



## Analysis

# The comparative study of forced return monitoring in Europe by Matrix/ICMPD

Marie Martin

**Forced return monitoring mechanisms vary widely throughout the EU and the rights of irregular migrants are not safeguarded consistently. This study was an opportunity to make a strong case for improved practices in all Member States, but its scope and recommendations are very limited from a human rights perspective.**

In 2009, the European Commission launched a call for tender for the purpose of a comparative study on forced-return monitoring systems in place in the different EU Member States. In 2008, the Returns Directive, regulating return procedures for third country nationals irregularly staying in the EU, was adopted. It gave Member States two years starting from its entry into force (January 2009) to transpose the directive into their respective national laws, including the obligation to “provide for an effective forced-return monitoring system” (article 8(6)).

The comparative study aimed at providing an audit of current measures to allow for the sharing of best practice and putting in place mechanisms for ensuring an EU-compliant monitoring system of forced returns. The study, which started in June 2010, was completed a year later, (i.e. after the deadline for the directive’s transposition in December 2010).

### The Returns Directive

In 2004, the European Council agreed at The Hague on harmonising return and removal procedures among EU member states according to EU standards [2] and created the European Return Fund (ERF) to this end. Since then, legal harmonisation has been underway since the adoption of “Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals” [3], commonly known as the Returns Directive (which the UK is not part of).

The directive is described by the Commission as:

*clear, transparent and fair common rules concerning return, removal, use of coercive measures, detention and re-entry, which fully take into account the respect for human rights and fundamental freedoms of the persons concerned. The "Return Directive" creates a*

*common understanding amongst Member States of the most important elements of return and limits Member States' discretion to follow different national approaches on each of these issues. [4]*

Return, as understood in the directive, comprises forced as well as voluntary return.

However, the Returns Directive has been subject to much criticism in the past few years, with some human rights organisations calling it the “shameful” or “outrageous directive” arguing that the new legal framework merely legitimated the expulsion of migrants that Member States considered undesirable. They also expressed concern at removal procedures and standards in the directive, which, for many civil society organisations, did not sufficiently safeguard the rights of those who were subject to return. [5]

Part of the European Return Fund (7%) may be used to finance transnational projects or projects of interest to the European Community (rather than projects in single Member States applying for the ERF), and the Commission decided to fund a comparative study on practices and legislation in Member States in relation to forced return monitoring, so that best practice may be shared.

Considering the criticism mentioned above, the ERF study could have been an opportunity to suggest improving the directive, which had been accused of “not go[ing] far enough to ensure that minimum standards of proportionality, fairness and humanity are satisfied”. [6] As the Returns Directive aims at limiting “Member States’ discretion” in how to return irregular migrants, the study could have been an opportunity for identifying insufficiencies in the scope of these limits and ways to upgrade standards, notably safeguards for the rights of irregular migrants facing return.

### **The study: main findings**

The call for tender was won by a consultancy firm based in London, Matrix Insight, which conducted the study in cooperation with the International Centre for Migration Policy and Development (ICMPD) between June 2010 and June 2011. According to the methodology required by the European Commission, the study should be based on existing literature, on reviewing the legal frameworks, and on information collected through interviews with the authorities of nine EU Member States, with representatives of NGOs working on forced return, research institutes and people subjected to return procedures. Case studies and field data took precedent over academic research because “very little has been written specifically on forced return monitoring”.

The study was submitted to the Commission in July 2011 and made public in November 2011. It covers the whole EU (except Ireland) and EEA countries (Iceland, Lichtenstein, Norway and Switzerland – who are members of the Schengen group) with an in-depth analysis of best practice in nine countries: Austria, Belgium, France, Germany, Latvia, Luxembourg, Norway, Poland and Switzerland. The inclusion of EEA countries seems fair as they are participating in some aspects of the EU return policy (in particular in Frontex operations). The case studies are presented as helping “gain an insight as to the difficulties which may occur in the process of setting up an effective and transparent monitoring system...and to provide illuminating examples of best practice.”

As regards the monitoring of forced return, the study reveals that:

*- Based on the country profile sheets, 20 countries had a monitoring system in place (or one is imminent) while four countries were in the legislative process of putting one in place. Six*

*countries therefore do not have any monitoring system so far, including some countries at the EU's external borders where the rate of successful applications is very low and from where irregular migrants are likely to be returned under the Dublin II Regulation (cf. Bulgaria, Greece, Iceland, Italy, Malta, Slovakia and Sweden).*

*- Forced return monitoring systems generally place more emphasis on the pre-return than on the post-return phase.*

*- In the majority of cases, civil society organisations, law enforcement bodies and ombudspersons are involved in the monitoring system*

*- The study reflects the opinion that a real difference exists between monitoring actors (simply monitoring forced return) and interventionist actors (organisations empowered to expose misbehaviour when it happens). It is argued that monitoring organisations are more likely to communicate with the returnees and to report on the situation than "intervention powers" for which a mixed role of monitoring and intervention may be "confusing".*

Regarding effectiveness (ensuring that returnees are treated in accordance with human rights standards) and transparency of forced return monitoring systems, the study concludes that:

