POST-RETURN MONITORING OF PERSONS IN NEED OF INTERNATIONAL PROTECTION - LEGAL BOUNDARIES AND IMPACT ON MIGRATION POLICY IN SERBIA AND THE REGION

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Abstract

The expanding numbers of returned persons in need of international protection have led the UN Committee against Torture to indicate obligations of post-return monitoring for sending states. In its general practice and a well-known infamous case against the Republic of Serbia, the Committee gradually, yet inconsistently, put forward the contents of this obligation. The article explores several intriguing legal and policy questions that this decision raises since it essentially binds Serbia to act outside of its jurisdiction to monitor the rejected asylum seeker's well-being upon return to the country of origin. It questions migration policy implications of such an obligation for the states involved, with repercussions also for other states in the region that lay on the current migratory routes. Through an analysis of current state practice, the authors inquire into the potentials of post-return monitoring to outweigh its presumable role of a rather weak redress and to instead serve as a valuable tool for *non-refoulement* prevention used to the benefit of larger numbers of persons seeking international protection.

Keywords: *post-return monitoring; torture; refugees; international protection; extraterritoriality; human rights.*

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1. Introduction

Once a person is returned to his or her country of origin, he or she might be found in a situation of vulnerability and complete deficiency of international legal protection. Being no longer within its jurisdiction, a returnee ceases to be the concern of the returning state and is instead left at the discretion of his or her country of origin. However, through its recent practice the UN Committee against Torture (ComAT, the Committee), a body of independent experts that monitors the implementation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) by its states parties, has introduced a significant shift in this regard by confirming that the returning state's commitments continue post-return and that it needs to monitor whether returnee's conventional rights are respected by the state to which the person is returned. In August 2019, the Committee against Torture adopted a decision that concerned the fate of a certain Mr. Cevdet Ayaz (*Cevdet Ayaz v. Serbia*, 2019). This decision was adopted by the Committee following a blatant disregard by the Republic of Serbia of a prior ComAT's decision indicating provisional measures according to which the Committee ordered Serbia not to return Mr. Ayaz to Turkey before the completion of the proceedings in meritum (Krstić & Davinić, 2019, pp.171-172).

Mr. Ayaz, a national of Turkey and a Kurdish political activist requested asylum in the Republic of Serbia but was nonetheless extradited to Turkey. The Committee found Serbia in violation of Articles 3 and 22 of the Convention against Torture and concluded, *inter alia*, that the Republic of Serbia should "explore ways and means for monitoring the conditions in which Mr. Ayaz is serving his prison sentence in Turkey to ensure that he is not treated in contravention of Article 3 of the Convention against Torture." (*Cevdet Ayaz v. Serbia*, 2019, para. 11). There are several important and intriguing legal and policy questions that this decision raises since it essentially binds Serbia to act outside of its jurisdiction and territory to satisfy the implementation of CAT provisions. In this interpretation, a state should endeavor to use all available diplomatic and legal means to ensure the fulfillment of its treaty obligations. However, this endeavor might easily conflict with the obligation to respect other state's sovereignty and refrain from interference in its internal affairs.

States' post-return monitoring commitments have been perceived by human rights experts in a rather contradictory manner. Whereas Manfred Nowak, the former Special Rapporteur of the Commission on Human Rights on torture, considered back in 2005 that they did "little to mitigate the risk of torture" and had proven "ineffective in both safeguarding against torture and as a mechanism of accountability", (CHR, 2005, para. 46), Jari Pirjola, a former member of the European Committee for the Prevention of Torture, qualified them as "the missing link in the protection chain for rejected asylum-seekers" (Pirjola, 2019, p. 363). The reasons for such a divergent apprehension of the said institute are manifold but they mainly relate to the fact that the issue of post-return monitoring commitments has largely remained an under-researched area of migration, both as regards their legal basis, the very content of the

commitments, and, most importantly, the effects they have upon asylum and migration policies of states parties.

This article will attempt to fill this void by analyzing several relevant issues. Since the practice of indicating post-return monitoring measures has so far been an almost exclusive feature of the Committee against Torture, the first part of the paper will offer an overview of ComAT's approach in this regard as well as its evolution. An analysis would follow of the legal basis of post-return monitoring, i.e., whether such commitments are based on the concept of states' positive obligations or whether they imply not only the extraterritorial but also extra-jurisdictional application of the Convention. The authors will try to demonstrate that despite difficulties "to establish where the responsibility for such monitoring lies" (Tazreiter, 2006, p. 12), international human rights law does offer several self-standing duties of which post-return monitoring may be considered a constituent element. Based on formulations used by the ComAT in its views, in the third part of the paper, the authors will research the precise content and elements of post-return monitoring commitments. The final part of the paper will identify both positive and negative implications of post-return monitoring commitments for asylum and migration policies of the states involved, not only as regards the returning state and the state to which the person was returned, but also regarding third states.

2. Post-Return Monitoring in the Case-Law of the Committee Against Torture – a Gradual but Inconsistent Widening of the Concept

ComAT's rather recent inclusion of post-return commitments in its decisions appears to be in stark contrast to their subsequent prompt evolution. Based on the exact wording used by the Committee, post-return commitments may be classified into several categories.

