that are removed? *Non-refoulement* has been analysed many times over by academics and judges alike. But the fate of returned failed asylum seekers remains an under-researched void within the context of forced migration studies. Indeed, it has been 'recognized

---

<sup>1</sup> B Iyodu 'Uganda: The silent practise of deportations' *Pambazuka News* (6 May 2012).

<sup>2</sup> G Goodwin-Gill 'Refugee identity and protection's fading prospect' *Refugee rights and realities* (Cambridge Press 1999).

<sup>3</sup> 'Returnees' are referenced in this paper as failed asylum seekers who have been returned to their country of origin following denial of refugee status by the host state.

repeatedly as a major gap in the global refugee framework'.<sup>4</sup> Many failed asylum seekers who have been removed have 'disappeared', and there is often no way to find out what became of them. Existing knowledge is anecdotal. *Unsafe Return*, a report by the UK-based non-governmental organisation (NGO) Justice First, documents several returnees, including a female asylum seeker from the Democratic Republic of Congo (DRC), taken to the infamous *Tolérance Zero* prison upon her return, where she was tortured and raped.<sup>5</sup> Such cases should no longer remain anecdotal, but should form part of a body of information upon which action can be taken. 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 monitoring 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 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 Country of Origin Information (COI), the monitoring network would also seek to ensure the safety and welfare of returnees once they are returned. Such COI could serve to better improve States' adherence to *non-refoulement*.<sup>6</sup> This paper is guided by a series of questions. Firstly, what constitutes *refoulement*, and what State obligations exist in terms of avoiding - and monitoring cases of - *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

---

<sup>4</sup> Letter from editors of Oxford Forced Migration to co-author of Fahamu Deportation Project (9 October 2011).

<sup>5</sup> C Ramos *Unsafe Return* (Justice First 2011) 27. This returnee was released after paying a hefty bribe.

<sup>6</sup> This has been exemplified in cases such as *SM and Others*, which this thesis will later analyse (*SM and Others (MDC – internal flight – risk categories) Zimbabwe CG [2005] UKIAT 00100.*)

all contribute to this need. Erroneous RSD procedures result in refused refugee status and deportation; such individuals are no longer 'of concern' to the host state nor the United Nations High Commissioner for Refugees (UNHCR). As this paper explores, such individuals are often deported to danger, and should therefore be monitored. Finally, this paper asks what monitoring network would 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 Programme (FRP)<sup>7</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 DRC as a case study, whilst other states, including the UK, are referenced.

## **2. *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>8</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>9</sup>

---

<sup>7</sup> FRP 'Deportation of failed asylum seekers' *Fahamu Refugee Project*. Available at <http://frlan.org/content/deportation-failed-asylum-seekers-0>. Accessed 22 May 2012.

<sup>8</sup> J Hathaway *Refugee rights: report on a comparative study* (York Lane Press, 1995) 5.

<sup>9</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>10</sup> and has generally been considered as international customary law.<sup>11</sup> However, the status of 'customary law' is questionable as States continue to *refoule*.<sup>12</sup>

Beneficiaries of this provision includes 'every individual having a well-founded fear of persecution',<sup>13</sup> regardless of whether they are asylum seekers or refugees.<sup>14</sup> The protection of *non-refoulement* also covers those in 'international zones'.<sup>15</sup> Furthermore, the provision includes returning refugees 'in any manner whatsoever', which covers all forms of *refoulement*, including extradition, expulsion and deportation,<sup>16</sup> including to third countries where there is a likelihood of further *refoulement*.<sup>17</sup>

A grey area exists regarding the *refoulement* of *prima facie* refugees who have not yet entered a state's territory. The Thai government's return of the Vietnamese boat people, or the US government's decision to send boatfuls of unscreened Haitian refugees back to Haiti serve as examples.<sup>18</sup> In the US case

---

<sup>10</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>11</sup> UNHCR, *Agenda for Protection* (2003) 24 and UNHCR (n7).

<sup>12</sup> A Duffy 'Expulsion to face torture? Non-refoulement in international law' *International Journal of Refugee Law* (2008) 20, 3, 377.

<sup>13</sup> Guy Goodwin-Gill *The principle of non-refoulement: its standing and scope in international law* (1993) 2. This is also set in caselaw. For example, *Plaintiff M70/2011 v. Minister for Immigration and Citizenship*; and *Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship*, [2011] HCA 32, Australia: High Court, 31 August 2011 clarifies that those seeking protection due to a well-founded fear are protected under *non-refoulement*. Whether *prima facie* refugees are protected by *non-refoulement* is discussed shortly.

<sup>14</sup> UNHCR *Note on the principle of non-refoulement* (n10 above) - also confirmed *Plaintiff v Minister for Immigration and Citizenship* (n13 above).

<sup>15</sup> This principle has been set down by several cases, including the South African case of *Abdi and Another v Minister of Home Affairs and Others* 2011 (3) SA 37 (SCA), 29.

<sup>16</sup> Goodwin-Gill (n 13 above) 16.

<sup>17</sup> K Wouters *International legal standards for the protection from refoulement* (Intersentia, 2009) 140. This is known as 'indirect refoulement'. Confirmed in caselaw, such as *NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2005) HCA 6, Australia: High Court, 2 March 2005. This issue is pertinent to Australia: the case deals with states such as Nauru and permitted Australia's transfer of hundreds of asylum seekers for their RSD processing (Human Rights Watch *By Invitation Only: Australian Asylum Policy* (2002) 1).

<sup>18</sup> Hathaway (n 8 above) 10.

*Sale v Haitian Centres Council*, the Supreme Court held that there was ‘an inherent territorial limitation on the prohibition of *refoulement* contained in Article 33(1)’.<sup>19</sup> Hathaway describes the ambiguity of *refoulement* applicability in this context, where the Australian government’s decision to turn away the *Tampa* ship, full of Afghani asylum seekers as having no basis in international law. Simultaneously, ‘neither is there a basis in international refugee law for the assertion ... that those rescued had a right to come to the Australian mainland in order to enter that country’s asylum system’.<sup>20</sup>

Differing interpretations also exist amongst refugee law academics. Whilst Goodwin-Gill confirms that ‘states...have recognised that *non-refoulement* applies to the moment at which asylum-seekers present themselves for entry’,<sup>21</sup> Wouters finds that obligations of *non-refoulement* evoke State obligations of non-rejection at the border.<sup>22</sup> Hathaway concludes, after tying in the provisions of non-penalisation (Article 31 of the Refugee Convention), that ‘a state party is *not* precluded from expelling a refugee claimant from its territory during the earliest phases of refugee reception. It is only barred from doing so mechanistically or without scrupulous regard for the simultaneously applicable duty of *non-refoulement*’ – a conclusion that Hathaway admits is ‘not universally shared’.<sup>23</sup> Space does not permit a deeper discussion of the applicability of *non-refoulement*, save to consider the wide theoretical – yet narrow practical – applicability of *non-refoulement*.

According to the Refugee Convention, *non-refoulement* can be over-ridden in certain cases:

The benefit of the present provision [*non-refoulement*] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.<sup>24</sup>

---

<sup>19</sup>*Sale v Haitian Centres Council*, 509 U.S 155 (1993) 1.

<sup>20</sup> J Hathaway ‘Refugee law is not immigration law’ *World Refugee Survey 2002* (2002) 41.

<sup>21</sup> Guy Goodwin-Gill *The Refugee in International Law: Second Edition* (Oxford University Press, 1998) 124.

<sup>22</sup> Wouters (n 17 above) 507.

<sup>23</sup> J Hathaway ‘*The Rights of Refugees under International Law*’ (Cambridge University Press, 2005) 42.

<sup>24</sup> Refugee Convention (n 9 above) Art. 33(2).

Case-law has encouraged a narrow interpretation of this provision. *Suresh v Canada* clarified that perceived threats to national security must 'be grounded on objectively reasonable suspicion... [and] threatened harm must be substantial rather than negligible'.<sup>25</sup> Regarding public order, the judge of *RU (Bangladesh) v SSHD*, a UK case, set a proportionality test by asking whether the appellant's expulsion would be 'proportionate to the legitimate public end sought to be achieved'.<sup>26</sup> However, States continue to interpret this provision widely. For example, in 1990, president Moi of Kenya ordered that '*all refugees engaged in illegal activities*' should be deported.<sup>27</sup> A similar expulsion took place during the 1980s when Rwandans were 'chased' from Uganda in an outbreak of anti-Rwandan hostility.<sup>28</sup> Indeed, Hathaway finds that mass expulsions on grounds of public order occur more within the African context due to the fear that refugees' presence may evoke 'armed conflict or retaliatory attack'.<sup>29</sup> Such expulsions of refugees further highlights the need for such returnees' monitoring.

Although, as abovementioned, *non-refoulement* can be over-ridden in some cases, the provisions protecting an individual from *refoulement* in other provisions is much wider and, ultimately, non-derogable. The obligations derived from the Refugee Convention and the resulting domestic statutes should be interpreted to be consistent with other bodies of international law; thus, with regards to *non-refoulement*, the state's obligations under CAT, ICCPR and other international human rights law treaties, ensures further protection for any individual facing *refoulement*.<sup>30</sup> *Chahal v United Kingdom*,<sup>31</sup> a landmark *refoulement* case in the European Court of Human Rights (ECHR),

---

<sup>25</sup> *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002, 90.

<sup>26</sup> *RU (Bangladesh) v Secretary of State for the Home Department* (SSHD) [2011] EWCA Civ 651.

<sup>27</sup> Immigration and Refugee Board of Canada, *Kenya: information on the current status of refugees in Kenya, on their rights and on whether Kenya protects them from non-refoulement (forced repatriation)* (1993).

<sup>28</sup> Hathaway (n 23 above) 661.

<sup>29</sup> Hathaway (n 23 above) 662.

<sup>30</sup> As stressed by the Canadian *refoulement* case of *Németh v. Canada (Justice)*, 2010 SCC 56, Canada: Supreme Court, 25 November 2010, 5. The specific protection provided by these treaties is discussed in greater detail below.

<sup>31</sup> *Chahal v United Kingdom* (1996) 23 EHRR 413.

involved a Sikh asylum-seeker facing expulsion to India. The appellant was alleged, by the UK Home Office, to be a terrorist member of a separatist group. It was claimed that the appellant would face persecution on return. The Court held that, as per the CAT, *non-refoulement* cannot be overridden. Although the Court was 'well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence', it held that 'even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment'.<sup>32</sup>

The non-derogability of *non-refoulement*, as set in *Chahal*, 'has been followed extensively by other international courts and bodies, and now reflects an accepted international standard'.<sup>33</sup>

The non-derogability of *non-refoulement* is inherent to the Organization of African Unity's *Convention Governing the Specific Aspects of Refugee Problems in Africa* (OAU Convention), whereby it 'does not provide for expulsion or *refoulement* of refugees under any circumstances'.<sup>34</sup> Kapferer confirms that the OAU Convention does not permit any exceptions to the rule of *non-refoulement*.<sup>35</sup> The South African Refugees Act, drawing on the OAU Convention, also provides a non-derogable obligation of *non-refoulement*.<sup>36</sup>

The burden of proof in *refoulement* cases and RSD is shared between the applicant and the State.<sup>37</sup> The Executive Committee (ExCom) clarifies that both parties must have access to 'sufficiently objective and accurate information'.<sup>38</sup> However, as refugee claimants are unable to access the same amount of information as the host state party, such a sharing of burden can

---

<sup>32</sup> *Ibid.* 79.

<sup>33</sup> *Ramzy v. Netherlands*, Application no. 25424/05, Council of Europe: European Court of Human Rights, 27 May 2008 – Written comments by Amnesty International, The Association for the Prevention of Torture, Human Rights Watch, Interrights, The International Commission of Jurists, Open Society Initiative and Redress.

<sup>34</sup> UNHCR (n 10 above) F.

<sup>35</sup> S Kapferer 'The interface between extradition and asylum' *UNHCR Department of International Protection* (2003) 76.

<sup>36</sup> *South African Refugees Act* (1998) No. 130 of 1998.

<sup>37</sup> Wouters (n 17 above) 94 and Hathaway (n 8 above) 81.

<sup>38</sup> UN High Commissioner for Refugees *General Conclusion on International Protection* (1993) No. 71, para.44 - quoted in Wouters (n 17 above) 95.

seem unjust.<sup>39</sup> Indeed, Duffy claims this burden is at odds with the Convention's inherent principles.<sup>40</sup> These concerns are later addressed within the proposal of a monitoring network, as the generation of COI from grassroots NGOs, fed into an accessible resource, would seek to overcome this unbalance.

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.

### 3. State obligations of *non-refoulement* in international law

In this section of the paper, two main groups of law will be analysed with regards to (a) the standard of risk constituting *refoulement* and (b) 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 first 'group' will include the Convention,<sup>41</sup> the OAU Convention and the Refugees Act of South Africa (Refugees Act). These are selected due to their direct relevance to refugees and the issue of *refoulement*, and because the Refugees Act derives from them.<sup>42</sup> Secondly, the ICCPR<sup>43</sup> and CAT<sup>44</sup> will be analysed. The ICCPR and CAT are selected as they are over-arching international treaties that are often evoked in arguing against a proposed removal. States' post-removal obligations, under all above-mentioned bodies of law, will then

---

<sup>39</sup> Wouters (n 17 above) 96.

<sup>40</sup> Duffy (n 12 above) 381.

<sup>41</sup> Article 33 is quoted above.

<sup>42</sup> Refugees Act (n 36 above) Preamble.

<sup>43</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>44</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

be explored, and analysed in terms of the monitoring network assisting in States' engagement with such obligations.

### *3.1 Standard of risk constituting refoulement and standard of proof*

#### *(a) Refugee Convention, OAU Convention and Refugees Act*

The OAU Convention outlines a similar *refoulement* article to the Convention, although more generous in its provisions:

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2 [refugee status].<sup>45</sup>

'Rejection at the frontier' clarifies states' obligations regarding *prima facie* refugees, which escapes the differing interpretations, discussed above, evoked by the Refugee Convention. The 'reasons' set out in Article 1 of the OAU convention are wider than the Refugee Convention in that they include public disorder and external aggression as grounds for refugee status.<sup>46</sup>

The Refugees Act's provision regarding *refoulement* reads:

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

---

State 'where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

<sup>45</sup> Organization of African Unity *Convention Governing the Specific Aspects of Refugee Problems in Africa* 10 September 1969, 1001 U.N.T.S. 45. Art. 2(3).

<sup>46</sup> This will be discussed under the *well-founded fear* section, below.

or disrupting public order in either part or the whole of that country.<sup>47</sup>

Again, the provisions are wider than the Convention and seek to clarify rejection at the border and removal to third countries.

The level of persecution, grounds for refugee status and standards of proof relating to *refoulement* within these three bodies of law is now analysed. Such analysis permits a full understanding of the standards and risk which a monitoring network's information must adhere to if it is to be used in legal cases. It also clarifies whether abuses recorded by a monitoring network would constitute *refoulement*.