*1. Monitoring organisations/authorities should be "different from the enforcement authorities"*

*2. "Monitors should be immediately informed of impending return operations" in countries where such mechanisms are in place. This is not the case in Denmark, Lichtenstein, Lithuania and Romania (the country profile states: "to be decided"), or is left to the discretion of the authorities (Ministry of Interior in Estonia; Prosecution Service in Hungary)*

*3. Sufficient funding is necessary to ensure proper forced return monitoring*

*4. Cooperation between all stakeholders is desirable*

*5. Monitoring should cover the whole return process, including pre-departure, return and arrival*

*6. "Monitors should be able to decide which cases to monitor"*

*7. Observation duties may be extended, under strict conditions, to other tasks (a review of medical files is suggested)*

*8. Monitors should endeavour to facilitate cooperation and "constructive work relationships" with enforcement authorities especially when there is a risk of confrontation between them and the returnee*

*9. Monitoring reports should be taken into account in a systematic manner by the authorities*

*10. A special recommendation regarding Frontex joint return flights is made: a monitor should be designated by the country hosting the operation (or the country returning the biggest group) and common monitoring reports on all operations should be submitted to Frontex. It is suggested that Frontex reports annually on these monitoring observations to the European Parliament.*

## **Analysis**

Some of the points raised in this study give a useful insight into forced return monitoring mechanisms in Europe. Systems vary widely depending on the country, especially regarding the nature of the organisations involved in the monitoring and the tasks they carry out. The independence of monitors and their capacity to act differ from one country to another. The comparative study was an opportunity to point out these differences and make recommendations to improve forced-return monitoring mechanisms. Regrettably, the recommendations are unsatisfactory from a human rights perspective – this problem may well have been due to the lack of detailed data being made available to the study.

### **Blurred definitions**

The scope of the definitions lacks clarity regarding other aspects of the study. The definition of “forced return” is obviously of particular importance in this case. The study presents in detail the different positions adopted by various organisations regarding the criteria adopted to decide whether a return is forced or voluntary. In particular, there is no clarification as to whether the controversial notion of “forced return without compulsion” used by the International Organisation of Migration (IOM) is taken into account in the final definition of voluntary or forced return. Similarly, people issued with a deportation order but given time to leave the country by themselves are defined by the IOM as being “voluntary under compulsion”, as being “voluntary” by the European Migration Network, and as “mandatory returns” by the European Council of Refugee and Exiles (ECRE). Here again, no common definition is provided in the study.

It must be assumed that the questionnaires have been filled in by the different stakeholders following different definitions. Differences as to whether a return is forced or voluntary are crucial, not least when evaluating monitoring systems.

### **Non-comprehensive study**

As mentioned above, the study is based much more on field research than on desk review, due to the absence of relevant literature on mechanisms to monitor forced returns. While this may be true, it seems legitimate to expect from field studies that they detail in the most comprehensive way the mechanisms in place in the different countries under survey.

Moreover, the list of stakeholders interviewed for the purpose of the study lacks consistency. The methodology requirement for officials, civil society organisations operating in the field of forced return, and returnees to be contacted, only applies to “case studies”. The list provided in Appendix G reflects that in many cases, only officials were interviewed for the country not shortlisted for the case study (i.e. 21 out of 30 countries), giving only a partial picture of the reality.

As a result, the study does not seem comprehensive enough to allow for a real comparison of practices. For example, in a number of cases, no information is given as to when monitors are informed about impending return operations (Cyprus, the Netherlands, Portugal, Slovenia, Spain, Switzerland and the UK).

### **Monitors different but not independent from authorities**

According to the study, monitors should be different from enforcement authorities. Such a principle would help ensure a clear distinction in the tasks of each actor involved in the return process and limit conflicts of interest. Yet, this recommendation does not go far enough to ensure the independence of monitors other than recommending that “safeguards [are] in place which allow the monitor to perform the monitoring tasks in an independent way”.

In fact, “financial independence from the State is not necessarily required” (p.19), and “a public body would qualify as monitor” (p.19). While the example given of a public body is that of the national ombudsman, the recommendation may be interpreted as not being limited to such body; for example, in Belgium, it is the General Inspectorate of the General Federal Police and the local Police force (*Inspection générale de la Police fédérale et de la Police locale*) which is in charge of monitoring forced returns (p.24).

Another recommendation made about cooperation between monitoring and enforcement bodies entails a similar risk of collusion, if not conflict of interest in the monitoring process. Sharing feedback with all stakeholders after monitoring so that “lessons learnt are incorporated into practice” may be valuable, but doubts remain as to the lifting of “any barrier to effective and respectful cooperation ‘on the ground’ between monitors and executing authorities” (p.8).

Based on the study’s recommendations, situations where monitors would partly depend on public funding and would therefore be strongly inclined to cooperate with enforcement authorities, i.e. where monitors would not be entirely independent in their capacity to act, cannot be excluded.