2.1. Absence of Post-Return Monitoring

ComAT's early jurisprudence, as well as some of its later decisions, are characterized by a complete absence of post-return monitoring duties. The Committee either simply concluded that the removal of the applicant would constitute a breach of Article 3 of the Convention without including any reference to potential consequences or measures (*Balabou Mutombo v. Switzerland*, 1993; *Tahir Hussain Khan v. Canada*, 1994; *Pauline Muzonzo Paku Kisoki v. Sweden*, 1996; *Ismail Alan v. Switzerland*, 1996; *Ali Falakaflaki v. Sweden*, 1998; *Orhan Ayas v. Sweden*, 1998; *A. v. The Netherlands*, 1998; *Halil Haydin v. Sweden*, 1998; *Chedli Ben Ahmed Karoui v. Sweden*, 2002; *R.S. et al. v. Switzerland*, 2014), or it, in addition to finding a violation, urged the state to inform it of the steps taken in response to its decision (*S.S. Elmi v. Australia*, 1999; *Josu Arkauz Arana v. France*, 2000 *A. S. v. Sweden*, 2001; *Enrique Falcon Ríos v. Canada*, 2004; *T. A. v. Sweden*, 2005; *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, 2005; *Mostafa Dadar v. Canada*, 2005; *Gamal El Rgeig v. Switzerland*, 2006; *C. T. and K. M. v. Sweden*, 2006; *V. L. v. Switzerland*, 2007; *Jean Patrick Iya v. Switzerland*, 2007; *Eveline Njamba and*

her daughter Kathy Balikosa v. Sweden, 2010; *Tony Chahin v. Sweden*, 2011; *Sylvie Bakatu-Bia v. Sweden*, 2011; *Sathurusinghe Jagath Dewage v. Australia*, 2013; *Mumin Nasirov v. Kazakhstan*, 2014; *Kwami Mopongo and others v. Morocco*, 2014; *Ali Fadel v. Switzerland*, 2014; *Hussein Khademi et al. v. Switzerland*, 2014; *Asghar Tahmuresi v. Switzerland*, 2014; *Abed Azizi v. Switzerland*, 2014; *E.K.W. v. Finland*, 2015; *M.C. v. The Netherlands*, 2013; *F.B. v. The Netherlands*, 2015; *G.I. v. Denmark*, 2017; *A.A. v. Sweden*, 2022; *T.A. v. Switzerland*, 2022; *Berhane v. Switzerland*, 2022; *X. and Y. v. Switzerland*, 2022; ComAT, *N.U. v. Finland*, 2023). Rarely did the Committee explicitly express that it was "deeply concerned by the fact that the state party did not accede to the request made by the Committee" to refrain from returning the applicant to the country of origin, though without indicating any post-return commitments (*Cecilia Rosana Núñez Chipana v. Venezuela*, 1998).

2.2. A Forerunner to Post-Return Commitments

The second category of decisions started to appear in 2005 onwards. In addition to finding a violation of Article 3 and indicating time frames for informing the Committee of the steps taken to respond to ComAT's views, the Committee demanded from the state to make reparation for the breach of Article 3, and "to determine, in consultation with the country to which he was deported, the complainant's current whereabouts and the state of his well-being" (*Mafhoud Brada v. France*, 2005; *Adel Tebourski v. France*, 2007; *Bachan Singh Sogi v. Canada*, 2007). Although ComAT introduced some sort of forerunner to post-return commitments, it is clear that it primarily focused on reparation, whereas the determination of returnee's circumstances in the country of origin appeared to be of a secondary and incidental character, surely not encompassing measures that would prevent him from being subjected to torture.

2.3. Introducing True but Diverse Post-Return Monitoring Duties

It was in 2015, ten years after the introduction of the second type of cases, that the third and fourth approaches to post-return considerations started to be applied by the ComAT. Quite curiously, two decisions relating to a similar factual background but containing diverse post-return commitments were adopted by the Committee on the same day. In a case against the Russian Federation, ComAT, after finding a violation of both Article 3 and Article 22 of the Convention, urged "the State party to provide redress for the complaint, including his return to the Russian Federation and adequate compensation" (*X. v. Russian Federation*, 2015). On the contrary, in a case brought before the Committee against Kazakhstan, having determined breaches of the same provisions of the Convention, ComAT demanded that Kazakhstan performed "regular visits and effective monitoring" in order to ensure that the complainant "is not subjected to treatment contrary to Article 3 of the Convention" (*Khairullo Tursunov v. Kazakhstan*, 2015).

Such different apprehension of respondent states' post-return commitments might be explained by either the fact that in the former case there

was no contact between the returned person and his counsel and relatives, thus seriously questioning his situation and adequate protection from torture in Uzbekistan to which he was returned, or the returning state's prior failure to "provide any sufficiently specific details as to whether it has engaged in any form of post-expulsion monitoring and whether it has taken any steps to ensure that the monitoring is objective, impartial and sufficiently trustworthy" (*X. v. Russian Federation*, 2015, para. 11.9.). ComAT's position seems to suggest that post-return monitoring does not exclusively relate to the period after the adoption of its decision, but exists from the moment the person is actually returned to the country of origin should this happen before ComAT decides on the matter. This implies that post-return monitoring is not necessarily perceived as a form of redress only, but also as an autonomous element of the *non-refoulement* principle provided in Article 3 of the Convention. What is more, the ComAT seems to use the returning state's attitude towards post-return monitoring, from the moment of return to the moment the Committee adopts its decision, as an important criterion for determination of additional post-return measures. In rare cases the ComAT combined the third and fourth approach into a single one, thus asking the returning state alternatively to either return the complainant to its territory or to implement regular visits and effective monitoring if he is in detention, to ensure that he is not subjected to ill-treatment (*X. v. Kazakhstan*, 2015, para. 14) This line of cases implies that post-return commitments differ depending on whether the returnee is detained or not. In case the returnee is detained by the country of origin, post-return duties would include visits in detention and monitoring the circumstances in which he is held, whereas in cases the returnee is not detained, post-return duties may consist in returning the person to the territory of the returning state.

2.4. Post-Return Monitoring in the Recent Cases – A step backward?

The latest line of cases was introduced by the ComAT in the *Cevdet Ayaz v. Serbia* case, which is of primary concern for this article. It contained a formulation similar to the fourth category of cases although with differences that may have practical repercussions. Namely, in this case, the ComAT required Serbia to "explore ways and means for monitoring the conditions in which Mr. Ayaz is serving his prison sentence in Turkey in order to ensure that he is not treated in contravention of Article 3 of the Convention against Torture" (*Cevdet Ayaz v. Serbia*, 2019, para. 11). If compared to the fourth group of cases which demanded regular visits and effective monitoring in order to ensure that the complainant is not subjected to treatment contrary to Article 3 of the Convention, it appears that both approaches have the same aim which should, though, be achieved through diverse means. In Cevdet Ayaz's type of cases, the state is only asked to explore ways and means of monitoring, whereas in the fourth category of cases the returning state is offered clear guidance by the ComAT by its demand to conduct regular visits. Besides, in the latter case it is clear that monitoring needs to satisfy the standard of effectiveness, whereas, in the former type of cases, such a criterion is not provided.