#### *Level of persecution*

Levels of persecution that constitute *refoulement* in the Convention, the OAU Convention and the Refugees Act mirror directly the level of persecution that constitutes 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>48</sup> Indeed, there would exist a logical inconsistency within the Convention if they were to be different.<sup>49</sup> It is important to remember that these legal frameworks protect *refugees*.<sup>50</sup> Those that have been denied refugee status (i.e. returnees) are no longer protected by these legal frameworks. The implications of this will be discussed in more detail below, as CAT and ICCPR can offer such individuals protection.

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.

---

<sup>47</sup> Refugees Act (n 36 above) Art. 2.

<sup>48</sup> P Weis *The Refugee Convention 1951: the travaux préparatoires* (1995) 33.

<sup>49</sup> E Lauterpacht and D Bethlehem 'The scope and content of the principle of *non-refoulement*' in E Feller and V Türk (eds.) *Refugee protection in international law* (Cambridge University Press, 2003) 125.

<sup>50</sup> Convention (n 9 above) Preamble and OAU Convention (n 45 above) Preamble and Refugees Act (n 36 above) Preamble.

*Grounds for refugee status: a 'well-founded fear'*

A 'well-founded' fear is 'the backbone of the refugee definition as well as the prohibition on *refoulement*'.<sup>51</sup> Although fear is a subjective human emotion, a 'well-founded fear' in the Conventions' context refers to fear with an objective basis.<sup>52</sup> Indeed, the Michigan Guidelines on Well-Founded Fear stress that subjective fear not an essential element of deciding upon refugee status, but is rather a factor that can be used when there is an 'insufficiency of actual risk'.<sup>53</sup> In short, such fear must be objectively provable and is not to be taken as fear in the sense of trepidation.<sup>54</sup> The 'test' of a well-founded fear was set in the case of *Matter of Acosta* and has since been referred to as the 'Acosta test'.<sup>55</sup> *Acosta* found that a well-founded fear can be proved when the feared conduct amounts to persecution (see below), when there is a 'real chance' of this occurring, and when the persecutor is – or could easily become – aware of the applicant's characteristic that is the basis of his or her persecution.<sup>56</sup>

This requires the use of objective evidence and 'a decision on the relative weight to be assigned to different forms of evidence',<sup>57</sup> as corroborated by the UNHCR Handbook.<sup>58</sup> The Convention is worded to require a forward-looking assessment of risk of persecution,<sup>59</sup> in that it is not a purely objectively-based definition - what Hathaway describes as 'prospective harm'.<sup>60</sup> Thus, the varied and correct use of COI in deciding on *refoulement* is vital. The importance of objective evidence in refugee cases highlights the importance of COI garnered by a monitoring network. Indeed, by adhering to COI guidelines (which is

---

<sup>51</sup> Wouters (n 17 above) 83.

<sup>52</sup> *Ibid.* 83.

<sup>53</sup> University of Michigan Law School *The Michigan Guidelines on Well-Founded Fear* (2004) 1. These guidelines are not legally enforceable but are used in guiding states RSD.

<sup>54</sup> *Ibid.*

<sup>55</sup> For example, in the well-known judgement of *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court (1987) 40.

<sup>56</sup> *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985, 2.

<sup>57</sup> Michigan Guidelines (n53 above) 3.

<sup>58</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.

<sup>59</sup> Wouters (n 17 above) 84.

<sup>60</sup> J Hathaway *The law of refugee status* (Butterworths Law, Canada 1991) 67.

discussed in more detail below), the monitoring network would seek to collect evidence that can be used in on-going asylum cases. Such evidence, used in *refoulement* cases, would therefore seek to ensure, or challenge, state adherence to *non-refoulement* obligations.

### *Persecution*

Having surveyed other academics' thoughts on persecution, Hathaway concludes persecution to be a 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection.'<sup>61</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>62</sup> The definition is used in RSDO decisions in South Africa and is often quoted in refusal letters. The definition is used widely in caselaw. For example, the case of *Horvath v Secretary of State Department* which found that persecution requires serious harm *and* failure of state protection, rests its judgement upon Hathaway's definition.<sup>63</sup> The New Zealand case *Refugee Appeal No. 71427/99* also uses Hathaway's definition and concludes that core norms of international human rights law are relied on to define persecution.<sup>64</sup> Such 'core norms' 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>65</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

---

<sup>61</sup> *Ibid.* 101.

<sup>62</sup> ACCORD *Researching Country of Origin Information: a training manual* (2006) 37.

<sup>63</sup> *Horvath v. Secretary of State for the Home Department*, United Kingdom: House of Lords (Judicial Committee), 6 July 2000.

<sup>64</sup> *Refugee Appeal No. 71427/99*, 71427/99, New Zealand: Refugee Status Appeals Authority, 16 August 2000, 61.

<sup>65</sup> Hathaway (n 23 above) 109-111. Hathaway groups further rights (derogable rights) which, if denied on any of the five convention grounds, can constitute persecution.

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>66</sup> This widens the situations whereby obligations under *non-refoulement* can be engaged.

Under the Refugee Convention, such persecution must be due to one of the five Convention grounds in order to evoke *non-refoulement* protection. Space does not permit a full consideration of each ground, although a short description of each is relevant to the types of persecution that a monitoring network is to document should its COI be relevant to refugee claims. In short, the Convention grounds are to be taken as race, religion, nationality, membership of a particular social group or political opinion.<sup>67</sup> Goodwin-Gill offers a summarised definition of each, whereby race is to be interpreted as 'race, colour, descent, or national or ethnic origin'<sup>68</sup> and religion as 'theistic, non-theistic and atheistic beliefs'.<sup>69</sup> Nationality can be interpreted as 'membership of particular ethnic, religious, cultural and linguistic communities'<sup>70</sup> and political opinion as 'any opinion on any matter in which the machinery of the State, government, and policy may be engaged'.<sup>71</sup> Hathaway emphasises that political *action* need not be taken: if the persecutors 'are, or could reasonably become aware of, the claimant's views', this can suffice to engage refugee status or protection from *non-refoulement*.<sup>72</sup> Membership of a particular social group is 'is impractical, if not impossible' to define.<sup>73</sup> This concept is being remoulded to include various categories by different caselaw. *Canada v Ward* offers the most concise definition of 'social group'. The judgement defined social groups as those defined by innate or unchangeable character, or whose members voluntarily associate and from which they would not leave for sake of their human dignity. Social groups can

---

<sup>66</sup> O Bueno, 'Perspectives on refoulement in Africa' *International Refugee Rights Initiative* (2006) 2.

<sup>67</sup> Convention (n 9 above) Art. 1. The South African Refugees Act inserts 'tribe' into these grounds - Refugees Act (n 36 above) Art. 3.

<sup>68</sup> Goodwin-Gill (n 21 above) 43.

<sup>69</sup> *Ibid.* 45.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.* 49.

<sup>72</sup> Hathaway (n 690 above) 149.

<sup>73</sup> Goodwin-Gill (n 21 above) 47.

also be those which are formed voluntarily but unalterable due to historical permanence.<sup>74</sup> Mention whether the other Conventions including non-refoulement obligations require such grounds?

### *Standard of Proof*

The standard of proof set in establishing a well-founded fear is equal to that of the standard evoking *non-refoulement*. Thus, the standard of proof for evoking *non-refoulement* can be taken directly from the caselaw and academic findings on well-founded fear.

The standard of proof required to evoke *non-refoulement* is widely considered to be one of 'a reasonable degree' of persecution on return.<sup>75</sup> Lauterpacht confirms this to mean 'more than mere conjecture concerning a threat but less than proof to a level of probability or certainty.'<sup>76</sup> The UNHCR Handbook finds that a well-founded fear exists when such fear of persecution can be proved to a reasonable degree.<sup>77</sup> Wouters states that the standard of risk has not been clarified in independent international legal spheres, but academic research has concluded that

States draw a distinction between the stricter balance of probabilities test and the more commonly used reasonable chance or serious possibility test. The balance of probabilities test requires the refugee claimant to establish that persecution will probably take place, or is reasonably likely or more likely than not to occur.<sup>78</sup>

Hathaway adds;

The 'reasonable possibility' test is the appropriate compromise between respect for the Convention's commitment to anchor protection decisions in objectively observable risk and the need to simultaneously to avoid the establishment of an inappropriately high threshold of concern.<sup>79</sup>

Although such general standards have been set by States and academics alike, and shall be used in this paper as a common general standard of proof, it is

---

<sup>74</sup> *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993.

<sup>75</sup> Lauterpacht (n 49 above) 126.

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

<sup>77</sup> UNHCR Handbook (n 58 above) para.41.

<sup>78</sup> Wouter (n 17 above) 84.

<sup>79</sup> Hathaway (n 60 above) 80.

important to remember that jurisprudence on the standard of universally agreed?. For example *INS v Cardoza-Fonseca* case found that, instead of a balance of probabilities, a 'reasonable possibility' test should be applied to invoke the Convention.<sup>80</sup> Meanwhile, *Joseph Adjei v Minister of Employment and Immigration* found the standard to be 'a reasonable or even serious possibility as opposed to a mere possibility'.<sup>81</sup> Conversely, Canadian jurisprudence has been liberal, demanding only a 'reasonable possibility' of proof.<sup>82</sup>

Nonetheless, the standard of 'reasonable degree' has generally been upheld in caselaw. Indeed, *Sivakumaran v Immigration Officer* held the standard of 'a reasonable risk' standard.<sup>83</sup> The judge made clear that it was to be proven that the appellants faced 'reasonable risk that the appellants would meet death or serious injury' and that such 'injury' was to be taken to mean 'the sort of injurious consequence contemplated in the dictionary definition of persecution', as explored above.<sup>84</sup> *Sivakumaran*, heard by the UK Asylum and Immigration Tribunal in 1989, involved five Sri Lankan Tamils who had claimed asylum. The judge used 'Press articles, journals and Amnesty International publications and also information supplied...by the Home Office and as a result of recent visits to Sri Lanka by Ministers' to ascertain such likelihood.<sup>85</sup> From such evidence, it was to be ascertained whether the appellants building on the decision of the lower courts' 'reasonably likely to be subjected to inhuman treatment' level.<sup>86</sup>

### (b) CAT and ICCPR

---

<sup>80</sup> *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court, 9 March 1987, III.

<sup>81</sup> *Joseph Adjei v. Minister of Employment and Immigration*, R.S.C. 1976, C. 52, Canada: Federal Court, 27 January 1989 and Hathaway (1991) p.79.

<sup>82</sup> Hathaway (n 60 above) 81.

<sup>83</sup> *Saravamuthu Sivakumaran, Navaratnasingam Vathanan, Vinasithamby Rasalingam, Vythialingam Skandarajah, Nadarajah Vilvarajah v. Immigration Officer, Heathrow*, TH/6840/88, TH/6841/88, TH/6842/88, TH/6843/88, TH/6844/88, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 13 March 1989.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.* 'Background in Sri Lanka'.

<sup>86</sup> *Ibid.* Fifth Appellant.

Protection against *refoulement* offered by ICCPR and CAT is wider than the above-mentioned Conventions 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.

CAT states that:

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.<sup>87</sup>

When 'determining whether there are such grounds...a consistent pattern of gross, flagrant or mass violations of human rights' should be proven by the 'competent authorities'.<sup>88</sup>

The UNHCR advises that the ICCPR encompasses the obligation not to 'extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 [right to life] and 7 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment].<sup>89</sup> The UN Human Rights Committee has also confirmed the ICCPR's direct applicability to *refoulement* cases.<sup>90</sup>

The non-derogability of *non-refoulement* within CAT and the ICCPR ensure this wide protection is absolute.<sup>91</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*.

As abovementioned, the CAT prohibits return where torture might occur. The CAT defines torture as 'any act by which severe pain or suffering, whether

---

<sup>87</sup> CAT (n 9 above) Art. 3(1).

<sup>88</sup> *Ibid.* Art 3(2).

<sup>89</sup> UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (2007) 9.

<sup>90</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (1992) Para. 9.

<sup>91</sup> As set down in cases like *Chahal v UK* (n 31 above).

physical or mental, is intentionally inflicted on a person'.<sup>92</sup> Under the ICCPR, Article 7 states that 'no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.'<sup>93</sup>

In terms of standard of proof, the Committee Against Torture (ComAt) confirms that 'substantial grounds' must be provided in order to prevent return.<sup>94</sup> *Chahal v UK* exemplifies the use of this standard. The case involved an order for the deportation to India of a Sikh separatist for national security reasons. According to the Court, there were 'substantial grounds' to believe that there existed a 'real risk' of CAT Article 3 being violated on the appellant's return.<sup>95</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' to evoke *refoulement*.<sup>96</sup> This standard has been confirmed in caselaw<sup>97</sup> including ComAT cases. ComAT points out that the *personal* risk of Article 3 violations must be proved.<sup>98</sup> (Under the OAU Convention, however, refugee status applies to those fleeing due to 'events seriously disturbing public order'<sup>99</sup> and proof of personal risk is not required.)

### 3.2 Use of COI in non-refoulement cases

As this paper establishes, a standard of risk must be proven, at a certain standard of proof, in order to evoke *non-refoulement*. Such standards must be reached through the use of objective evidence, 'taking into account all relevant information, including new or previously

---

<sup>92</sup> CAT (n 44 above) Art.1.

<sup>93</sup> ICCPR (n 43 above) Art.7.

<sup>94</sup> For example: *Mutombo v. Switzerland*, Communication No. 13/1993, UN Committee Against Torture, U.N. Doc. A/49/44 at 45 (1994), para.9.3.

<sup>95</sup> *Chahal v UK* (n 31 above) 80 and 107.

<sup>96</sup> IAT decision as quoted in *Harari v Secretary of State for Home Department* [2003] EWCA Civ 807, 4.

<sup>97</sup> This standard was used in the ComAT case of *Seid Mortesa Aemei v. Switzerland*, CAT/C/18/D/34/1995, UN Committee Against Torture, 29 May 1997, para.9.3. It was also used in the South African High Court case of *Tantoush v the Refugee Appeal Board and Others*, HC, 13182/06 (2006)134. In the UK case of *EM v Tutsi*, the criteria of proving such a 'consistent pattern' was deemed to be one of a 'generally or consistently happening' nature (*EM (Tutsi - Common Threshold of Risk) DRC [2004] UKIAT 00075 9.*)

<sup>98</sup> *Ibid.* para.9.4.

<sup>99</sup> OAU (n 45 above) Art 1(2).

unrecognised facts'.<sup>100</sup> It is of great interest to establish what has led courts to decide to halt – or continue – removals of failed asylum seekers. These cases exemplify the uses of standard of risk and proof. Importantly, such cases exemplify what kind of objective evidence suffices to halt a removal. From this, one can deduce what kind of objective evidence can assist in proving cases of *refoulement*. This is one of the central aims of the monitoring network itself. Section 5.5 of this paper seeks to analytically compare two such cases in order to deduce such standards of proof and their implications for the monitoring network.