### **The absence of systematic monitoring of forced returns**

As pointed out in the study, “third country nationals do not have a subjective right to be monitored” (p.20). Moreover, it is recalled that the Commission does not consider “the mere existence of judicial remedies in individual cases” as a transposition of the obligation to set up a forced return monitoring mechanism (p.20). In the absence of a subjective right to be monitored, it seems reasonable to expect that forced return monitoring mechanisms are compliant with European standards in ensuring that all forced returns are respectful of human rights and fundamental freedoms. In the absence of automatic monitoring, the risk exists that some people are wrongfully returned because no preventive mechanism is in place.

### **Frontex Joint Return Operations**

The identification of a need for a monitoring mechanism for Frontex operations fits the general consensus reflected in the amended Regulation 2004/2007 on the Agency, which foresees such mechanism in Article 9(1)b. [7] It is recommended that host countries should nominate a monitor for each joint return operation, but the study does not reach a conclusion on the submission of the report before national bodies in charge of monitoring forced return.

### **The unexplored potential of the study**

An evaluation such as the Matrix and ICMPD study could have been used to improve practices in all EU countries where international standards apply. The death of Jimmy Mubenga and the alleged disproportionate use of force during his forced deportation emphasises the need for common standards and monitoring mechanisms applicable to all return operations, not only in response to

misconduct, but also to prevent improper practices which may put lives at risk. The growing involvement of private companies in removal operations and the issues of accountability and monitoring are not addressed in the Matrix/ICMPD study either. [8]

The recent publication by Justice First [9] on the unsafe return of Congolese asylum seekers from the UK is a good example of the importance of proper return monitoring mechanisms, not only to assist decision-making when a return takes place, but also to ensure the safety of the people removed. This report documented the experiences of 17 asylum seekers returned to the Democratic Republic of Congo, nine of whom alleged that they had been the victim of ill-treatment upon arrival in Kinshasa, and/or had been arrested, and faced imprisonment after information on their asylum case was passed on from the UK to the Congolese authorities.

## **Conclusion**

While differences between Member States reflect their sovereignty in the field of immigration and asylum, the aim of a European immigration and asylum policy is the adoption of “minimum rules”. Yet, in practice, much has been debated as to whether these “minimum rules” should act as the lowest common denominator or should improve the standards in accordance with the European Union’s values. The state of play of monitoring mechanisms in Member States shows that, depending on where migrants are returned from, their rights will not necessarily be safeguarded in a consistent way across the EU.

The information available helps to identify best practices, some of which are a step in the right direction (e.g. mechanisms involving independent monitors, or extending the scope of monitoring to the post-return phase and reintegration in the country of origin). Nevertheless, in the general context of the promotion of EU standards in the field of immigration and asylum which are compliant with the respect of fundamental rights and freedoms, the recommendations submitted in the study do not reflect the need for improvement in some practices that have been criticised: breaches of returnees’ rights and developments such as the accountability of private companies in charge of removal operations.

## **Endnotes**

[1] Matrix/ICMPD (2011) Comparative Study on Best Practices in the Field of Forced Return Monitoring JLS/2009/RFX/CA/1001, European Commission Directorate-General Justice, Freedom and Security,

[http://ec.europa.eu/home-affairs/doc\\_centre/immigration/docs/studies/Forced%20Return%20Monitoring%20Study%20Final%20Report.pdf](http://ec.europa.eu/home-affairs/doc_centre/immigration/docs/studies/Forced%20Return%20Monitoring%20Study%20Final%20Report.pdf)

[2] Peers (2005) The “Hague Programme”: Annotation of final version, approved 5.11.2004, p.16,

<http://www.statewatch.org/news/2004/nov/hague-annotated-final.pdf>

[3] Directive accessible at

<http://www.statewatch.org/semDOC/assets/files/council/DIR-2008-115.pdf>

[4] European Commission (2009), Invitation to tender No.

JLS/2009/RFXX/CA/1001 concerning a comparative study on best practices in the field of forced-return monitoring, p.7,

[http://ec.europa.eu/justice/tenders/2009/338746/tender\\_en.pdf](http://ec.europa.eu/justice/tenders/2009/338746/tender_en.pdf)

[5] The Council of Ministers of the European Union must not adopt the outrageous directive!, Joint communique (Anafé, APDHA, Arci, ATMF, La Cimade , Gisti, IPAM, LDH-Belgique, Migreurop, Statewatch ), 2008, <http://www.migreurop.org/article1333.html>

[6] Peers (2008a) The Returns Directive - 9 June 2008, p.10,

<http://www.statewatch.org/news/2008/jun/eu-analysis-returns-directive-june-2008-final.pdf>

[7] REGULATION (EU) No 1168/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union,

<http://database.statewatch.org/article.asp?aid=31086>

[8] The death of Jimmy Mubenga: "Securing your world" through "privatised manslaughter", by Statewatch Journal Volume 21 no 1 January-March 2011

[9] Justice First (November 2011)Unsafe return: Refoulement of Congolese Asylum Seekers. A report compiled by Catherine Ramos,

<http://justicefirst.org.uk/wp-content/uploads/UNSAFE-RETURN-DECEMBER-5TH-2011.pdf>

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