The evolution of the Committee's approach to post-return monitoring obligations did not end with the case against Serbia. In the more recent case against Azerbaijan, ComAT took both a step forward and a step back. It concretised the returning state's post-return monitoring obligations by explicitly stating that Azerbaijan should monitor the complainant's "access to counsel and medical care" (*A. and B. V. Azerbaijan*, 2022, para. 10). However, it limited Azerbaijan's post-return monitoring obligations to "the framework of existing agreements with Türkiye" (*A. and B. V. Azerbaijan*, 2022, para. 10), apparently suggesting that post-return monitoring is to be carried out within the limits of existing agreements between returning and receiving states. Yet the Committee's decision is silent on which specific agreements this refers to.

The analysis reveals that post-return monitoring has been gradually widened by the ComAT since its initial loose formulations were later replaced by sufficiently strict and quite precisely determined measures. However, the *Cevdet Ayaz v. Serbia* and *A. and B. v. Azerbaijan* cases may in this regard be qualified as slight steps backward, since, on the one hand, the former appears to have left much discretion to the returning state concerning the choice of means and standards through which to achieve that the returnee is not subjected to ill-treatment upon expulsion, while, on the other hand, the latter limited the scope of post-return monitoring to the contents of unidentified agreements. Besides, cases in which ComAT decided to indicate post-return measures are by far outnumbered by cases in which it did not use such a possibility. This may be explained by the fact that in most cases complainants claimed that their return would amount to a breach of Article 3 of the Convention, whereas the return itself did not materialize at the moment of delivering of the ComAT's decision. ComAT does not seem to mind that, should the person be returned to another country post and despite Committee's finding of a breach of Article 3, the returnee would be left without any protection of the returning state, no matter how nonideal it was. Finally, ComAT's approach may be subject to criticism due to a lack of clear criteria that guided the Committee when deciding whether to indicate post-return monitoring or not, as well as when opting for the appropriate level of the returning state's post-return involvement in monitoring the returnee's situation. Determining the content of post-return monitoring commitments, therefore, appears like a demanding yet pivotal task.

3. The Legal Basis of Post-Return Monitoring in International Law – a Positive Obligation to Act Extraterritorially?

Under international law, one state's obligations are usually territorial, since states have sovereign jurisdiction, meaning the capacity to implement these obligations only inside their territorial limits. If a state would be under obligation to perform an act outside its territory, it might collide with the sovereign jurisdiction of another state, therefore breaching the principle of non-interference, one of the principal tenets of contemporary international law (Heschl, 2018, p. 53). However, already in classical legal doctrine, it was accepted that exceptions to this principle might be allowed under a specific rule of international law. As the Permanent Court of International Justice (PCIJ)

famously concluded in the *Lotus* case, jurisdiction "cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or a convention" (*S.S. Lotus (France v. Turkey)*, 1927, para. 23).

As state actions were becoming more transnational due to the ever-increasing complexity of international relations, states were pushed to abide by their obligations even when acting beyond their borders, or when their domestic acts were causing injury outside these borders. Recommendations made by states to the US Government during the United Nations Human Rights Council's Universal Periodic Review (UPR) that took place in 2015 concerning this country's overall performance of extraterritorial human rights obligations (the most relevant example due to its greatest capacity to influence among all the states members of the international community) showed that of all the states that cared to issue a recommendation, more than a quarter tied their recommendations to extraterritorial obligations (Heupel, 2018, p. 525).

Furthermore, in the field of human rights law, throughout the development of various international legal instruments for the protection of human rights, these instruments came to be interpreted by doctrine to bind states towards any persons under their jurisdiction, a concept that unequivocally covers some extraterritorial acts and situations, although only the Convention on the Prevention and Punishment of the Crime of Genocide and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) contain no clauses that restrict their application, while all other conventions have jurisdiction clauses that define their scope of application (Sun & Feng, 2021; Da Costa, 2013; Milanović, 2011; Grisel, 2010). The International Court of Justice (ICJ) has categorically rejected the argument that human rights treaties only bind states with regard to their own territory (*Georgia v. Russian Federation*, 2011), and instead recognized that human rights obligations are unequivocally applicable in respect of acts done by states in the exercise of their jurisdiction outside their own territory (*The Wall*, 2004). UN Human Rights Committee held that states are accountable for violations of rights under the International Covenant on Civil and Political Rights (ICCPR) "which their agents commit upon the territory of another State" (*Delia Saldias de Lopez v. Uruguay*, 1981, para. 12.3). Parts of the doctrine went so far as to claim a kind of a special status for human rights treaties, due to the nature of state obligations stemming from them, which are owed to the international community as a whole (*erga omnes partes*) (Meron, 2006). This extreme conclusion implies that "for human rights obligations there is no presumption against their extraterritorial application" (UNGA, 2015, p. 6). All these interpretations of extraterritoriality are obviously in the interest of the protected person. Otherwise, there would exist no possibility of legal redress for suffered harm in cases where a breach of a right was perpetrated outside the territory of the protecting state.

The Convention against Torture requires parties to take effective legislative, administrative, judicial and other measures to prevent torture in "any territory under [their] jurisdiction", which means all areas and places

"where the State party exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control" (CAT, Art. 2). This notion of effective control is a test that establishes the basis for a state's jurisdiction over the person to whom the obligation is owed. As Tzevelekos argues, "when a state causes a wrongful result, effective control has no other role in extraterritoriality than that of a criterion for (direct) attribution of the wrongful conduct" (Tzevelekos, 2015, p. 133). It serves the purpose of allocating responsibility for unclear jurisdictional situations. If under the conditions of the effective control test no jurisdiction can be established, this does not automatically mean that the protected person would be left hanging.