### 3.3 States' obligations post-removal

#### (a) Refugee Convention/OAU Convention/Refugees Act

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>101</sup> However, as explored below, ICCPR and CAT can create post-removal obligations for the host state. Indeed, Lauterpacht and Bethlehem argue that

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.<sup>102</sup>

The authors go on to argue that a State's extra-territorial responsibility regarding *refoulement* is engaged under Article 2(1) of the ICCPR which covers all individuals subject to States' jurisdiction.<sup>103</sup> *Loizidou v Turkey*,<sup>104</sup> which used CAT to prove post-removal State obligations, evaluated State responsibility regarding Turkish troops' behaviour outside of Turkey. The Court held that

---

<sup>100</sup> Wouters (n 17 above) 99.

<sup>101</sup> *Ibid.* 164.

<sup>102</sup> Lauterpacht (n 49 above) 110.

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

<sup>104</sup> *Loizidou v. Turkey*, 40/1993/435/514, Council of Europe: European Court of Human Rights, 23 February 1995.

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>105</sup>

Wouters goes on to recommend a State obligation to monitor the application of Article 33 of the Convention.<sup>106</sup> He further claims that 'not having any responsibility would de facto nullify effective protection from *refoulement*'.<sup>107</sup> Indeed, the only cases of post-return monitoring that the UNHCR implement are those of diplomatic assured returns.<sup>108</sup> Furthermore, post-removal monitoring would ensure the Convention is being applied in 'good faith'<sup>109</sup> as it will adhere to the 'relevant rules of international law'<sup>110</sup> – as set out in the Vienna Convention on the Law of Treaties - that is, to ensure the realisation of human rights.<sup>111</sup>

A state can ensure its adherence to *non-refoulement* not only through post-returns monitoring, but through ensuring a 'proper and complete' RSD.<sup>112</sup> *Refoulement* in an 'absence of a review of individual circumstances [is] inconsistent with the prohibition of *refoulement*', and should be appealable.<sup>113</sup> For example, in the South African case of *Tantoush v RAB*, the judge condemned the Refugee Status Determination Officer's (RSDO) lack of reference to COI, and the fact that the Refugee Appeal Board did not address it, linking it to the appellants' proposed removal and, in the judge's eyes, the appellant's *refoulement*.<sup>114</sup> He stressed that 'objective facts must be used to

---

<sup>105</sup> *Ibid.* 62.

<sup>106</sup> Wouters (n 17 above) 164.

<sup>107</sup> *Ibid.*

<sup>108</sup> UN High Commissioner for Refugees, *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, August 2006, 10. This document defines diplomatic assured returns as 'the transfer of a person from one State to another, refers to an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State'.

<sup>109</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, Art 31(1).

<sup>110</sup> *Ibid.* Art 31(2)(c).

<sup>111</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>112</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>113</sup> Lauterpacht (n 49 above) 118.

<sup>114</sup> *Ibrahim Ali Abubaker Tantoush v. Refugee Appeal Board and Others*, 13182/06, South Africa: High Court, 14 August 2007,94.

decide if a well-founded fear exists'.<sup>115</sup> Such rulings inherently claim that unfounded and inadequate RSD decisions are, fundamentally, a form of *refoulement* through the states non-adherence to the obligation of proper RSD procedures. Although the State's obligation to conduct full and fair RSD procedures using COI does not explicitly exist within the Convention, it is clear that States are obliged to implement treaties in good faith,<sup>116</sup> and therefore it can be argued that inadequate RSD procedures would violate States' treaty obligations.

Following the above logic, if unjust RSD procedures are challenged in court (through appeals), so should those cases whereby the failed asylum seeker has been returned following inadequate RSD procedures. Such cases have only been approached by ComAT and the HRC, as discussed in the following section. In the case of *Ahani v Canada*, for example, the counsel of the claimant was unable to contact him after his removal.<sup>117</sup> This instigated the case and the HRC ruled that reparation be arranged 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>118</sup> One assumes that 'such steps' would include the granting of refugee status. In light of such cases, the obligations of the Refugee Convention are re-engaged, despite refugee status initially being denied in by the host state.

Linked to the point of the re-engagement of the Refugee Convention 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>119</sup>

---

<sup>115</sup> *Ibid* 102.

<sup>116</sup> As per the Vienna Convention (n 109 above).

<sup>117</sup> *Mansour Ahani v. Canada*, CCPR/C/80/D/1051/2002, UN Human Rights Committee (HRC), 15 June 2004, 6.1.

<sup>118</sup> *Ibid.* 12.

<sup>119</sup> Amnesty International (2009) *Eritrea: Sent Home to Detention and Torture*, Amnesty International Publications, London, 4.

These points serve to illustrate the fact that Refugee Convention obligations that can be re-evoked, after removal. The monitoring network would seek to instigate this and would follow Wouter's recommendation above that Article 33 of the Refugee Convention should be more closely monitored. The information generated by the monitoring network could provide evidence in post-removal legal cases. If *refoulement* is proved in such cases, the State will be obliged to adhere accordingly through protection of the applicant,<sup>120</sup> and to improve future adherence to this legal obligation.

*(b) CAT and ICCPR*

The ICCPR and CAT create explicit post-return State obligations, in that their provisions for redress cover those individuals who have been removed from the host state. 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, which Wouters interprets to include victims of torture on removal to another State.<sup>121</sup>

Article 2(3) of the ICCPR reads:

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.<sup>122</sup>

Article 14 of CAT reads:

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate

---

<sup>120</sup> As seen in the case of *Ahani* (n 117 above), for example.

<sup>121</sup> Wouters (n 17 above) 513.

<sup>122</sup> ICCPR (n 43 above) Art. 2(3).

compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.<sup>123</sup>

ComAT stresses that a State's obligation to prevent acts of torture is 'wide-ranging' and the Wouters confirms that the HRC has on several occasions concluded that, should a State commit *refoulement*, that State should make appropriate compensation and guarantees of non-repetition.<sup>124</sup> Indeed, ComAT stress in a General Comment that the 'comprehensive reparative concept...entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition and refers to the full scope of measures required to redress violations under the Convention [Against Torture].'<sup>125</sup> ComAT goes on to demand that 'States parties should undertake measures to combat impunity for violations of the Convention', and ensure guarantees of non-repetition.<sup>126</sup> Ensuring compliance with Article 3 of the Convention prohibiting *refoulement*' is noted as one such measure.<sup>127</sup> For example, the Court found this in the case of *Ahani v Canada*.<sup>128</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>129</sup> ComAT questioned 'whether *refoulement* of the complainant to another State violated France's obligations under the Convention [Against Torture]; in other words whether, when the French authorities decided to enforce the deportation order they could reasonably think, in the light of the information available to them, that Mr. Brada would be exposed to substantial danger if sent home'.<sup>130</sup>

---

<sup>123</sup> CAT (n 44 above) Art. 14.

<sup>124</sup> Wouters (n 17 above) 409.

<sup>125</sup> ComAT *General Comment No. 3 of the Committee against Torture: Implementation of article 14 by States parties* (2012) CAT/C/GC/3, para. 2.

<sup>126</sup> *Ibid.* para. 18.

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

<sup>128</sup> *Ahani v Canada* (n 117 above).

<sup>129</sup> *Mafhoud Brada v. France*, CAT/C/34/D/195/2002, UN Committee Against Torture (CAT), 24 May 2005 para.15.

<sup>130</sup> *Ibid.* para. 11.1.

ComAT found that the conditions the appellant were returned to were in breach of Article 3 of CAT.<sup>131</sup> (Furthermore, the appellant had lodged an appeal and ComAT had demanded France halt the removal in the interim until their decision.<sup>132</sup>) demanded that they be informed of his whereabouts and that he be adequately compensated.<sup>133</sup> Thus, the provisions and obligations under CAT and ICCPR can be invoked post-removal. It must, however, be kept in mind that ComAT decisions are not legally binding on States, but offer legal guidance and recommendations. Indeed, ComAT can ‘submit observations’<sup>134</sup> to State Parties which, although non-binding, are considered authoritative interpretations of international law.<sup>135</sup>

### 3.4 Conclusions: State’s responsibilities regarding refoulement

In conclusion, one can see that the type and level of persecution addressed by ICCPR and CAT is much wider than that of the Conventions.

According to the *Sivakurmaran* judgement, the ‘kernel’ of the appeal was the question, ‘is there a risk that the persecution will be for a Convention reason?’<sup>136</sup> This clarifies the type of persecution that needs to be proved to engage a state in *non-refoulement* obligations under the Convention. In short, such persecution must be on Convention grounds. As this paper explored, definitions of persecution under ICCPR and CAT are much wider and do not require persecution on particular grounds. Signatory States bound to the Refugee Convention, ICCPR and CAT are obliged to the coexisting obligations surrounding *non-refoulement*. As this thesis has explored, the resulting obligations on States are wide, encompassing a generous definition of what constitutes *refoulement*.

---

<sup>131</sup> *Ibid.* para. 13.6.

<sup>132</sup> *Ibid.* Para. 13.3.

<sup>133</sup> *Ibid.*

<sup>134</sup> CAT (n 44 above) Art.20.

<sup>135</sup> C Hall ‘The duty of States Parties to the Convention against Torture to provide procedures permitting victims to recover reparations for torture committed abroad’ *European Journal of International Law* 18, 5, 921.

<sup>136</sup> *Sivakumaran* (n 83 above) 3.

## 4. Why a monitoring network is required

This section seeks to set out the main reasons behind the need for a monitoring system.

A failed asylum seeker who is returned to his or her country of origin is likely to encounter security agents upon their arrival. Depending on the country, security checks might be undertaken. In some states, automatic detention and interrogation face all failed asylum seekers. A returnee might face torture, indefinite detention, or be 'disappeared'.

The reality that faces returnees will be examined more closely in this section through two case studies. Firstly, Congo DRC serves as an example of a state to which many failed asylum seekers are sent. Research on the fate of such returnees, from what information is available, exemplifies the need for a monitoring network in such countries. The research also indicates the gaps of knowledge and clarity surrounding returnees' fate. The second case study is of a failed asylum seeker who underwent a removal. Both case studies are anecdotal, but this provides contextual and 'real-life' information, thus enhancing the concept of a monitoring network.

This section of the paper will then study the ongoing phenomena that contribute to the need of a monitoring network. The concept and practise of deportation and removals is studied before the occurrences of increasing removals, accelerated RSD and the designation of 'safe countries' are examined, amongst others, as contributing to the call for a monitoring network.

### 4.1 *Deportation and removals*

Deportation and the removal of 'unwanted migrants',<sup>138</sup> according to Gibney, 'has been considered a secondary instrument of migration control...resorted

---

<sup>138</sup> Deportation is associated more with the removal of foreigners who have committed crimes. However academics often include the removal of failed asylum seekers within this category. Although this thesis, as above mentioned, concentrates on removals (of failed

to relatively rarely and with a degree of trepidation'.<sup>139</sup> It is what he describes as a 'cruel power' that uproots individuals and disbands families and communities.<sup>140</sup> Indeed, considering that there exists a large gap, in liberal states, between the number of people who are theoretically 'deportable' and the number of people who are actually deported, removals can be seen as very much a symbolic power rather than one of practical value in terms of controlling migration.<sup>141</sup> Despite States being bound to several international legal obligations regarding human rights, as explored above, deportations and removals are rising – and within this rise, a higher occurrence of *refoulement* is highly likely. Hollifield finds the opening of international economies and the tightening of immigration controls (with the rise in deportations) contradictory.<sup>142</sup> Gibney adds that a rise in States' use of deportations reflects 'a new willingness and ability on the part of states to treat non-citizens in illiberal ways'.<sup>143</sup> Although some States have compiled COI that can be used for RSD procedures and deportation cases,<sup>144</sup> there is no State-run monitoring institution for those failed asylum seekers that have been removed.

#### 4.2 Case study I: receiving state – Congo DRC

This section focuses on Congo DRC as a case-study, exemplifying the fate some returnees face. It is within such contexts that a monitoring network can be imagined.

The case of Congo DRC is particularly relevant to the proposal of a monitoring network. The country is plagued by conflict and thousands of people seek

---

asylum seekers), this section will consider deportations in their relevance to the removal of failed asylum seekers.

<sup>139</sup> M Gibney 'Asylum and the expansion of deportation in the United Kingdom' (2008) 43,2 *Government and Opposition*, 147.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.* 148.

<sup>142</sup> J Hollifield 'The emerging migration state' *International Migration Review* (2006) 38, 3, 886.

<sup>143</sup> Gibney (n 139 above) 167.

<sup>144</sup> For example, the UK Border Agency *Country of Origin Information Service*, available at <http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/coi/>. Accessed 30 November 2012., or the Immigration and Refugee Board of Canada *Research Program*, available at <http://www.irb-cisr.gc.ca/Eng/resrec/respro/Pages/index.aspx>. Date accessed 30 November 2012.

asylum from Congo DRC every year. States including the UK and South Africa regularly return failed asylum seekers to Congo DRC, and journalists and academics have voiced concern over this, especially concerning returning people to Congo DRC after the 2011 election.

### Procedures facing returnees in Congo DRC

The procedure facing returnees in Congo DRC, without a monitoring network in place, can only be discerned from existing reports and interviews. It seems, in theory, most returnees face a reasonably standard procedure upon disembarkation in Congo DRC, which has been corroborated by several sources, both in news articles<sup>145</sup> and in COI.<sup>146</sup> On their arrival to N'Djili Airport, returnees will be screened and interrogated by Direction Générale des Migrations ('DGM') officials. If they are found to be on a 'wanted' list, they will be transferred to prison or a detention centre.<sup>147</sup> Depending on their perceived danger to the Congolese state, these detainees will face interrogation, torture, prolonged detention or disappearance. Some are able to bribe their way out.<sup>148</sup>

In reality, this procedure is applied inconsistently: *Unsafe Return* reports that some returnees were handed to Congolese immigration officers, whilst others were handed to Congolese police.<sup>149</sup> It has emerged that, during recent returns to Lubumbashi, Congolese officials transferred returnees directly to prisons or screened them at the prison itself.<sup>150</sup> Some returnees do not face difficulty in the airport itself but rather are subject to the state security afterwards,<sup>151</sup> which a particularly efficient force in targeting potential

---

<sup>145</sup> J Cuffe 'Asylum questions for Congo DRC' *BBC News* (1 December 2005), for example.

<sup>146</sup> Ramos (n 5 above) and Refugee Documentation Centre of Ireland *Information regarding the dangers for failed asylum seekers returning to the DRC* (2010).

<sup>147</sup> UK Border Agency *The Democratic Republic of Congo: Country of Origin Information Report* (2012) 185. Ramos (n 5 above) 18, Cuffe (n 145 above).

<sup>148</sup> Cuffe (n 145 above).

<sup>149</sup> Ramos (n5 above) 19.

<sup>150</sup> Thierry Vircoloun, personal correspondence, 27 March 12. Vircoloun is an expert on the Congo DRC, having worked for the French Foreign Ministry and the European Commission in the DRC. He is also part of the OECD group of experts on state-building and peace-building.