Namely, in human rights law, it is generally accepted that states have a range of positive obligations to act to ensure the fulfillment of human rights to all persons falling into their jurisdiction. This argument is based on the position taken by the Committee for Economic, Social, and Cultural Rights and expressed in several of its General Comments, where it is claimed that a state incurs obligations towards an individual whenever it is capable to positively influence this person's human rights situation (Skogly, 2006, pp. 83-98, 144-153). This includes, for instance, the obligation of the state to prevent third parties from violating human rights extraterritorially if it has the legal or political means to do so. The doctrine argues that necessary components of positive obligations are a combination of knowledge of potential damage to a protected person and the capability of a state to influence the status of a protected person (Heschl, 2018, p. 96). If these two elements are fulfilled, the obligation to monitor would be triggered, however, its contents are not sufficiently established in doctrine (Pirjola, 2019, p. 368), and we have previously analyzed that the practice of the ComAT is not uniform on this issue. The only helpful orientation is provided by the 'due-diligence' principle, which means that the state is obliged to perform some kind of conduct, dependent on particular circumstances of the case (McDonald, 2019, pp. 1044-1049), without necessarily achieving any concrete result. Again, effective control has a role here, as it comes into play as one of the criteria used to assess the fault of the states having an obligation to demonstrate diligence concerning the extent that each is responsible for preventing or remedying the wrongful conduct (Tzevelekos, 2015, p. 134; Goller, 2024, pp. 71-73).

Finally, although doctrinal approaches to extraterritorial jurisdiction and positive obligations surpass the purpose of this article, it might be useful to indicate that even in cases where jurisdiction cannot be established extraterritorially, some extraterritorial obligations of the sending state still can be incurred through state responsibility for the breach of certain primary obligations, which then creates a new, secondary legal obligation of post-return monitoring. Valid arguments may also be offered for considering post-return monitoring as an element of the primary duty of *non-refoulement* (Heschl, 2018, p. 95), and the obligation to cooperate, either by analogy with the logic behind the relevant principles relating to the second generation of human rights (Marks, 2014, p. 174) or by extensive reading of the duty to cooperate for the full realization of the Convention against Torture (De Schutter et. al, 2012, pp.

1092-1093). Any further violations of a protected person's rights might also be attributed to the sending state if it failed to do everything in its power to prevent these violations (the due diligence test) (McNamara, 2013, p. 319), especially since it "holds a considerable level of control" over the decision to return the migrant (McNamara, p. 334), and for "facilitating, through the extradition process, a denial of the applicant's rights by that other state" (Stefanovska, 2017, p. 175). Such an understanding of human rights obligations, when translated into practical migration policy measures, would represent a significant shift from effective control "to a more functional conception of extraterritorial jurisdiction", with the focus on the specificities of the relationship between the migrant and the returning State, not the place where the ill-treatment materialized (De Boer, 2015, p. 126).

4. Shaping the Contours of Post-Return Duties

4.1. Who are the Addressees of the Post-Return Duties?

When analyzing policy implications of post-return monitoring, potential addressees of the obligation need to be ascertained. "Exploring ways and means" might relate to the conduct of state organs or non-state actors acting on its behalf. To imply that the addressees should be Serbian consular officers in Turkey, or a Serbian state monitoring body that oversees the implementation of the Convention would result in some form of interference in internal affairs of Turkey, another sovereign state, by Serbia. Although National Preventive Mechanisms (NPMs) in Europe regularly monitor return flights of illegally staying migrants to third countries (Pirjola, 2015, p. 317), their involvement ceases upon reception by the authorities of the receiving state, whereas another problem would consist in expecting an obviously junior partner in this bilateral relationship to influence the sovereign policy of a much stronger and more influential state in international relations. This is unrealistic and not really feasible from the point of view of Serbian foreign policy. Furthermore, it is doubtful whether an international quasi-judicial body such as the Committee against Torture should deal with such political matters. It might lead it to severely overstep its competencies. However, human rights treaty bodies are sometimes willing to go so far as illustrated by the case of *Illaşcu* before the European Court of Human Rights, where the political tactics applied by Moldova as a respondent state concerning the treatment of the applicants by an entity which was not under its control were criticized (*Ilaşcu and others v. Moldova and Russia*, 2004, para. 350). This argument prompted one author to note that the Court appeared to be somehow naive about real politics and political negotiations (Heschl, 2018, p. 503). It is not surprising, therefore, that previous practice of post-return duties usually rested on the activities of the NGO sector, sometimes in coordination with international governmental organizations and agencies (IOM and UNHCR) (Pirjola, 2019, pp. 370-371).

4.2. Available Methods

The second issue is to determine methods that should be used to ensure that post-return monitoring is fulfilled. Again, these methods must stay in the framework of the principle of non-interference if they relate to the activities of state authorities. Diplomatic assured returns are one of the most commonly used methods in wider human rights practice. Those are formal undertakings by the receiving state that the protected person would be treated under conditions set by the sending state (UNHCR, 2006). Human Rights Watch points to the growing practice of states seeking assurances of humane treatment in order to transfer terrorism suspects to states with well-established records of torture (HRW, 2005). However, diplomatic assured returns do not contain any mechanism that can enable the sending state to continue monitoring once the assurance is issued, thus leaving space for their extensive criticism by the UN High Commissioner for Human Rights, UN Special Rapporteur on Torture, and numerous human rights organizations (Droege, 2008, pp. 695-696). The establishment of a monitoring mechanism that could continuously collect and transfer to the sending state the information on the protected person's well-being would therefore be the best option. This mechanism might coordinate the work of local NGOs and international organizations and connect them with the embassy of the sending state. The European Council on Refugees and Exiles (ECRE) advises that the UNHCR, embassies, and NGOs monitor returned migrants in tandem, and share such information with each other and with host states (ECRE, 2005, p. 5). However, reports indicate that the possibilities of monitoring by human rights organizations in Turkey were severely restricted after the attempted coup d'état, because of a nationwide crackdown on human rights defenders in this country (Alpes et al, 2017, p. 2). This in turn leads us to consider that states that experience difficulties in on-the-ground investigations might try exploring the use of modern technology to collect data, especially since sovereignty in cyberspace is still not a developed concept in international law. This might include creating websites to give platforms for complaints about returned migrants exposed to violations, or usage of social networks. Similar proposals have already been suggested by Pirjola, though in a slightly different context (Pirjola, 2019, pp. 327-328).

4.3. Criteria and Elements of the Post-Return Monitoring Duty

The nature of the obligation of post-return monitoring is another issue that needs to be considered. When the ComAT recommends the state "to determine, in consultation with the country to which he was deported, the complainant's current whereabouts and the state of his well-being" (*Mafhoud Brada v. France*, paras. 14-15; *Adel Tebourski v. France*, paras. 9-10; *Bachan Singh Sogi v. Canada*, paras. 11-12), this is a one-time obligation that can be exhausted through the methods and agents analyzed above. When the sending state receives the information on the whereabouts and well-being of the protected person, monitoring would cease. On the contrary, when the ComAT indicates "regular visits and effective monitoring" (*Khairullo Tursunov v. Kazakhstan*, paras. 10-11), this is a continuous obligation, which is related to

the fact that the protected person is detained, which would imply that this obligation would stop at the moment of his/her release, although it might be argued that the fact of detention does not automatically entail the persecution, therefore the obligation would lapse at the moment when the source of persecution disappears, e.g. conditions of detention have improved (Tazreiter, 2006, p. 20). In any case, ComAT has indicated that monitoring must be objective, impartial, and sufficiently trustworthy (*Khairullo Tursunov v. Kazakhstan*, paras. 10-11), which reinforces our suggestions that local civil society organizations should cooperate with renowned international organizations to ensure high-quality monitoring.

General criteria of the case might also influence the contents of post-monitoring obligation. As some decisions on the return of protected persons take place after denials of asylum requests on a procedural basis only, without competent authorities reviewing the request on merits, post-return monitoring would be especially needed in case there is no viable option for these persons to appeal the decision. CAT prohibits states from expelling persons to countries where they could be tortured. If, as in the case of Ayaz, a state returns a person to a place where he is detained and exposed to torture, while it previously had not considered all the necessary evidence to ground its decision in fact, or it has violated its asylum procedure, the appeal would most probably overturn the decision on removal. Even if the appeal fails, some avenues should be explored to enable applicants a chance to reenter the country to take part in the appeal proceedings (Hoffman et al, 2015, p. 151). This is even more important in cases where the protected person is returned to a country that is not a party to the Convention since in case of violation of his rights there would be no legal option of recourse to the Committee for protection of any kind (*Asghar Tahmuresi v. Switzerland*, para. 8). In the case of Ayaz, the general situation with human rights in Turkey, as documented by credible sources of international and non-governmental organizations reviewed above, further reinforced the legitimacy of the post-return monitoring obligation.

5. Policy Implications of Post-Return Monitoring: Balancing between High Expectations, Realistic Prospects and Enduring Obstacles

Post-return monitoring commitments indicated by the ComAT have the potential of impacting both migration and asylum policies of states. However, besides positive implications of post-return duties, there is a number of impeding factors that hinder their potential to achieve functional and beneficial results. How states have so far approached post-return measures indicated by the ComAT, may serve as a litmus test for their efficiency as well as guidance for their further transition towards a more effective instrument.

5.1. Positive Policy Implications of Post-Return Commitments

The very fact that post-return commitments analyzed in this paper have all been indicated by an international body established by the international treaty to which involved states are parties and to whose jurisdiction they

consented, represents the main argument from which positive inferences for migration policies derive. Positive aspects of post-return monitoring are diverse. First of all, they may be identified at both international and domestic levels. Secondly, positive implications are not limited to a particular returnee but have the potential to affect a substantial number of persons, whereas they do not necessarily relate to forcibly returned migrants but encompass voluntary returns as well. Finally, although they primarily influence the policies of the returning state and the state of destination, positive implications of post-return monitoring would proportionally increase should they manage to reach a wider regional and international audience.

Positive policy implications of post-return monitoring are perceived at the international and domestic levels, with the tendency to intertwine. At the international level, a body of an international character, through the indicated post-return measures, signals the returning state what it is expected to do, i.e. the state is given clear guidance as regards its desirable future conduct not only in the case at hand but also in other similar cases. In that way, post-return measures serve the purpose of placing additional pressure on the returning state through available measures of soft coercion and the follow-up procedure subsequently conducted before the ComAT. These forms of soft international pressure are very likely to be consequently transposed to the national level and they are to be used by relevant non-governmental organizations as a valid argument in their respective activities that influence the returning state's migration and asylum policies. Besides, and as already remarked by legal scholars, post-return monitoring assists states at the domestic level "in creating effective, transparent, and morally responsible return policies" (Pirjola, 2019, p. 363), as well as upgrading the standards of conducting the asylum and extradition procedures. Country of origin information, an important factor in assessing both the asylum claim and risks the person may face once returned, should be regularly updated by information gathered throughout the post-return monitoring process. Although examples of collecting country of origin information through post-return monitoring have already occurred (Podeszfa & Manicom, 2012, p. 13), such practice has so far remained occasional and may be criticized for not becoming a systemic feature. It may also be used to the benefit of overthrowing the assumption that either the country of origin or the third country may be considered as safe for the returnees both generally and in case their circumstances are similar to the given returnee and that "until there is a review of the policy indicating that it is safe to return people" to the particular country, "no further removals should be carried out" (Ramos, 2011). Such an advantage of post-return monitoring proves beneficial in domestic legal systems that recognize the safe country of origin/safe third country concepts as grounds for rejecting asylum claims without their examination on the merits, as is the case in EU Member States and national asylum systems of states that tend to harmonize their legal systems with the European *acquis*. Erroneous application of these concepts used to be the main obstruction for the proper functioning of the asylum system in Serbia (Krstić & Davinić, 2019, pp. 168-172), whereas information gathered in the process of post-return