<sup>151</sup> Ramos (n 5 above) 20

opponents is<sup>152</sup> and which has a 'very good and wide network throughout the country'.<sup>153</sup> With regards to surveillance of opponents, the state is 'extremely efficient'.<sup>154</sup> Trefon confirmed the state security's bugging of SIM cards as an acknowledged form of surveillance, which was corroborated by *Unsafe Return*.<sup>155</sup> A 2008 report by Human Rights Watch further confirms government agents' use of text messages, anonymous calls and night visits as methods of intimidation.<sup>156</sup>

The fact that returned asylum seekers are, simply for having applied for asylum in another state, considered political threats in DRC is corroborated by various other sources.<sup>157</sup> The *Evening Gazette* reported on a returnee who 'was told he was arrested because he was from the UK, against the regime and had to be punished'.<sup>158</sup> Dianne Taylor, in her article for the UK-based *Guardian* refers to the presidential candidate Marie Thérèse Nlandu, who had herself been imprisoned in the DRC.<sup>159</sup> In 2007, she made a speech at the All Party Parliamentary Group at Great Lakes, explaining that Congolese abroad (in this case, Britain) are viewed as traitors.<sup>160</sup> The Congolese media also plays into the imputed political opinions of returnees. Vircoloun described how 'expulsions have been described by the state media as politically motivated'.<sup>161</sup> The national television broadcaster, Radio Télévision Nationale Congolaise ('RTNC'), portrayed the return of Congolese deportees from South

---

<sup>152</sup> Theodore Trefon, personal correspondence, 10 March 2012. Trefon is a Congolese affairs analyst for the BBC and author of the recent book *Congo Masquerade*. He is senior researcher at the Royal Museum for Central Africa. Human Rights Watch (HRW), *We Will Crush You: The Restriction of Political Space in the Democratic Republic of Congo* (2008), 1-56432-405-2.

<sup>153</sup> C Querton and S Huber *Comments on the Operational Guidance Note on Democratic Republic of Congo prepared for Still Human Still Here* (2008) 38.

<sup>154</sup> *Ibid.*

<sup>155</sup> Ramos (n 5 above) 13.

<sup>156</sup> HRW (n 152 above) 5.

<sup>157</sup> D Taylor 'Britain sending refused Congo asylum seekers back to threat of torture' *The Guardian*, 27 May 2009, Querton (n13 above) 8, J Desira 'Campaigners claim asylum seeker is beaten on Congo return' *Evening Gazette*, 8 June 2009, D Taylor, 'Torture fate 'awaits UK deportees' *The Observer*, 16 September 2007.

<sup>158</sup> Desira (n 157 above).

<sup>159</sup> Taylor (n 157 above).

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

<sup>161</sup> Vircoloun (n 150 above) personal correspondence, 26 April 2012.

Africa in early March as 'combatants'.<sup>162</sup> Segatti,<sup>163</sup> writing from Kinshasa, confirmed that such broadcasts are reinforcing the idea that Combatants are thugs that ought to be eradicated (terms used in that video).<sup>164</sup> These terms used to describe Congolese failed asylum seekers put them at further risk of being targeted by the Congolese State and, perhaps, Congolese society.

### Existing Reports on Returnees in DRC

Several reports have sought to follow Congolese returnees. The most prominent report is *Unsafe Return*, compiled by the UK-based NGO Justice First, which has received attention both within media and judicial spheres.<sup>165</sup> The UK Country of Origin Information Service (COIS), which published their latest report on Congo DRC in March 2012, quotes *Unsafe Return* at length. COIS is used in RSD procedures and in subsequent court cases, and therefore has been accepted as legally admissible evidence.<sup>166</sup>

The report found that 13 out of 24 Congolese returnees were 'subject to some degree of interrogation, arrest, imprisonment, verbal, physical and sexual abuse, rape and torture';<sup>167</sup> six out of nine deported children were also imprisoned.<sup>168</sup> Three of these children required medical treatment following their imprisonment.<sup>169</sup> Seven out of ten Justice First clients who had been returned were imprisoned without access to a lawyer. Two out of the five women interviewed were raped on their return.<sup>170</sup>

Several journalists have also sought to research the fate of Congolese returnees. Jenny Cuffe, writing for the BBC, reports on returnees facing torture and detention in jail. Her interview with the National Intelligence

---

<sup>162</sup> This was highlighted by Ms. Aurelia Segatti, Senior Research Fellow African Centre for Migration and Society University of the Witwatersrand. The broadcast can be viewed at: [http://www.youtube.com/watch?v=x-tlCtqwI04&feature=player\\_embedded](http://www.youtube.com/watch?v=x-tlCtqwI04&feature=player_embedded)

<sup>163</sup> A Segatti, personal correspondence, 12 May 2012 (see n 162 above).

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

<sup>165</sup> N Tolsi 'South Africa ignores deportee torture claims' *Mail and Guardian* (9 March 2012) and Taylor (n157 above).

<sup>166</sup> Ramos (n 5 above) 11.

<sup>167</sup> *Ibid.* 16.

<sup>168</sup> *Ibid.* 15.

<sup>169</sup> *Ibid.* 21.

<sup>170</sup> *Ibid.* 19.

Official (of the 'ANR', or Congolese secret police) exposes how 'political dissidents, people who leave the country and go to say bad things about the government' face detention. When asked what would happen to them, the ANR official only answers, 'everything'.<sup>171</sup> Cuffe contacted Celestin Nikiana, a human rights lawyer in the DRC, who had found returnees in Kin Mazière – an infamous prison in Kinshasa – who had 'been there for more than five years without charge'.<sup>172</sup> The US Department of State 2010 human rights report on Congo DRC found that prison conditions in the country 'remained severe and life-threatening'.<sup>173</sup>

Dianne Taylor, reporting for *The Guardian* (UK), exposes the torture faced by two returnees, who were detained in Kin Mazière prison. This included beating, burning and forced sexual acts. Furthermore, her report found 'entries in the Kin Mazière log book, leaked to the Guardian, [which] confirm the men's [returnees'] detention there'<sup>174</sup>.

Niren Tolsi, writing for *The Mail and Guardian* (South Africa) reports that, of a South African deportation to DRC in February 2012, 46 out of 52 returnees were detained at Kasapa prison. Here, they were 'deprived of food and water, threatened, beaten and interrogated about their political affiliations'.<sup>175</sup>

However, quite opposed to *Unsafe Return* and other mentioned reports, a 2006 UNHCR report found that Congolese returnees they faced no real harm on return.<sup>176</sup> The report refers to the International Organisation for Migration's office in Kinshasa, who claimed to have no information regarding the mistreatment of returnees,<sup>177</sup> although it acknowledged conditions in detention centres (to which returnees are transferred) as

---

<sup>171</sup> Cuffe (n 145 above).

<sup>172</sup> Cuffe (n 145 above).

<sup>173</sup> US Department of State *2010 human rights report: Democratic Republic of the Congo* (2011) 10.

<sup>174</sup> Taylor (n 157 above).

<sup>175</sup> Tolsi (n 165 above).

<sup>176</sup> UNHCR *Response to Information Request – DRC: Treatment of rejected asylum seekers* (2006) 1.

<sup>177</sup> *Ibid.* 2.

'dire'.<sup>178</sup> L'Association Africaine de Défense des Droits de l'Homme<sup>179</sup> (ASADOH) and Voix Sans Voix<sup>180</sup> (VSV), two NGOs working in Congo DRC, feature in the UNHCR report as recording no mistreatment of refused asylum seekers.<sup>181</sup>

However, recent contact with the abovementioned organisation provides conflicting information. The ASADOH Katanga president confirms his belief that returnees are being detained in prisons and disappearances being commonplace.<sup>182</sup> The VSV was recently found to no longer have offices at N'Dijili airport due to restricted resources, thus their ability to comment on the treatment of returnees is somewhat affected.<sup>183</sup> The suspicious death of Floribert Chebeya, VSV president, in 2010, has led many returnees to fear being involved with, or revealing information about, the VSV.<sup>184</sup> In a phone interview in 2010, Mr Chebeya stated that returnees were imprisoned.<sup>185</sup> This is contrary to VSV's position in the UK Country of Origin Information report. Furthermore, information from VSV regarding returnees has been used in 2012 COI reports, despite their offices at the airport being closed since 2010.<sup>186</sup>

The ASADHO president further confirmed that there have been several arrests of Congolese returnees from South Africa. There were 45 returnees who landed at the Loano airport in Lubumbashi in early 2012. They were taken directly to the Kasapa prison.<sup>187</sup>

Comité des Observateurs des droits de l'Homme (CODHO) found, in February 2011, that returnees' fates are at the discretion of the DGM official. If a returnee presents a 'problem', in that they are known for their position against the state, they will be 'exposed to ill-treatments when arriving in Ndjili

---

<sup>178</sup> *Ibid.* 2.

<sup>179</sup> L'Association africaine de Défense des droits de l'Homme is a human rights organisation working in Congo DRC. <http://asadho-rdc.net>.

<sup>180</sup> Voix Sans Voix is a human rights organisation working in Congo DRC. [www.vsv-rdc.com](http://www.vsv-rdc.com).

<sup>181</sup> UNHCR Response to Information Request (n 176 above) and UKBA (n 147 above).

<sup>182</sup> ASADOH (n 179 above) personal correspondence, 17 April 2012.

<sup>183</sup> Ramos (n 5 above) 31.

<sup>184</sup> *Ibid.* 34, 15 and 31.

<sup>185</sup> *Ibid.* 31.

<sup>186</sup> Ramos (n5 above) personal correspondence, 17 May 2012.

<sup>187</sup> ASADOH (n 179 above) personal correspondence, 2 March 2012.

[airport]'.<sup>188</sup> Make clear how this treatment of returnees would violate the legal non-refoulement obligations laid out above.

The worrying differences in evidence regarding Congolese returnees is of deep concern. It is especially important that the monitoring network should be made up of several organisations in order to allow the corroboration of information. The fact that the UNHCR have a very different opinion to several other sources is something that should be addressed through a monitoring network. (This is addressed in more depth in the section, below, 'Existing COI'.)

Furthermore it is interesting to note the resourcefulness which both journalists and Justice First deployed in gathering their evidence. Whereas the UNHCR report gathered information from other organisations such as the IOM and VSV, further research indicates that such organisations may not be so reliable. The evidence gathered by the journalists and Justice First paints a worrying picture.

#### *4.3 Case study II – the returned failed asylum seeker*

Examples of the fate of returned failed asylum seekers are plentiful, but anecdotal. Although the case studies are indicative of the situation facing returnees, their anecdotal nature restricts the legal implications of such situations. A fully functioning monitoring network would be able to collect the data of many such individuals, thus lending weight to otherwise anecdotal examples. The collection of a large amount of this data would, if it adhered to official COI guidelines, be legally admissible. The legal admissibility of information gathered by the monitoring network is discussed in greater depth at Section

The following case study comes from the Fahamu Refugee Programme:

---

<sup>188</sup> UKBA (n 147 above) 186.

In 2006, a Sudanese refugee reported what happened to him after being deported. This Sudanese had spent eight years in the Netherlands. His claim to asylum had been rejected but he was allowed to stay in the Netherlands and work. When the Dutch government decided to deport large numbers of failed asylum seekers, he was arrested and, accompanied by three policemen, deported to Sudan. At the Khartoum airport he was handed over to Sudanese state security, who tortured and imprisoned him. It took nearly a year for his family to find him, bribe the prison officials and secure him a new identity and passport in order for him to escape to Egypt. This was necessary because he was still in fear of persecution from the Sudanese state. As he put it, 'I am 34 years old and all I want is to be safe'.<sup>189</sup>

Such case studies remain anecdotal and, between the NGOs and refugee organisations working across the world, such cases are not wholly unusual. Such an individual would, if the monitoring network was fully functional, be monitored upon his return.

#### *4.4 States' conduct: why a monitoring network is required*

##### (a) Failed asylum seekers as 'treasonous'

As the DRC example proves above, a major factor contributing to the need of a monitoring network is the fact that returnees face charges of treason upon their return. Several states view the very act of applying for asylum in another state as treason, and punish it as such. An Amnesty International report on Eritrea found that 'under torture, or threat of torture, returnees have been forced to state that they have committed treason by falsely claiming persecution in asylum applications. Leaving the country is itself considered by the authorities as an act of treason'.<sup>190</sup> In other states, simply crossing the borders of other states is an act of treason; in Sudan, visiting Israel is viewed as treason, 'a crime punishable by long-term imprisonment or death'.<sup>191</sup> Such treatment is in violation of the provisions of CAT. The noted torture of Eritrea would be in violation of CAT, Article 2. Prison conditions in Sudan are, according to the US State Department Human Rights Report, 'harsh and

---

<sup>189</sup> Interview and article drafting with Barbara Harrell-Bond, Director of FRP (July 2012).

<sup>190</sup> Amnesty International (2009) *Eritrea: Sent Home to Detention and Torture*, Amnesty International Publications, London.

<sup>191</sup> US Committee for Refugees and Immigrants (2009) *World Refugee Survey 2009: Egypt*.

overcrowded', where healthcare and food are scarce and 'sanitary and medical facilities [are] uniformly inadequate.'<sup>192</sup> Many prisoners were found to be permanently shackled around trees outside.<sup>193</sup> Such conditions do not fulfil the UN Standard Minimum Rules for the Treatment of Prisoners,<sup>194</sup> and such conditions could be claimed to violate basic human rights including the CAT provision against 'cruel, inhuman or degrading treatment'.<sup>195</sup> Last, the abovementioned punishment of death violates the ICCPR right to life.<sup>196</sup>

Such evidence should be taken into consideration by States that intend to deport asylum seekers from these States. The accusations made against failed asylum seekers on their return indicates the further need to monitor returned failed asylum seekers, as their wellbeing is endangered upon return. If such evidence is gathered by the monitoring network, and used in legal cases against removing states, one hopes that state policies would alter to avoid such situations as outlined above, and to ensure their better adherence to legal obligations of *non-refoulement*.

#### (b) Rise in Deportations

There has been a marked rise in the use of deportations as a method of immigration control.<sup>197</sup> Gibney refers to this as the 'deportation turn'.<sup>198</sup> This rise unavoidably results in more failed asylum seekers, and more individuals with refugee claims, being returned. Indeed, Hathaway claims that, through this, the principle of *non-refoulement* has been 'undeniably under increasing attack in state practise'.<sup>199</sup>

This rise in deportations is largely due to the politicisation of the removal system. Indeed, Tony Blair is quoted as celebrating his 'government's achievement' in dramatically increasing deportations as part of a campaign to

---

<sup>192</sup> US Department of State *2010 Human Rights Report: Sudan* (2010).

<sup>193</sup> *Ibid.*

<sup>194</sup> United Nations, *Standard Minimum Rules for the Treatment of Prisoners* (1955). This sets out the basic treatment of those in prison, including spacing, feeding and healthcare standards among others.

<sup>195</sup> CAT (n 44 above) Art. 16.

<sup>196</sup> ICCPR (n 43 above) Art. 6(1).

<sup>197</sup> Gibney (n 139 above) 146.

<sup>198</sup> *Ibid.* 146.

<sup>199</sup> Hathaway (n 8 above) 5.