monitoring would offer valid evidence for proving the unsafety of a particular country. Such an implication appears as particularly important in cases similar to that of Cevdet Ayaz. Namely, Mr. Ayaz's asylum claim had not been substantially considered by Serbian authorities, meaning that it was not discussed at any point during the asylum and extradition procedures whether Mr. Ayaz would face the risk of ill-treatment once returned to Turkey (BCHR, 2020, pp. 50-51). Information gathered through post-return monitoring would serve the task of correcting future return policies with regard to the given state. Should the post-return monitoring show that the returnee had not been exposed to ill-treatment by the receiving state, the returning state would benefit from the satisfaction that its decision to return the person did not violate other conventional rights. The satisfaction would, however, be only of moral not legal nature since actual exposure to ill-treatment is not relevant for qualifying its initial decision as a violation of the prohibition of *refoulement* (Tzevelekos, 2015, pp. 159-160), but whether the returning state properly assessed the likeliness that the returnee would be exposed to ill-treatment in the receiving state (Frenzen, 2017, p. 510). On the contrary, should post-return monitoring reveal that the ill-treatment had indeed materialized upon return, further consequential duties of the returning state would arise. In addition to correcting its existing return policies, such a revelation should be transposed back to the international level and communicated to other states through ComAT and other international mechanisms, followed by several additional consequences consisting in subjecting the involved states to enhanced international supervision by all available means, returning the victim of ill-treatment to the territory of the sending state and re-engaging "the obligations of the Refugee Convention (…), despite refugee status initially being denied in the host state" (Manicom, 2013, p. 24).

Although established for the benefit of one particular returnee, various positive implications of post-return monitoring have the obvious potential of reaching larger numbers of persons and impacting policies that may concern different categories of migrants. Relevant ComAT's practice reviewed in the first part of the paper referred exclusively to cases of forced return. However, concluding observations adopted by the ComAT in 2015 concerning Denmark suggest that post-return monitoring has the potential impact upon wider migration policies since it should encompass voluntary returns as well. The ComAT remarked that Denmark "should put in place mechanisms to monitor the situation of vulnerable individuals and groups in receiving countries after their deportation, even in cases where the return is voluntary, and act upon reports of ill-treatment" (ComAT, 2015, para. 21). Although ComAT seems to have limited post-return monitoring in voluntary return cases to vulnerable individuals and groups, this significantly widens the reach of post-return monitoring in three aspects. Firstly, the recommendation to get involved in post-return monitoring is general and does not relate to a particular complainant. Secondly, by widening the reach of post-return monitoring, the amount of information potentially gathered throughout the process is also extended, thus enabling the returning state to form its migration policies upon

the more solid and instructive ground, whereas collected information, as well as the fact that their return will be monitored, might encourage other migrants to return voluntarily. Thirdly, the returning state is explicitly required to react to cases of reported ill-treatment. Even though the ComAT does not clarify which specific measures this entails, it does explicitly suggest that the main purpose would consist in informing Denmark's migration policies (ComAT, 2015, para. 21).

The position towards post-return monitoring of both the returning state and the receiving state should also serve as an important indicator for third states, especially those that lay on common migratory routes. Information gathered throughout the post-return monitoring mechanism, as well as the involved states' willingness to mutually cooperate actively and in good faith for the benefit and in the interest of the given returnee, may and should influence the way third states qualify them as safe for their own potential and future returnees. In this regard, post-return commitments have the potential of being considered as a complement to traditional human rights reporting mechanisms. Feedback on the returnee's post-return treatment by both the returning and the receiving states should become an integral and mandatory part of periodic reports submitted by states, shadow reports prepared by relevant international, non-governmental, and other organizations, as well as reports, recommendations, and concluding observations of various international bodies. In such a way, this kind of information will be available and easily accessible to a wider range of countries and other relevant actors and may thus become an authoritative means of shaping their respective migration, asylum, and return policies. Besides, the practice of indicating post-return monitoring measures as a form of redress which is currently ComAT specific has the potential of being transposed to other international human rights courts and bodies, thus "furthering discourse" on post-return commitments in other jurisdictions just as it was the case concerning several other issues (Kim, 2017, p. 70). Such a spill-over effect would be highly beneficial with regard to the European Court of Human Rights since, as a judicial body, its decisions are mandatory, whereas the Court has the possibility of indicating individual and general measures as a form of redress which is later supervised through a developed monitoring system with the Committee of Ministers of the Council of Europe at its forefront.

5.2. Obstacles for Post-Return Monitoring

Several factors question the efficiency of post-return monitoring and its ability to live up to the above-listed expectations. The fact that the returning state no longer has the returnee within its jurisdiction or control proportionately reduces its factual and legal capacities to respond to the exigencies of supervising his fate upon return. The obstacles for post-return monitoring may therefore be classified into two categories and will vary depending on the willingness of the state of destination to cooperate.

Under the complicated scenario of the lack of willingness of the state of destination to cooperate, the main impediment relates to the fact that the

returning state is expected to act on the territory of another sovereign state, which in essence, as already explained, represents the interference into its affairs. Official channels of communication will in such cases remain inoperable, whereas using alternative, non-official channels to obtain information about the returnee, as well as taking other post-return measures without consent will surely be qualified by the state of destination as an interference in its internal affairs. This significantly reduces the options at the disposal of the returning state and seriously questions its capacity to respond to the indicated post-return commitments. Although under such a scenario post-return monitoring will prove inefficient with regard to the given returnee, the implications for migration and asylum policies of the returning state will still be significant since the very fact that the state of destination refuses cooperation should be taken into account and influence the relevant policy-makers of both the returning state and third states.