'prevent fraudulent asylum seekers misusing the asylum route to gain entrance to the British labour market'.<sup>200</sup> The European Council on Refugees and Exiles (ECRE) also comments that 'European governments have used return as a tool to gain political advantage by appearing tough on asylum at the expense of fairness and efficiency'.<sup>201</sup> Such politicisation in removing individuals risks a hasty, inadequate removal procedure, as the system is geared towards reaching targets (as seen in the US, for example)<sup>202</sup> rather than removing individuals whose refugee claims have been thoroughly analysed before being refused.

It is inevitable that a rise in removals of any kind results in a rise in the return of failed asylum seekers, thus heightening the need of their monitoring. The monitoring network would gather information indicating in which areas returnees are facing human rights abuses on return. Such information can be used in legal cases or used as a political lobbying tool to bring about change in the deportation systems, ensuring better screening of those facing deportation and removal.

### (c) Inadequate RSD Procedures & 'Safe Countries'

Hathaway refers to a 'less direct form' of *refoulement*, which is 'namely by application of an excessively restrictive interpretation of the Convention definition, leading to the rejection of genuine refugees who may face persecution on their return'.<sup>203</sup> The UNHCR has also expressed its concern at 'accelerated' RSD procedures and 'manifestly-unfounded claims' where appeal rights are limited.<sup>204</sup> Under-resourced or overly-strict asylum systems have

---

<sup>200</sup> Gibney (n 139 above) 146.

<sup>201</sup> European Council on Refugees and Exiles (ECRE) *The Return of Asylum Seekers whose Applications have been Rejected in Europe* (2005) 5.

<sup>202</sup> Merco Press South Atlantic News Agency 'US immigration target for 2011: 404.000 deportations, includes screening jails' (2 January 2011) Available at <http://en.mercopress.com/2011/01/02/us-immigration-target-for-2011-404.000-deportations-includes-screening-jails>. Accessed 6 December 2012.

<sup>203</sup> Hathaway (n 8 above) 7.

<sup>204</sup> UN High Commissioner for Refugees, *Country of Origin Information: Towards Enhanced International Cooperation*, February 2004, 21.

permitted further *refoulement*.<sup>205</sup> A similar phenomenon exists in States designating certain countries of origin as 'safe'. This results in more people with genuine asylum claims facing return.<sup>206</sup> Designation of 'safe countries' in the UK, includes Ghana, Nigeria, Ecuador and Albania. Asylum applicants from these countries face a different asylum procedure (Detained Fast Track, or DFT) and lessened appeal rights.<sup>207</sup> DFT is an accelerated asylum procedure applied to those whose cases, according to the UK Border Agency, can be decided 'quickly'. The asylum applicant is detained for the whole process, and most detainees 'only have an opportunity to consult their duty solicitor in a short conversation over the phone'<sup>208</sup>.

The designation of 'safe countries' is particularly relevant to the monitoring network, as evidence generated by the network might prove on-going human rights abuses to returnees. Indeed, the UNHCR records that 20, 361 individuals, originating from Ghana (a 'safe country'), are recognised refugees.<sup>209</sup> Evidence regarding the treatment of returnees to 'safe countries' could be used, through legal avenues, to better improve the UK's policy of designating safe zones, which inevitably allow the

The above mentioned factors contributing to a rise in deportations outline an international system of removal within which genuine refugees face a rising risk of return. Indeed, as ECRE's paper points out, using return 'as a tool to gain political advantage [and] appearing tough on asylum [is] at the expense of fairness and efficiency.'<sup>210</sup> As such, the need for a monitoring system is further highlighted. However, this needs to be in tandem with the improvement of RSD procedures and the implementation of rights to appeal and fair trials.

#### (d) Alternative programmes encouraging return

---

<sup>205</sup> Hathaway (n 8 above) 7 and 8.

<sup>206</sup> *Ibid.* 160.

<sup>207</sup> Gibney (n 139 above) 160.

<sup>208</sup> Human Rights Watch *Fast-Tracked Unfairness* (2010).

<sup>209</sup> UNHCR *Regional operational profiles – West Africa – Ghana* (2012). Available at <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=4a03e2f76&submit=GO>. Accessed 2 Jan 2013.

<sup>210</sup> ECRE (n 201 above) 2.

Voluntary Returns Programmes, carried out by IOM, UNHCR and several implementing partners, offer reintegration support for those migrants and asylum seekers who chose to return to their country of origin. The offer of return is made 'tempting'<sup>211</sup> and reports have found that many of these returns are far from 'voluntary'.<sup>212</sup> Rather, a situation is created whereby return is their only choice. Denial of benefits and removal of accommodation are measures that the Home Office use to persuade refused asylum seekers to apply for 'voluntary' return. Far from a 'voluntary' return, such measures force failed asylum seekers to 'accept the option because they do not have any other choice'.<sup>213</sup> Indeed, the Institute for Race Relations reports that, of twenty-nine Sri Lankans who opted for Voluntary Return, 'nearly all twenty-nine Tamils...suffered racial harassment from police or other officials since their return, and four had suffered serious human rights abuses'.<sup>214</sup> States' use of Assisted Voluntary Return Programmes, and its misuse (as above noted) resulting in individuals being returned, sometimes coercively, to dangerous situations, is another factor in modern State practise that highlights the need for these returnees' monitoring.

#### (e) Securitisation of asylum

In the climate of global terrorism, the securitisation of asylum and the ensuring rise in removals in the name of 'national security' has permitted states' wider abilities in returning failed asylum seekers. This is what Hathaway has called a 'zealous exploitation of national security exemptions' which can result in *refoulement*.<sup>215</sup> This rise is dangerous in that those with genuine refugee claims are more likely to be caught up in such scenarios and returned to their country of origin.

---

<sup>211</sup> Gibney (n 139 above) 166.

<sup>212</sup> F Webber 'The politics of voluntary returns' Institute for Race Relations (IRR) (11 November 2011) and Independent Asylum Commission *Fit for purpose yet? The Independent Asylum Commission's interim findings* (2008) 104.

<sup>213</sup> ECRE (n 201 above) and Independent Asylum Commission, *ibid*.

<sup>214</sup> Webber (n 212 above).

<sup>215</sup> Hathaway (n 1995 above) 18.

For example, explicitly in light of the London terrorist attacks in 2005,<sup>216</sup> the UK published *Exclusion of Individuals from the United Kingdom for Engaging in Unacceptable Behaviour*.<sup>217</sup> After acknowledging that non-nationals can be excluded from the UK on the grounds of public good, the document then lists the types of behaviour which would be regarded as unacceptable and which could constitute the grounds for their deportation. Such behaviour includes speaking or publishing of information with the intent to foment, glorify or encourage serious criminal activity or terrorist violence. Furthermore, this list is indicative, not exhaustive.<sup>218</sup>

In the US, 'Secure Communities' is a government initiative that allows local law enforcers to take fingerprints of those taken into custody and check their data against the Automated Biometric Identification System. When a match is detected, the Immigration and Customs Enforcement decides if they are deportable or not.<sup>219</sup> Critics claim that this policy results in the situation whereby 'individuals can be deported for shoplifting, jumping subway turnstiles, drunken driving and petty drug crimes'.<sup>220</sup> This process of arrest and removal is conducted whilst detainees are in custody, and access to legal assistance is reduced.<sup>221</sup> This policy has allegedly resulted in hundreds of Cambodian refugees being returned.<sup>222</sup> In South Africa, after recent anti-Kabila protests in Johannesburg were filmed, 150 Congolese participants were arrested. Tolsi reports that 'the arrests made came after the team's investigations which included examining footage of several incidents of this nature'.<sup>223</sup> Linked to the securitisation of removal and asylum is the

---

<sup>216</sup> *Ibid.* 1.

<sup>217</sup> United Kingdom Home Office *Exclusion of individuals from the United Kingdom for engaging in unacceptable behaviour* (2009).

<sup>218</sup> *Ibid.*

<sup>219</sup> Immigration Policy Centre *Secure Communities: A Factsheet* (2011).

<sup>220</sup> R Rosenbloom 'Senseless Deportations', *Washington Post*, 25 March 2008.

<sup>221</sup> Berkley Law School (A Kohli, P Markowitz and L Chavez) *Secure Communities by numbers: an analysis of demographics and due numbers* (2011) 5.

<sup>222</sup> Walter Leitner International Human Rights Clinic *Removing refugees: U.S. deportation policy and The Cambodian-American community* (2010) 4.

<sup>223</sup> N Tolsi 'Congolese nationals claim intimidation during raids' *Mail and Guardian*, 21 January 2012.

extrajudicial transfer of suspected terrorists to third States where they may be detained or interrogated ('extrajudicial rendition'). In terms of asylum cases, Ahmed Hasan Agiza and Muhammad Al-Zery exemplify how those with refugee claims can become caught up in extraordinary rendition and face *refoulement*. They both applied for asylum in 2001 in Sweden. The US requested extraordinary rendition and Sweden permitted their removal to Egypt where they were allegedly detained and tortured.<sup>224</sup> The monitoring network could seek to uncover such cases and use such information to prove that those refugees facing extrajudicial rendition are subject to *refoulement*. Such information could be used to rule on such cases and prevent *refoulement*.

Although expulsion is permitted on the grounds of national security, as per the Refugee Convention,<sup>225</sup> analysts and academics are concerned at States' increasingly liberal use of such provisions.<sup>226</sup> Courts have sought to limit such state practise in cases which involve appellants faced with removal under the expulsion clause. For example, the ECHR confirmed, in the case of *Maslov v Austria*, that the 'power of expulsion must be exercised in good faith' by States.<sup>227</sup> Other cases have sought to define further the strict grounds on which an individual can be removed under this clause.<sup>228</sup> A monitoring network could assist in gathering information regarding those removed under this clause. If *refoulement* was proved to have occurred, this would add weight to the Courts' ruling that States must exercise good faith in such cases in order to avoid *refoulement*.

#### (f) Mass expulsions resulting in failed asylum seekers being returned

<sup>224</sup> Human Rights Watch *Black Hole: The Fate of Islamists Rendered to Egypt* (2005) 30-33 and American Civil Liberties Union *Factsheet: Extraordinary Rendition* (2005).

<sup>225</sup> Refugee Convention (n 9 above) Art. 33.

<sup>226</sup> Berkley Law School (n 221 above), Rosenbloom (n 220 above), Hathaway (n 8 above).

<sup>227</sup> *Maslov v. Austria*, 1638/03, Council of Europe: European Court of Human Rights, 22 March 2007, para. 29.

<sup>228</sup> For example, the UK case of *SSHD v Rehman*, in which a Pakistani national was accused of being a member of a terrorist organisation. The judge demanded that the State must 'examine the case as a whole against an individual and then ask whether, on a global approach, that individual is a danger to national security', *Secretary for State for the Home Department v. Rehman* (2001) UKHL 47 (UK). The case of *RU v SSHD*, in which a Bangladeshi refugee was found to be complicit in a shooting was due to be deported, focused on the 'finely balanced assessment' that the State must exercise in exercising this clause. *RU (Bangladesh) v Secretary of State for the Home Department (SSHD)* (2011) EWCA Civ 651.

Mass expulsions of foreigners, including asylum seekers, is another form of removal that risks resulting in the return of genuine asylum seekers.

Hathaway makes a distinction between the cases of *refoulement* in developed and less-developed states in that restrictive asylum policies in some states cause *refoulement*, whilst mass expulsions often take place in less developed states.<sup>229</sup> He continues; ‘particularly in Africa, the expulsion of refugees is also linked to fear that their presence will embroil the host state in armed conflict, or retaliatory attack’.<sup>230</sup>

Such mass expulsions are, in some ways, easier to monitor, in that larger NGOs and human rights organisations are more able to document larger groups of returnees, and due to the number of people involved, such removals are likely to gain media attention.

#### (g) Lack of Existing Support for Returnees

In addition to the factors contributing to a need for a monitoring network is the fact that very few organisations exist that work with, or have within their remit, returnees. The lack of support that returnees face on return further calls for institutions to be involved in their monitoring and support.

As mentioned, organisations like IOM and Refugee Action monitor those who return with Voluntary Return Programmes, but returnees who have had their asylum claim refused find themselves with very little or no support on their return. The UNHCR monitors returnees but only within the remit of ‘durable solutions’ – such returnees would be those who have returned voluntarily or who are being supported in their reintegration by UNHCR programmes.<sup>232</sup> IOM has developed community-based monitoring systems to develop better understanding of situations facing returnees<sup>233</sup>.

---

<sup>229</sup> Hathaway (n 8 above) 7.

<sup>230</sup> Hathaway (n 23 above) 662.

<sup>232</sup> UNHCR *UNHCR Global Appeal 2007* (2007) 31.

<sup>233</sup> IOM *Revised Methodology for Return Monitoring Survey* (2008) Available at: <http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/countries/docs/timo>



a 'better understanding of the violations and difficulties faced by migrants and the needs of the organisations working with deportees'.<sup>242</sup>

The fact that there are few organisations offering support to returnees strengthens the call for a monitoring network, which would seek to bring together existing organisations and increase the capacities of other organisations working in Countries of Origin to monitor deportees. Furthermore, the monitoring network can gather, from these existing organisations, good practises and effective methods in their work with returnees.

#### *4.5 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 new abilities of tracking and researching the fate of returnees. Such developments hold promise for the prospect of a monitoring network.

*Unsafe Return*<sup>243</sup> was compiled following concerns by the authoring organisation, Justice First, that Congolese returnees had 'disappeared'. The author sought to contact returnees and travelled to the DRC to conduct research and interviews. The methodology is explained at length including the attempts to legally verify information gathered in the DRC.<sup>244</sup> This report has been used in cases both in the UK<sup>245</sup> and in appeals submitted recently in South Africa.<sup>246</sup> The report has been published as part of the UK Country of

---

<sup>242</sup> *Ibid.*

<sup>243</sup> Ramos (n 5 above).

<sup>244</sup> *Ibid.* 11-15.

<sup>245</sup> Email from Catherine Ramos to author (17 February 2012).

<sup>246</sup> Appeals recently filed by the LRC, drafted by author, February – June 2012.

Origin Information Service,<sup>247</sup> thus giving it the ‘seal of approval’ to be used in court and confirming the its legal admissibility.

*Deported to Danger* is a similar report: 40 returnee interviews took place in eleven countries.<sup>249</sup> The methodology used conformed to the criteria used by the Refugee Review Tribunal in assessing credibility.<sup>250</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>251</sup> David Corlett’s book *Following Them Home: The Fate of the Returned Asylum Seekers*<sup>252</sup> seeks to track several failed asylum seekers who were returned from Australia. Corlett, having completed his doctoral thesis on Australia’s response to asylum seekers, concluded that ‘what was missing was in-depth, informed research on the situation of those people who were being pressured to return from Australia and on the fate of those who had been returned’.<sup>253</sup>

There are many similar reports and newspaper articles that have followed returnees to their country of origin.<sup>254</sup> Organisations and blogs dedicated to this area have unearthed further information.<sup>255</sup> In April 2010, Anafé published a report documenting the experience of deported migrants, entitled ‘*On the Other Side of the Border: Monitoring of ‘Refouled’ People*’.<sup>256</sup> Many of those documented in the report had asylum claims. Although the report is

---

<sup>247</sup> United Kingdom COI (n 147 above).