In case the state of destination demonstrates its willingness to cooperate, another set of problematic issues is raised. First of all, the success of post-return monitoring will be directly dependent on how actively involved both the returning and the receiving states are and how much effort they are ready to employ. Besides, using official diplomatic channels and the institute of international legal aid may prove to be insufficiently efficient, especially in cases that demand urgent action. Although the returning state is not bound to utilize diplomatic and inter-state channels only, they appear as the sole way to counter the interference into internal affairs argument. More prosaic but equally significant impediments relate to the accessibility, reliability, and verifiability of acquired information, as well as the actual capacity of the returning state to impose the measure it considers the most appropriate on the receiving state. Furthermore, the level of the returning state's involvement in post-return monitoring may be conditional on the status and influence that a state in question has in the international community and on its mutual political relations with the receiving state. ComAT's divergent approach to post-return commitments indicated to the Russian Federation and Kazakhstan in factually similar situations seems to acknowledge the existing political realities. Namely, Russia, as a state of influence in the international community, was ordered a highly intrusive measure of returning the person to its own territory (*X. v. Russian Federation*, pp. 12-13), whereas ComAT urged Kazakhstan to pay regular visits and perform effective monitoring of the returnee (*Khairullo Tursunov v. Kazakhstan*, paras. 10-11). On the other hand, whereas disrupted mutual relations between the returning and receiving states will surely represent an insurmountable obstacle for the implementation of post-return monitoring, relations officially proclaimed as excellent may also obstruct its efficiency. The *Ayaz* case may serve as an excellent example in that regard. Being a decision of a political nature in the first place, the extradition of Mr. Ayaz to Turkey while the procedure before the ComAT was still pending was implemented within the context of excellent relations between Serbia and Turkey, following the visit of the President of Turkey to Serbia (Krstić & Davinić, 2019, p. 172). It is to be expected that considerations of political nature will prevail in the

post-return monitoring phase as well and that the returning state would not contravene the wishes and interests of its political and economic ally, notwithstanding the repercussions that ignoring clear recommendations of an international body would have upon its reputation of a country that (dis)respects human rights.

5.3. Measuring the Influence - Post-Return Monitoring in Practice

Responses to indicated post-return measures fit the larger picture of states' general reluctance to accept extraterritorial commitments concerning the application of human rights treaties (Da Costa, 2013, p. 11). Beyond the CAT system, states indeed do not perceive post-return monitoring as a component of their international duties. According to a study carried out in 2011 and relating to available practices in 15 European states, only 13% were involved in some sort of post-return monitoring through the reintegration of forcibly returned migrants, whereas 67% covered the pre-return phase (DG JLS, 2011, p. 27). The situation has not meanwhile significantly changed (ICMPD, 2021), whereas the EU has been criticized for not having put in place a mechanism for monitoring the situation of individuals readmitted to Turkey (Alpes et al, 2017, p. 2). Explicit positions of particular countries can be rarely found but their common feature appears to be that they consider monitoring duties to cease at the border as is the case with the UK (Podeszfa & Vetter, 2013, p. 69), or at best at the moment a returnee is handed over to the authorities of the receiving state, which is the position of Germany (Ruttig & Bjelica, 2017).

Similarly, within the CAT system, examples of states' responses to indicated post-return monitoring commitments do not leave space for promising conclusions. Scarce information on states parties' position on post-return monitoring suggests that there exists significantly divergent apprehension of post-return duties, ranging from an explicit refusal of such duties to their moderate acknowledgment, although without visible outcomes for a particular returnee.

In 2005 cases *Brada v. France* and *Tebourski v. France* where the Committee recommended the state party to determine, in consultation with the country to which he was deported, the returnee's current whereabouts and the state of his well-being, France initially failed to inform the ComAT about measures taken to respond to its recommendation. Upon another demand issued in January 2010 that France should "inform the Committee of the follow-up given to the Committee's conclusions" in the respective cases and "give details of recent measures taken by the state party to confirm the present place of residence of the complainants and to ascertain what has become of them" (ComAT, 2010a, para. 16), France replied that it considered itself "not required to respond to requests for interim measures" (ComAT, 2010b, para. 35). The Committee, in turn, recalled that indicated post-return measures were intended to give meaning and scope to Articles 3 and 22 of the Convention, which otherwise would offer migrants "alleging a serious risk of torture only theoretical protection" and urged France "to review its policy in this respect" by considering requests for post-return monitoring measures in good faith

(ComAT, 2010b, para. 35). However, France persisted in holding its initial position throughout its further communication with the Committee, reaffirming that it does not consider conclusions of the Committee as mandatory but as simple recommendations. The only obligation that France reads in ComAT's conclusion is to inform the ComAT on potential measures that it intends to take. Referring explicitly to *Brada v. France*, France considered that its only duty was "to carefully examine the demand and, to the extent possible, try to implement the measures" (ComAT, 2016a, paras. 171-173). However, it reserved the right to assess on its own whether the return would expose the complainant to ill-treatment, essentially stating that its commitments do not exist post-return (ComAT, 2016a, para. 174). A similar approach was taken by Canada with regard to *Bachan Singh Sogi v. Canada* case in which the Committee ordered the same post-return measures and reproached the state party for not providing an update on the matter. The Committee explicitly asked Canada to "explain the procedure followed, guarantees received and monitoring mechanisms" (ComAT, 2012, para. 14). However, Canada provided the Committee only with the statement that it considered its domestic processes relevant for concluding "that the individual in question would not face a real and personal risk of irreparable harm upon removal from Canada" (ComAT, 2018, para. 26), thus basically refusing the possibility to extend its CAT commitments to the post-return phase.

On the contrary, states' response to post-return measures offered reasons for moderate optimism in *Tursunov v. Kazakhstan.* As previously noted, the ComAT ordered Kazakhstan to perform regular visits to Mr. Tursunov and effectively monitor his circumstances upon return. The state party considered it appropriate to give the suit to ComAT's demand. Namely, it informed the Committee that "its general prosecutor's office had requested from the general prosecutor's office of Uzbekistan the organization of a visit to the complainant in prison by the state party's diplomatic service on both a regular and an *ad hoc* basis" (ComAT, 2016b, para. 6), whereas the Committee decided to keep the follow-up dialogue open. Taking into account that the first visit in the *Tursunov* case was scheduled less than a year after the ComAT adopted the decision indicating post-return measures, the more recent case of *Ayaz v. Serbia* represents a step back and another example of not using the full potentials of post-return monitoring. Efforts made by Serbian authorities to conform to the 2019 ComAT's views have so far been negligible. Nearly a year and a half after the indication of post-return monitoring the only activity undertaken by the Republic of Serbia related to the meeting with relevant Serbian non-governmental organizations convened by the Government Council for Monitoring the Implementation of Recommendations of UN Human Rights Mechanisms. The meeting aimed to discuss the implementation of ComAT's recommendations to Serbia, however without reaching any pragmatic conclusions (BCHR, 2020, p. 33). Such a frail undertaking surely cannot be considered as meeting the Republic of Serbia's duty to "explore ways and means" for monitoring Mr. Ayaz's situation in a Turkish prison, where, based on scarce available information, he still remains (Rakić-Vodinelić, 2024).

Serbia's failure to undertake post-return monitoring of Mr. Ayaz's situation was acknowledged by the ComAT in its 2021 Concluding observations on the third periodic report of the Republic of Serbia. The Committee regretted "the lack of progress made by the State party in carrying out comprehensive post-expulsion monitoring of the complainant and ensuring redress" and asked Serbia, *inter alia*, to „provide the Committee with information on institutional and legal reforms undertaken to avoid a similar wrongful extradition" (ComAT 2021, paras. 31-32). However, despite this clear recommendation, which went beyond Mr Ayaz's situation and became a general one, similar practices continue. The case of a Bahrein national who was deported from Serbia to his country of origin in 2022, notwithstanding the interim measures ordered by the European Court of Human Rights, is currently pending in Strasbourg (*Ahmed Jaafar Mohamed ALI v. Serbia*, 2022).

6. Conclusion

Considered as a relatively recent phenomenon of a worldwide character (Kanstroom & Chicco, 2015, p. 542), a constant increase in the number of returned migrants implies that the situation is worse than ever. Within the European Union, for example, 484.160 migrants were ordered to leave EU in 2023, with an increase of 3,8% as opposed to 2022. Among them, 111.185 persons were actually returned outside the EU, with an even more drastic increase of 25,1% with regard to 2022 (EUROSTAT, 2024). Therefore, post-return monitoring, although introduced by the ComAT as a form of a rather weak redress indicated in a limited number of cases that managed to reach it, primarily serves as a valuable tool for *non-refoulement* prevention whose prospects and potentials may serve to the benefit of a larger number of migrants but have not so far been fully resorted to.

In the absence of an international normative framework that would regulate the post-return commitments of states or a transfer agreement concluded in relation to particular returnees (Droege, 2008, p. 694), the developing law on extraterritorial human rights obligations offers valuable insight into the area of migration (Gammeltoft-Hansen, 2014, p. 131). Based on the current experience in the *Ayaz* case and in an effort to find a proper balance between the high expectations of post-return monitoring and the necessity to be pragmatic and down-to-earth, post-return commitments are distinguished at three different levels.

First-level commitments comprise the returning state's duty to make all reasonable efforts in order to get in contact with the authorities of the receiving state. In case a particular official channel proves unfeasible, the returning state should resort to other available channels of communication, including via relevant international institutions and organizations.

Secondly, once the communication between the two states is established, a number of options are put forward. Visits by the diplomatic representatives of the returning state may be perceived as the best available and most reliable solution, however, as already noted, national mechanisms for the prevention of torture that have the right to access detained persons could also

serve the purpose. As an already existing network of state institutions established by the Optional Protocol to the Convention against Torture, National Preventive Mechanisms offer a ready-made channel of communication and cooperation between the parties to CAT that would significantly simplify the execution of post-return monitoring commitments. In addition, information on returnees about whom post-return monitoring was established, should become an integral and mandatory element of NPM's reports of both the returning and the receiving state, thus easily accessible to third states as well. It must also be considered that post-return monitoring is a commitment of a continuing character. Therefore, visits should be regular just as the meetings organized by the respective countries, in which not only state representatives but also representatives of international and civil rights organizations and legal counsels of the returnee would take part. Information regarding the returnee's well-being should, in any case, be verified through alternative channels, whereas respective standards would be raised by establishing national contact persons or liaison officers in Convention against Torture parties.

Should post-return monitoring reveal any kind of evidence that the returnee had been exposed to ill-treatment, the returning state would have to engage in a new set of commitments. These third-level commitments would involve negotiations to explore durable solutions for the returnee's well-being, including the possibility to return him to the territory of the deporting state. Such a measure of last resort will undoubtedly be difficult to implement in highly sensitive cases similar to *Ayaz*. However, difficulties, no matter how strenuous they may be, should not be used as an excuse for not taking any action.

Information collected through post-return monitoring represents valuable evidence upon which effective migration policy needs to be based and an opportunity for the state to tailor future policy decisions in a manner to avoid repeating its past mistakes and omissions. All the more in cases such as *Ayaz v. Serbia* in which the potential violation of other CAT rights by Turkey was actually enabled by Serbia's decision to return Mr. Ayaz despite the ongoing proceedings before the Committee. Detecting ill-treatment upon return would be unlikely without engaging in some sort of post-return monitoring, though current practice points to a still underutilized potential of this institute. Taking into consideration the fact that international law is far from a general and universally accepted systematic post-return monitoring mechanism, relatively rare and still, isolated cases of such monitoring required by an international body such as ComAT, despite obvious difficulties, carry considerable weight and represent a useful tool in affecting return, asylum and migration policies of states.

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