<sup>249</sup> *Ibid.* 51.

<sup>250</sup> *Ibid.* 15.

<sup>251</sup> Sue Clayton *Hamdullah: The Road Home* (2011). Available at <http://www.hamedullahtheroadhome.com>. Accessed 20 May 2012.

<sup>252</sup> D Corlett *Following them home: the fate of the returned asylum seekers* (Black Inc., Melbourne, 2005).

<sup>253</sup> *Ibid.* 9.

<sup>254</sup> With regards to the Congo DRC, for example, the following articles are examples of a much wider body of literature: Cuffe (n 145 above) Tolsi (n 152 above) and Taylor (n 157 above).

<sup>255</sup> For example, The Association Nationale d’Assistance aux Frontières pour les Étrangers, *De l’autre côté de la frontière suivi des personnes refoulées* (2010), and the FRP Deportation News Website, which records returnees’ fates: <http://frlan.tumblr.com/post/22195766619/deportation-news>. Accessed 22 May 2012.

<sup>256</sup> Statewatch (n 238 above).

anecdotal in nature, it attempts to gather statistics<sup>257</sup> and points to wider abuses that exist for many returnees upon return.<sup>258</sup>

#### 4.6 Criticism of existing COI

UNHCR is, of course, a 'reputable source, if not the best available source...which must be given due weight'.<sup>259</sup> However, even reputable sources can come under criticism as has been noted in caselaw.<sup>260</sup> In their COI guidelines, the Country Guidance Working Group (COI-CG)<sup>261</sup> stresses that judges should know of such criticisms.<sup>262</sup> Whilst researching the treatment of Congolese returnees, <sup>263</sup> conflicting information arose. Personal communication with journalists and NGOs generated opposing information to that of the UNHCR.<sup>264</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>265</sup> through their direct generation of COI information.

## 5 The monitoring network: a proposal

In light of the above, this thesis 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.

---

<sup>257</sup> According to Anafé, in 2008, 60% of returned asylum seekers faced human rights abuses (Statewatch n 238 above).

<sup>258</sup> *Ibid.*

<sup>259</sup> *Katshingu v DHA* 2011 HC, case number 19726/2010 (unreported case) 5.

<sup>260</sup> *AH (Sudan) v. Secretary of State for the Home Department*, [2007] EWCA Civ 297, 4 April 2007, 14, for example.

<sup>261</sup> COI-CG 'Judicial criteria for assessing Country of Origin Information (COI): a checklist' *International Journal of Refugee Law*, 21(1), 2009.

<sup>262</sup> *Ibid.* 159.

<sup>263</sup> As part of specific research for the LRC.

<sup>264</sup> UNHCR *Response to Information Request – DRC: Treatment of rejected asylum seekers* (2006).

<sup>265</sup> Goodwin-Gill (n 2 above) 222.

FRP'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 deporting country when a failed asylum seeker is being deported to danger.<sup>266</sup>

As Matthews points out, a monitoring network would seek, overall, to 'take deportations out of their secrecy'<sup>267</sup> and to ensure State adherence to the principle of *non-refoulement*. 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 have instigated legal cases in the past.<sup>268</sup> Indeed, it was a newspaper report that instigated the case that suspended removals to Zimbabwe in 2007.<sup>269</sup> This indicated the potential of the legal admissibility of such information.<sup>270</sup>

As a result of the rising concern for returnees' wellbeing, several organisations and academics have recommended that a form of monitoring be established.<sup>271</sup> Indeed, drawing on the views of 74 NGOs, ECRE formulated a report regarding the voluntary repatriation and mandatory return of those with refugee or asylum seeking status, in which the establishment of a monitoring network is recommended.<sup>272</sup> ECRE advises that the UNHCR, embassies and NGOs monitor returnees in tandem, and share such

---

<sup>266</sup> FRP (n 4 above).

<sup>267</sup> Interview with Lisa Matthews, National Coalition for Anti-Deportation Campaigns Coordinator (Oxford, UK, 21 October 2011).

<sup>268</sup> In the mentioned case *Brada v France*, the disappearance of Mr Brada upon his removal was sufficient evidence to instigate the case (n73 above).

<sup>269</sup> *AA (Zimbabwe) v. Secretary of State for the Home Department*, [2007] EWCA Civ 149, 3.

<sup>270</sup> The legal admissibility of the information gathered by the monitoring network is discussed more fully in Section 5.1.

<sup>271</sup> Aside from academics such as Wouters, who recommends monitoring State's adherence to the Convention's Article 33 (n 17 above), organizations have also recommended a monitoring system. This includes the Fahamu Refugee Project, Justice First and the National Coalition of Anti-Deportation Campaigns (personal contact and correspondence) and Iyodu (n 1 above).

<sup>272</sup> European Council on Refugees and Exiles (ECRE) *Position on Return* (2003) 3.

information with each other and with host states.<sup>273</sup> The report recommends that 'NGOs should work co-operatively together to ensure that the wide range of skills and expertise required in this complex field are co-ordinated efficiently and to develop standards of good practice'.<sup>274</sup> Such monitoring procedures should establish complaints mechanisms, data collection mechanism for gathering statistics, and systems for returning information to the host country.<sup>275</sup>

ECRE's recommendation of a monitoring network is much wider than that of this paper: it suggests different organisations perform different tasks, including providing welfare, integration projects, family tracing and reunification, and so other such services.<sup>276</sup> Whilst such aspects of return should indeed be provided for, this paper concerns itself with the monitoring of the wellbeing of returnees. The author feels that offering welfare and other services within the monitoring network would put the network in danger of being over-burdened and would detract from the main aims of the network.

Thus, the aims of the monitoring network would fall into two main categories. On one hand, the information gathered from the monitoring network, in being relayed back to the host states, can assist in improving the quality of adherence to *non-refoulement* principles. This aspect of the network is also noted in ECRE's report.<sup>277</sup> This will be achieved through the instigation of legal cases, and depends on such the network's information being legally admissible. The monitoring network's research methods will therefore have to conform with COI standards in order to ensure its admissibility (see the following section). By contributing to existing COI, the monitoring network seeks to better inform the RSD procedures in place in host states, ensuring a fairer RSD system. This, one hopes, will result in those individuals requiring protection being granted it. The monitoring network, through bringing together organisations around the world and through collating information

---

<sup>273</sup> *Ibid.* 21.

<sup>274</sup> *Ibid.*

<sup>275</sup> *Ibid.*

<sup>276</sup> *Ibid.*

<sup>277</sup> *Ibid.*

regarding the fate of returnees, will form an international monitor of the deportation and returns system. This, one hopes, will put pressure on States to take further action in avoiding *refoulement*.

Secondly, and more immediately, the monitoring network will seek to protect and monitor those who are returned to their countries of origin. Organisations, refugee community groups, churches, NGOs and other members of the monitoring network will, if the returnee so wishes, be alerted to their return. The presence of an organisation representative at the airport can assist in ensuring the returnees' safety, avoiding detention, and can, assist the returnees' reintegration to their host state, through the organisation itself or by referring them to other relevant local organisations. If the returnee is detained upon arrival, the representative is, at least, aware of the detention. Those involved in the monitoring network will be informed and the relevant organisation in the host state may instigate a legal enquiry into the case.

#### *5.1 The monitoring network's adherence to existing COI guidelines & the legal admissibility of the monitoring network's information.*

This section seeks to analyse the ways in which the information gathered by the monitoring network can adhere to existing COI Guidelines. This analysis therefore seeks to understand the legal admissibility of the information gathered by the monitoring network.

Firstly, both the asylum claimant and the State must use,<sup>279</sup> and be able to access,<sup>280</sup> objective COI in deciding upon, or defending, asylum claims. Guidance in the production and use of COI can be garnered from sources such

---

<sup>279</sup> UNHCR Handbook (n 58 above) para.42.

<sup>280</sup> UNHCR Executive Committee (EXCOM) *Conclusion No. 71 (XLIV)* (1993) para. ff.

as UNHCR,<sup>281</sup> ACCORD<sup>282</sup> and the International Association of Refugee Law Judges (IARLJ).<sup>283</sup> Furthermore, academics have approached the topic.<sup>284</sup>

The COI-CG sets out nine criteria which COI must adhere to in order to be legally admissible. ACCORD corroborates such guidelines<sup>285</sup> as does the Immigration Advisory Service.<sup>286</sup>

Firstly, COI must be directly relevant to the facts of the asylum case<sup>287</sup> and relevant issues must be adequately covered.<sup>288</sup> The UNHCR confirms that COI must be both case and country specific.<sup>289</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>290</sup>

Secondly, COI must be temporally relevant. Most UNHCR and State generated COI are produced annually or bi-annually.<sup>291</sup> Also, COI should be based on publically available and accessible sources.<sup>292</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 FRP, may suffice.

---

<sup>281</sup> UNHCR *Country of Origin Information: Towards Enhanced International Cooperation* (2004).

<sup>282</sup> ACCORD (n 62 above).

<sup>283</sup> COI-CG (n 261 above).

<sup>284</sup> E Mason 'Update to guide to country research for Refugee Status Determination', *LLRX* (2002), for example.

<sup>285</sup> ACCORD (n 62 above). ACCORD guidelines to COI are – relevance, transparency, reliability and balance, accuracy and currency.

<sup>286</sup> Immigration Advisory Service (IAS), *The use of Country of Origin Information in Refugee Status Determination: critical perspectives* (2009).

<sup>287</sup> COI-CG (n 261 above) 155.

<sup>288</sup> *Ibid.*

<sup>289</sup> UNHCR (n 281 above) 3.

<sup>290</sup> UNHCR Handbook (n 58 above) para.43.

<sup>291</sup> COI-CG (n 261 above) 156.

<sup>292</sup> *Ibid.* 160.

The COI-CG Guidelines further suggest that COI material must be satisfactorily sourced: corroboration, multi-sourced reports with accessible sources are recommended.<sup>293</sup> Furthermore, COI should be prepared using sound methodology.<sup>294</sup> 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>295</sup> If the information can be subject to verification by larger human rights organisations or relevant embassies,<sup>296</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>297</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>298</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>299</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>300</sup> and should be subject to judicial scrutiny by other national courts.<sup>301</sup> Courts' and States' scrutiny of such information within relevant cases ensures that COI that is used adheres to such requirements.<sup>302</sup> This was confirmed in the case of *NA v UK*, which also used the COI-CG principles to guide its judgement.<sup>303</sup>

---

<sup>293</sup> *Ibid.* 157.

<sup>294</sup> *Ibid.* 164.

<sup>295</sup> *Ibid.* 158.

<sup>296</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>297</sup> COI-CG (n 261 above) 160.

<sup>298</sup> *Ibid.* 164.

<sup>299</sup> UNHCR (n 281 above) 11.

<sup>300</sup> COI-CG (n 261 above) 166.

<sup>301</sup> *Ibid.* 166.

<sup>302</sup> The analysis of COI presented in Court often takes place. For example, *BK (Failed Asylum Seekers) Democratic Republic of Congo v. Secretary of State for the Home Department*, (n296 above) and *Maslov v. Austria* (n 227 above).

<sup>303</sup> International Association of Refugee Law Judges Working Party on Country of Origin Information and Country Guidance (COI-CG) *Recent Developments* (2009) 22. This concerned

Information gathered by the monitoring network must adhere to the above COI guidelines in order to ensure legal admissibility. The information's use in national courts will be widely encouraged as a means of verification and – ultimately – an improvement in State returns policies.

### *5.2 Case Comparison: evidence use in refoulement cases*

To further understand the standards of legally admissible COI, this section shall concentrate on two UK cases, *BK v SSHD and SM and Others*, in a comparative analysis. Both cases were heard in the same year and, whilst one orders the halting of deportations, the other permits their continuation. This section seeks to analyse the standards of risk used, the standards of treatment that constitute *refoulement* and, most importantly, the use of COI within the cases. Alongside COI Guidelines (as discussed in Section 5.1), a thorough analysis of these cases allows a fuller understanding of what COI can be used, and what policy changes it could contribute to. Both these cases were heard in the Asylum Immigration Tribunal, which (as the COI Guidelines below outline) caselaw has confirmed as a judicial entity in which the use of COI serves to confirm its judicial admissibility.<sup>305</sup>

#### Introductory Information

*BK v SSHD* is a detailed, lengthy<sup>306</sup> case that concerned a Congolese asylum seeker who faced return to DRC, which was to be implemented by the UK State. It was heard before a senior immigration judge. The case focused on the risk facing all Congolese returnees and whether such returnees were at 'real

---

the case *NA. v. The United Kingdom*, Appl. No. 25904/07, Council of Europe: European Court of Human Rights, 17 July 2008, para. 110, 111, for example. This case also found that COI used and accepted in the lower court (the Asylum and Immigration Tribunal) is to be taken, unless contradicted or since updated, as acceptable COI (para. 118).

<sup>305</sup> *NA v UK* (see n303 above) para. 118.

<sup>306</sup> *BK v SSHD* (n 302 above) para. 2: the documentation, the judge stresses, filled 11 lever arch files.

risk of persecution or serious harm or ill treatment'.<sup>307</sup> The case took place in camera, as the court was concerned for the witnesses' safety should their identities become known.<sup>308</sup> The court heard from several witnesses, organisations and country experts. The court concluded that removals to Congo DRC could continue.

*SM and Others* is a much shorter case. The case concerned three appellants, all of whom were Zimbabweans appealing their impending removal. The judge sought to question whether Zanu-PF members and war veterans would face risk on return and whether internal relocation was a viable option for those at risk in their home area.<sup>309</sup> The Court heard evidence from one expert witness and media articles. The court ruled that 'there is a reasonable degree of likelihood that this will include treatment sufficiently serious to amount to persecution'.<sup>310</sup>

### Standard of risk

*BK* confirmed the test as a risk of ill treatment, amounting to a consistent pattern, as per a "generally or consistently happening" test.<sup>311</sup> *SM* confirmed that it was to prove a 'real risk of persecution'.<sup>312</sup>

### Witnesses

*BK v SSHD* heard three witnesses, who are referred to as W1, W2 and W3. Through their work in the Congo DRC, they had met each other or knew of each other.<sup>313</sup> W1 was a refugee from the Congo DRC who worked as a principal assistant to the chief prosecutor of the Military Court in the DRC.<sup>314</sup> W2 and W3 were refused asylum seekers, who both worked in the airport

---

<sup>307</sup> *BK v SSHD* (n 302 above) Para. 1.

<sup>308</sup> *Ibid.* para. 2.

<sup>309</sup> *SM and Others (MDC - Internal Flight - Risk Categories) Zimbabwe*, CG [2005] UKIAT 00100, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 11 May 2005, 1.

<sup>310</sup> *Ibid.* para. 42.

<sup>311</sup> *BK v SSHD* (n 302 above) para. 171.

<sup>312</sup> *SM and Others* (n 309 above) para. 1.

<sup>313</sup> *BK v SSHD* (n 302 above) para. 38.

<sup>314</sup> *Ibid.* para. 21.

that receives returnees.<sup>315</sup> One witness had documented proof of this employment.<sup>316</sup> Torture and rape were claimed to be ‘commonplace’ by W1, as was the transfer of returnees to Kin Maziere prison in Kinshasa.<sup>317</sup> W2 further claimed that failed asylum seekers were ‘perceived as traitors and criminals’.<sup>318</sup> W3 confirmed that returnees in Congo DRC were maltreated and left in ‘appalling’ conditions of detention.<sup>319</sup>

All three witnesses were found to be unreliable. This was due to several factors, including that fact that W1 and the expert were at odds regarding the frequency of human rights violations against returnees.<sup>320</sup> The fact that there are inconsistencies in the witnesses’ asylum claims also detracted from their credibility.<sup>321</sup> Dates provided were inconsistent. The Court disbelieved the witnesses’ role as airport immigration personnel, although it was accepted that W2 held the role of Immigration Officer at N’Djili airport.<sup>322</sup> However, W2’s asylum claim had been rejected as it was found to be inconsistent. He was therefore not found to be a credible witness.<sup>323</sup> The fact that he was an absconder from the UK Immigration Authorities also detracted from his credibility.<sup>324</sup> Inconsistencies regarding how many returnees are freed from detention was also claimed to detract from W3’s credibility.<sup>325</sup>

The case of *SM and Others* did not use witnesses as evidence.

One can see the stringent requirements of the Court when individuals seek to provide evidence. It is interesting to note that inconsistencies in their asylum claims automatically invalidate their ability to provide evidence (not necessarily connected to their asylum claim). Whilst this can be understandable, it does not take into consideration UNCHR’s recommendation that inconsistencies should be considered in light of the wider context at hand

---

<sup>315</sup> *Ibid.* para.39.

<sup>316</sup> *Ibid.* para.39.

<sup>317</sup> *Ibid.* para.26.

<sup>318</sup> *Ibid.* para.40.

<sup>319</sup> *Ibid.* para. 54.

<sup>320</sup> *Ibid.* para. 205.

<sup>321</sup> *Ibid.* para. 209, 50 and 42.

<sup>322</sup> *Ibid.* para. 213.

<sup>323</sup> *Ibid.* para. 213.

<sup>324</sup> *Ibid.* para. 215.

<sup>325</sup> *Ibid.* para. 234.

and that untrue statements are not a reason for refusal alone.<sup>326</sup> This point is especially relevant to the monitoring network if it hopes to use evidence provided by failed asylum seekers, as States can claim that their refused refugee claim is proof of their invalidity as witnesses. However, if an external organisation is to report on the fate of returnees, and can triangulate and corroborate such information whilst adhering to COI Guidelines, such evidence could be legally admissible. The legal admissibility of such information can be explored further in the two cases' treatment of COI, expert witnesses and organisations' inputs, below.

### Media Journalists

The fourth witness to give evidence in *BK v SSHD* was Jenny Cuffe, author of a BBC World investigation into the treatment of Congolese.<sup>327</sup> Cuffe travelled to Congo DRC where she interviewed several failed asylum seekers who had been returned,<sup>328</sup> who recounted maltreatment. Although found to be an 'impressive witness', the court found that Cuffe 'had not sought to ask a number of questions pertinent to any scientific or properly empirical investigation of the issue.'<sup>329</sup> Cuffe did not ask for identification of those she interviewed and based her interviews on trust only, and therefore the screening of interviewees was found by the court to be insufficiently 'rigorous'.<sup>330</sup> The lack of 'hard evidence' in her reporting further detracted from her role as witness, and the court lamented that 'it is a great shame that a more scientific study has not been done'.<sup>331</sup>

Thus, one imagines that if Cuffe had ensured more sound methodological approaches, her evidence would have been legally admissible. It seems that adherence to the COI Guidelines would suffice in such information gathering,

---

<sup>326</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) Section (1), especially para. 199.

<sup>327</sup> *BK v SSHD* (n 302 above) 69.

<sup>328</sup> *Ibid.* para.70.

<sup>329</sup> *Ibid.* para.244.

<sup>330</sup> *Ibid.* para.245.

<sup>331</sup> *Ibid.* para.248.

and this must be adhered to if the monitoring network is to be legally admissible.

Unlike *BK v SSHD*, *SM and Others* accept two articles (news reports from *The Observer*, UK, and *the Herald*, Zimbabwe) as credible evidence.<sup>332</sup> Although *The Observer* article 'was not sufficient to suggest that all returnees were at risk'<sup>333</sup> as it documented a single case of detention, its source or methodology was not questioned at all. The *Herald* article was noted as being corroborated by another paper, *The Sunday Mail*, but, again, there was no analysis of methodology or information sources in the judgement.<sup>334</sup>

The inconsistency between the two cases regarding the sources of media information is interesting; especially considering that the latter case caused a major policy change (i.e. the halting of deportations to Zimbabwe). It seems that the *SM and Others* case did not revert to the requirements set out by the COI Guidelines but assumed the sources as credible. The monitoring network should seek to ensure that, while the information they receive is credible, that it can be triangulated as much as possible with other forms of media.

### Representatives of Organisations

*BK v SSHD* heard evidence from individuals who had attempted to trace Congolese returnees by phone. Elizabeth Atherton, founder of the Congo Support Project,<sup>335</sup> traced returnees and took the accounts of 14 returnees, several of whom were 'detained and ill-treated'.<sup>336</sup> DW was the chairman of Lazarus Refugee Concern, a voluntary organisation set up especially for failed asylum seekers.<sup>337</sup> He was able to monitor four people, with three of them being monitored at N'Djili airport, all of whom were detained.<sup>338</sup> While the court found Atherton to be 'sincere', her findings were based on trust rather

---

<sup>332</sup> *SM v SSHD* (n 309 above) 16.

<sup>333</sup> *Ibid.* para.33.

<sup>334</sup> *Ibid.* para. 16.

<sup>335</sup> *BK v SSHD* (n 302) 76.

<sup>336</sup> *Ibid.* para. 78.

<sup>337</sup> *Ibid.* para. 81.

<sup>338</sup> *Ibid.* para. 82.

than seeking to validate and corroborate the information at hand.<sup>339</sup> A similar justification for discounting DW's evidence was confirmed by the court.<sup>340</sup> The finding of *BK v SSHD* has ramifications for the monitoring network, as the thorough methodology behind information gathering is ensured.

The case of *SM and Others* did not refer to representatives of organisations in its case.

### Experts

*BK v SSHD* heard evidence from an expert (who remained anonymous), whom the court found to be credible.<sup>341</sup> E1 claimed that 'human rights violations are seen as widespread'<sup>342</sup> and that returned failed asylum seekers are in danger of human rights violations.<sup>343</sup> Nevertheless, a change of opinion in his reports, over time, led the court to doubt his credibility.<sup>344</sup> This stringent approach sets very high standards for the provision of evidence in court cases regarding issues relevant to the monitoring network. This standard seems unusually high, especially when one considers the expert used in the case of *SM and Others*. Professor Ranger, an expert on Zimbabwe, was asked to give evidence relating to several 'risk categories' regarding returnees in Zimbabwe. His expertise is proven by 45 years of familiarity with Zimbabwe, teaching at university in Harare and other universities of note.<sup>345</sup> He is often in Zimbabwe and 'has known Robert Mugabe and other senior leaders of ZANU-PF for 45 years'.<sup>346</sup> The court accepted the evidence of Ranger as 'his expertise and knowledge of Zimbabwe is clear'.<sup>347</sup> This was despite the fact 'much of the information he had collated was speculative but this was inevitable as he was being asked to deal with very recent events.'<sup>348</sup>

---

<sup>339</sup> *Ibid.* para. 249.

<sup>340</sup> *Ibid.* para. 250.

<sup>341</sup> *Ibid.* para. 251.

<sup>342</sup> *Ibid.* para. 98.

<sup>343</sup> *Ibid.* para. 100 – 105.

<sup>344</sup> *Ibid.* para. 253.

<sup>345</sup> *Ibid.* para. 14.

<sup>346</sup> *Ibid.* para. 14.

<sup>347</sup> *Ibid.* para. 40.

<sup>348</sup> *Ibid.*

Ranger describes how, since 2002, the risks to returnees had increased. He used an anecdotal story of one returnee who managed to escape detention in Zimbabwe.<sup>349</sup> Ranger also conducts a review of the media's treatment of returnees.<sup>350</sup> Ranger provides details on the layout of Harare airport and the possibilities of interrogation rooms.<sup>351</sup> This further corroborated his close knowledge of Zimbabwe and the treatment of returnees.

Thus, despite speculation and anecdotal evidence, Ranger is accepted as a credible witness, whilst E1 of *BK v SSHD* is discrediting for shifting opinions over the years of publications. This seems inconsistent in the standards set. Nevertheless, the monitoring network could triangulate and corroborate information gathered regarding the treatment of returnees by asking experts to attend cases. In fact, FRP already run a similar programme:<sup>352</sup> the careful selection and use of such experts must ensue if their evidence is to be legally admissible, as the findings of *BK v SSHD* prove.

## COI

The court in *BK v SSHD* found certain evidence to be credible that supported the claim that many of those Congolese claiming asylum are in fact economic migrants.<sup>353</sup> A 2006 EU report on illegal migration, which found most migration from DRC to be economically driven,<sup>354</sup> UNHCR position statements which found asylum seekers were not at risk,<sup>355</sup> and individual embassy and EU government assessments, were all found to be credible sources.<sup>356</sup>

When regarding COI, the court in *SM and Others* uses COI provided by the UK Border Agency (CIPU).<sup>357</sup> This finds that there were 'flagrant breaches of

---

<sup>349</sup> *Ibid.* Para. 15.

<sup>350</sup> *Ibid.* Para. 17.

<sup>351</sup> *Ibid.* Para. 23.

<sup>352</sup> A section of the FRP website lists COI experts who are willing to draw up reports on a pro bono basis. Available at <http://www.refugeelaidinformation.org/content/country-origin-information-experts>. Accessed 6 December 2012.

<sup>353</sup> *BK v SSHD* (n 302 above) 195.

<sup>354</sup> *Ibid.* para. 285.

<sup>355</sup> *Ibid.* para. 286.

<sup>356</sup> *Ibid.* para. 287.

<sup>357</sup> *SM and Others* (n 309 above) para. 38.

human rights sanctioned by the government'.<sup>358</sup> The Court accepted news reports (which are consistent with other evidence) emanating from Zimbabwe that returnees would be subject to interrogation.<sup>359</sup> Thus, well-used COI sources (UNHCR, government COI) is acceptable in both cases. The COI created by the monitoring network will have to be to such a standard that it reaches the standards of such COI. The fact that Unsafe Return has been included in the UK Border Agency's CIPU (which *SM and Others* found to be legally admissible) is proof that well-researched evidence, however contradictorily to a State's position, can suffice the standards of legally admissible COI.

### *5.3 Harnessing modern technology for human rights*

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>360</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>361</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>362</sup> Several clients at the LRC mention internet footage that documents post-return treatment. The legal admissibility? of such information in terms of COI is an exciting and interesting area that merits real research, especially in terms of adherence to

---

<sup>358</sup> *Ibid.*

<sup>359</sup> *Ibid.* para. 41.

<sup>360</sup> J Handmaker *Advocating for accountability: civic-state interactions to protect refugees in South Africa* (Intersentia, 2009).

<sup>361</sup> *Ibid.* 29.

<sup>362</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.

the abovementioned COI Guidelines. 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.

#### *5.4 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 admissibility. However, through corroboration and large volumes of research, such hurdles can be overcome. The logistical and moral hurdles perhaps pose a greater challenge. As the UN High Commissioner for Human Rights Louise Arbour pointed 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>363</sup> Participating organisation will have to prove their credibility and trustworthiness, especially if they are to have contact with returnees.<sup>364</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 occurrence of *refoulement* faced by returnees is proved to be widespread,

---

<sup>363</sup> Statement by UN High Commissioner for Human Rights Louise Arbour (7 December 2005) Available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2117&LangID=E>. Accessed 3 Jan 2012.

<sup>364</sup> Matthews (n 267 above).

States would have to reconsider return policies. This would have huge implications for the existing ‘removal systems’ that States currently implement.

## 6 Conclusion and Current Developments

The fate of returned failed asylum seekers remains a little understood and little researched aspect of forced migration. Indeed, most existing knowledge is generated by organisations and individuals who offer anecdotal case studies. Recently, attention has focused on the treatment of returnees and reports are emerging that paint a worrying picture. Indeed, *Unsafe Return* records high levels of detention and rape upon failed asylum seekers’ return.<sup>365</sup> *Deported to Danger* and *Following Them Home* present similar pictures of interrogation and torture.<sup>366</sup> This thesis has sought to understand the feasibility of a monitoring network which would monitor such returnees.

As *non-refoulement* is a ‘cornerstone’ of refugee law, and as it has been held as international customary law,<sup>367</sup> ensuring full adherence to this obligation should be enforced. This thesis has explored the wide state obligations stemming from the principle of *non-refoulement*: as per the Convention, beneficiaries include ‘every individual having a well-founded fear of persecution’, whether they have refugee status or not.<sup>368</sup>

tate obligations of *non-refoulement* are evoked if the treatment of returnees reaches a certain standard. The Convention sets this at the same standard of treatment that evokes refugee protection. Therefore such treatment must also be due to one or more of the five grounds constituting refugee status: race, religion, nationality, membership of a particular social group, or political opinion.<sup>369</sup> Such treatment has been set, by academics and caselaw alike, as a ‘sustained or systemic violation of basic human rights demonstrative of a

---

<sup>365</sup> Ramos (n 5 above).

<sup>366</sup> *Deported to Danger* (n 249 above) and Corlett (n 252 above).

<sup>367</sup> UNHCR (n 11 above).

<sup>368</sup> Goodwin-Gill (n 13 above) 2.

<sup>369</sup> Convention (n 9 above) Art. 1.

failure of state protection.<sup>370</sup> CAT and ICCPR protect every human being, regardless of their refugee status. The obligations of *non-refoulement* are wider within these treaties. CAT outlines that, if there exist ‘substantial grounds’ for believing that a returnee would be ‘in danger of being subjected to torture’,<sup>371</sup> the State is obliged to refrain from returning the individual. Furthermore, treatment that constitutes ‘torture’, as per CAT, is much wider than that of the Convention, including ‘any act by which severe pain or suffering’ might occur.<sup>372</sup> The ICCPR obliges states to refrain from *refoulement* if there is ‘a real risk of irreparable harm’ contemplated by the right to life and the right to be free from torture other cruel, inhuman or degrading treatment.<sup>373</sup> Thus, one can see that, in theory, the failed asylum seeker is protected by several pieces of international human rights law. However, as this thesis has outlined, *refoulement* continues.

This thesis aligns with academics such as Wouters and Lauterpacht who argue that State responsibilities of *non-refoulement* should be monitored after an individual has been removed to ensure a State’s adherence to this obligation.<sup>374</sup> The CAT and ICCPR explicitly require post-return State obligations in their redress provisions.<sup>375</sup> Indeed, this thesis has mentioned several cases which involved returnees in which appropriate compensation for the returnee was demanded.<sup>376</sup> In light of this, it is argued that a monitoring network can assist in ensuring State’s post-removal obligations as per CAT and ICCPR by monitoring the treatment of the returnees that have been removing from the host State.

Aside from post-removal monitoring as part of fulfilling an international legal obligation, this thesis also explored ongoing situations facing returnees upon their return. The DRC, in particular, formed a case study outlining the treatment of returned failed asylum seekers. Recent phenomena has added

---

<sup>370</sup> Hathaway (n 60 above) 101.

<sup>371</sup> CAT (n 9 above) Art.3(1).

<sup>372</sup> *Ibid.* Art.1.

<sup>373</sup> ICCPR (n 89 above).

<sup>374</sup> Wouters (n 17 above) 164 and Lauterpacht (n 49 above) 110.

<sup>375</sup> CAT (n above) Art.14 and ICCPR (n 89 above) Art.2(3).

<sup>376</sup> *Ahani v Canada* (n 117 above) or *Brada v France* (n 129 above) for example.

weight to the argument that a monitoring network should be put in place: a marked rise in deportations, including the removal of failed asylum seekers, concurrently results in a rise of the number of returnees risking maltreatment on return.<sup>377</sup> Inadequate RSD procedures in host states and ‘new’ techniques within States’ asylum systems (such as the designation of ‘safe countries’) further rise the risk of failed asylum seekers being denied refugee status and being returned to danger. The ‘securitisation’ of asylum has also resulted in a rise of hasty removals, thus risking the *refoulement*.<sup>378</sup>

Such phenomena are only worsened for failed returned asylum seekers when the lack of existing support upon their return is considered. Very few recorded organisations offer support to returnees.

Thus this thesis proposes a ‘monitoring network’, comprised of several participating organisations in countries of origin. Such organisations would be notified of a returnee who is being returned to his or her country of origin. That organisation would then ensure the returnee is met upon arrival and that his or her situation is monitored. This information can be collected and, while adhering as closely as possible to COPI Guidelines, as this thesis has explored, the monitoring network would seek to form a resource of legally admissible COI. 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 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>379</sup>

---

<sup>377</sup> Gibney (n 139 above) 146.

<sup>378</sup> Hathaway (n 60 above) 18.

<sup>379</sup> Email from Barbara Harrell-Bond to author (26 May 2012).

## Bibliography

### *Primary Sources*

#### *Legal Frameworks*

*South African Refugees Act* (1998) No. 130 of 1998.

Organization of African Unity *Convention Governing the Specific Aspects of Refugee Problems in Africa* (10 September 1969) 1001 U.N.T.S. 45.

UN General Assembly *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 December 1984).

UN General Assembly *Convention Relating to the Status of Refugees* (28 July 1951).

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948

UN General Assembly *International Covenant on Economic, Social and Cultural Rights* (16 December 1967).

United Nations *Standard Minimum Rules for the Treatment of Prisoners* (1955).

United Nations *Vienna Convention on the Law of Treaties*, 23 May 1969.

### *Case Law*

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

*Abdi and Another v Minister of Home Affairs and Others* 2011 (3) SA 37 (SCA).

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

*BK (Failed Asylum Seekers) Democratic Republic of Congo v. Secretary of State for the Home Department*, CG [2007] UKAIT 00098, 18 December 2007, 12.

*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993.

*Chahal v United Kingdom* (1996) 23 EHRR 413.

*EM (Tutsi - Common Threshold of Risk) DRC [2004] UKIAT 00075.*

*Harari v Secretary of State for Home Department [2003] EWCA Civ 807, 4.*

*Horvath v. Secretary of State for the Home Department*, United Kingdom: House of Lords (Judicial Committee), 6 July 2000.

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

*Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court (1987).

*Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court, 9 March 1987, III.

*Joseph Adjei v. Minister of Employment and Immigration*, R.S.C. 1976, C. 52, Canada: Federal Court, 27 January 1989.

*Katsshingu v DHA* 2011 HC, case number 19726/2010 (unreported case) 5.

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

*Mafhoud Brada v. France*, CAT/C/34/D/195/2002, UN Committee Against Torture (CAT), 24 May 2005.

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

*Maslov v. Austria*, 1638/03, Council of Europe: European Court of Human Rights, 22 March 2007.

*Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985.

*Mutombo v. Switzerland*, Communication No. 13/1993, UN Committee Against Torture, U.N. Doc. A/49/44 at 45 (1994).

*NA. v. The United Kingdom*, Appl. No. 25904/07, Council of Europe: European Court of Human Rights, 17 July 2008.

*NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2005) HCA 6, Australia: High Court, 2 March 2005.

*Németh v. Canada (Justice)*, 2010 SCC 56, Canada: Supreme Court, 25 November 2010.

*Plaintiff M70/2011 v. Minister for Immigration and Citizenship; and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship*, [2011] HCA 32, Australia: High Court, 31 August 2011.

*Ramzy v. Netherlands*, Application no. 25424/05, Council of Europe: European Court of Human Rights, 27 May 2008.

*Refugee Appeal No. 71427/99*, 71427/99, New Zealand: Refugee Status Appeals Authority, 16 August 2000, 61.

*RU (Bangladesh) v Secretary of State for the Home Department (SSHD)* [2011] EWCA Civ 651.

*Sale v. Haitian Centres Council*, 509 U.S 155 (1993).

*Saravamuthu Sivakumaran, Navaratnasingam Vathanan, Vinasithamby Rasalingam, Vythialingam Skandarajah, Nadarajah Vilvarajah v. Immigration Officer, Heathrow*, TH/6840/88, TH/6841/88, TH/6842/88, TH/6843/88, TH/6844/88, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 13 March 1989.

*Secretary of State for the Home Department v. Rehman* (2001) UKHL 47 (UK).  
*RU (Bangladesh) v Secretary of State for the Home Department (SSHD)* (2011) EWCA Civ 651.

*Seid Mortesa Aemei v. Switzerland*, CAT/C/18/D/34/1995, UN Committee Against Torture, 29 May 1997.

*SM and Others (MDC – internal flight – risk categories) Zimbabwe CG [2005] UKIAT 00100.*

*Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002, 90.

*Tantoush v the Refugee Appeal Board and Others*, HC, 13182/06 (2006)134.

### *Secondary Sources*

ACCORD *Researching Country of Origin Information: a training manual* (2006).

Amnesty International *Eritrea: Sent Home to Detention and Torture* (Amnesty International Publications 2009).

The Association Nationale d'Assistance aux Frontières pour les Étrangers, *De l'autre côté de la frontière suivi des personnes refoulées* (2010).

Berkley Law School (A Kohli, P Markowitz and L Chavez) *Secure Communities by numbers: an analysis of demographics and due numbers* (2011).

O Bueno, 'Perspectives on refoulement in Africa' *International Refugee Rights Initiative* (2006).

COI-CG 'Judicial criteria for assessing Country of Origin Information (COI): a checklist' *International Journal of Refugee Law*, 21(1), 2009.

La Cimade *Fiche projet : project regional de defense des droits des migrants dans les pays de transit* (2010) 2. Available at : [http://www.cimade.org/poles/solidarites-internationales/rubriques/44-les-axes-de-travail?page\\_id=243](http://www.cimade.org/poles/solidarites-internationales/rubriques/44-les-axes-de-travail?page_id=243). Accessed 2 Jan 2013.

Sue Clayton *Hamdullah: The Road Home* (2011). Available at <http://www.hamedullahtheroadhome.com>. Accessed 20 May 2012.

ComAT *General Comment No. 3 of the Committee against Torture: Implementation of article 14 by States parties* (2012) CAT/C/GC/3.

D Corlett *Following them home: the fate of the returned asylum seekers* (Black Inc., Melbourne 2005).

J Cuffe 'Asylum questions for Congo DRC' *BBC News* (1 December 2005),

J Desira 'Campaigners claim asylum seeker is beaten on Congo return' *Evening Gazette* (8 June 2009).

A Duffy 'Expulsion to face torture? Non-refoulement in international law' *International Journal of Refugee Law* (2008) 20, 3.

European Council on Refugees and Exiles (ECRE) *The Return of Asylum Seekers whose Applications have been Rejected in Europe* (2005)

European Council on Refugees and Exiles (ECRE) *Position on Return* (2003).

Executive Committee, *Conclusion Number 6 (XXVIII) Conclusions on the international protection of refugees adopted by the Executive Committee of the UNHCR Programme* (2009).

Fahamu Refugee Project *Deportation of failed asylum seekers*. Available at <http://frian.org/content/deportation-failed-asylum-seekers-0>. Date Accessed: 10 November 2012.

G Goodwin-Gill *The principle of non-refoulement: its standing and scope in international law* (Cambridge Press 1993).

G Goodwin-Gill *The Refugee in International Law: Second Edition* (Oxford University Press, 1998).

G Goodwin-Gill 'Refugee identity and protection's fading prospect' *Refugee rights and realities* (Cambridge Press 1999).

C Hall 'The duty of States Parties to the Convention against Torture to provide procedures permitting victims to recover reparations for torture committed abroad' *European Journal of International Law* 18.

M Gibney 'Asylum and the expansion of deportation in the United Kingdom' (2008) 43,2 *Government and Opposition*.

J Hollifield 'The emerging migration state' *International Migration Review* (2006) 38, 3.

Human Rights Watch *Black Hole: The Fate of Islamists Rendered to Egypt* (2005) 30-33 and American Civil Liberties Union *Factsheet: Extraordinary Rendition* (2005).

Human Rights Watch *By Invitation Only: Australian Asylum Policy* (2002).

Human Rights Watch 'We Will Crush You': *The Restriction of Political Space in the Democratic Republic of Congo* (2008), 1-56432-405-2.

J Handmaker *Advocating for accountability: civic-state interactions to protect refugees in South Africa* (Intersentia, 2009).

J Hathaway *The law of refugee status* (Butterworths Law 1991).

J Hathaway *Refugee rights: report on a comparative study* (York Lane Press 1995).

J Hathaway 'Refugee law is not immigration law' *World Refugee Survey 2002* (2002).

J Hathaway *The Rights of Refugees under International Law* (Cambridge University Press, 2005).

Immigration Advisory Service (IAS), *The use of Country of Origin Information in Refugee Status Determination: critical perspectives* (2009).

Immigration and Refugee Board of Canada, *Kenya: information on the current status of refugees in Kenya, on their rights and on whether Kenya protects them from non-refoulement (forced repatriation)* (1993).

Immigration and Refugee Board of Canada *Research Program*, available at <http://www.irb-cisr.gc.ca/Eng/resrec/respro/Pages/index.aspx>. Date accessed 30 November 2012.

Immigration Policy Centre *Secure Communities: A Factsheet* (2011).

International Association of Refugee Law Judges Working Party on Country of Origin Information and Country Guidance (COI-CG) *Recent Developments* (2009).

International Organization for Migration *Revised Methodology for Return Monitoring Survey* (2008).

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

E Lauterpacht and D Bethlehem 'The scope and content of the principle of non-refoulement' in E Feller and V Türk (eds.) *Refugee protection in international law* (Cambridge University Press 2003).

E Mason 'Update to guide to country research for Refugee Status Determination', *LLRX* (2002).

Merco Press South Atlantic News Agency 'US immigration target for 2011: 404.000 deportations, includes screening jails' (2 January 2011) Available at <http://en.mercopress.com/2011/01/02/us-immigration-target-for-2011-404.000-deportations-includes-screening-jails>. Date Accessed 10 October 2012.

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.

S Kapferer 'The interface between extradition and asylum' *UNHCR Department of International Protection* (2003).

C Querton and S Huber *Comments on the Operational Guidance Note on Democratic Republic of Congo prepared for Still Human Still Here* (2008).

C Ramos *Unsafe Return* (Justice First 2011).

Refugee Documentation Centre of Ireland *Information regarding the dangers for failed asylum seekers returning to the DRC* (2010).

R Rosenbloom 'Senseless Deportations', *Washington Post* (25 March 2008).

Statewatch *Report on the fate of migrants on arrival and following deportation* (2011). Available at <http://www.statewatch.org/news/2010/jul/01france-migrants-deportation.htm>. Accessed 10 November 2012.

D Taylor 'Britain sending refused Congo asylum seekers back to threat of torture' *The Guardian*, 27 May 2009.

D Taylor, 'Torture fate 'awaits UK deportees' *The Observer*, 16 September 2007.

N Tolsi 'Congolese nationals claim intimidation during raids' *Mail and Guardian* (21 January 2012).

N Tolsi 'South Africa ignores deportee torture claims' *Mail and Guardian* (9 March 2012).

UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (2007).

UN High Commissioner for Refugees *Agenda for Protection* (2003).

UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (1992).

UN High Commissioner for Refugees *Country of Origin Information: Towards Enhanced International Cooperation* (2004).

UN High Commissioner for Refugees *General Conclusion on International Protection* (1993) No. 71.

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).

UN High Commissioner for Refugees *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983.

UN High Commissioner for Refugees *Response to Information Request – DRC: Treatment of rejected asylum seekers* (2006)

UN High Commissioner for Human Rights: Statement by Louise Arbour (7 December 2005) Available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2117&LangID=E>. Accessed 3 Jan 2012.

UN High Commissioner for Refugees *UNHCR Note on the Principle of Non-Refoulement* (1997).

UN High Commissioner for Refugees, *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, August 2006.

UNHCR Executive Committee (EXCOM) *Conclusion No. 71 (XLIV)* (1993).

United Kingdom Home Office *Exclusion of individuals from the United Kingdom for engaging in unacceptable behaviour* (2009).

University of Michigan Law School *The Michigan Guidelines on Well-Founded Fear* (2004).

UK Border Agency *Country of Origin Information Service*, available at <http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/coi/>. Accessed 30 November 2012.

UK Border Agency *The Democratic Republic of Congo: Country of Origin Information Report* (2012).

US Committee for Refugees and Immigrants (2009) *World Refugee Survey 2009: Egypt*.

US Department of State *2010 Human Rights Report: Sudan* (2010).

US Department of State *2010 Human Rights Report: Democratic Republic of the Congo* (2011).

Walter Leitner International Human Rights Clinic *Removing refugees: U.S. deportation policy and The Cambodian-American community* (2010).

F Webber 'The politics of voluntary returns' Institute for Race Relations (IRR) (11 November 2011) and Independent Asylum Commission *Fit for purpose yet? The Independent Asylum Commission's interim findings* (2008).

P Weis *The Refugee Convention 1951: the travaux préparatoires* (1995).

K Wouters *International legal standards for the protection from refoulement* (Intersentia 2009).

### *Personal Correspondence and Interviews*

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

A Segatti, personal correspondence, 12 May 2012.

Theodore Trefon, personal correspondence, 10 March 2012.

Thierry Vircoloun, personal correspondence, 27 March 12.