CHAPTER 7

Forced Repatriation: towards minimum guarantees for repatriation treaties

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7.1 Introduction

Forced repatriation of deportable aliens to their country of origin (in jargon: "repatriation of aliens who have exhausted all domestic legal remedies") occurs increasingly.[1] In recent years, there is a visible tendency for States wishing to rid themselves of a certain group of aliens, to conclude an agreement with the State of the nationality of the members of that group, and to accelerate and regulate this repatriation.

The Netherlands entered for the first time into such an agreement on 6 June 1994[2], regarding the Vietnamese people residing in The Netherlands. Indeed, this Agreement concerns a group of people with an exceptional background; most of them spent many years in the countries of Eastern Europe as migrant workers, sent there by the Vietnamese Government. Moreover, following the decision of the co-ordinating aliens chamber of the District Court of The Hague (*Rechtseenheidskamer in vreemdelingenzaken*) of 1 June 1995[3], the Agreement has lost much of its meaning.[4] Nonetheless, this Agreement with Vietnam can easily be regarded as a model which could also be used for repatriation treaties regarding aliens with a completely different background.[5] The text of the Agreement anticipates forced repatriation to Vietnam. According to the first paragraph of Article 3 of this bilateral Agreement: Vietnamese citizens who are not admitted into any other country "shall be repatriated to Vietnam."

1 Readmission by third countries is outside of the scope of this chapter.

2 Trb. 1994, No. 121. An example abroad is the treaty between Switzerland and Sri Lanka regarding the return of Tamils to Sri Lanka. See the - very critical - M. Marugg, Sichere Rückkehr von Tamilen in Unsicherheit, ASYL (1994/1), p. 6 *et seq.*

3 In its decision of 1 June 1995 (Rechtspraak Vreemdelingenrecht 1995, 40), the coordinating aliens chamber of the District Court of The Hague does not comment on the Agreement, but does conclude that the person involved qualifies for the so-called three year policy, based on the fact that he has resided longer than three years in The Netherlands as a result from the Second Chamber considering necessary additional guarantees from Vietnam (Proceedings of the Second Chamber of the Dutch Parliament, 1991-1992, p. 47-3073). The three year policy indicates that asylum seekers who have not received a conclusive decision on their application within three years will be granted a residence permit. Many Vietnamese people who at the time came to The Netherlands from Czechoslovakia, will still be eligible for residence based on this verdict.

4 The Dutch Minister of Justice on 19 September 1995, answering questions of 27 June 1995, from Members of Parliament Rijpstra and Korthals. Annex to the Proceedings of the Second Chamber, 1995-1996, No. 2.

5 The Dutch State Secretary of Justice has also announced consultation with her colleagues of Foreign Affairs and Development Cooperation about entering into more repatriation treaties. In particular, Eritrea and Ethiopia are mentioned. See Documents of the Second Chamber of the Dutch Parliament, 1994-1995, 19 637, No. 131, p. 7.

Many questions arise in this regard. Can this be allowed? Can aliens without the right of residence, and under certain conditions, be forced to return to their own country?[6] What are, according to international law, the legal limits of this forced return? Would it be desirable, within those limits, to include certain clauses in repatriation treaties which, as much as possible, guarantee some kind of support to the forced repatriates, to enable them to (re)build an acceptable existence? These are the questions which will be discussed in the following sections.

In section 7.2, the rules defining the limits of the lawful use of force are introduced. Section 7.3 covers the desirability of repatriation treaties. Section 7.4 outlines the minimum standards which these treaties should incorporate. The Agreement between The Netherlands and Vietnam is tested against these minimum standards in section 7.5. Finally, conclusions are reached in section 7.6.

7.2 The three basic rules and their exceptions

The cases where forced repatriation can be undertaken by the State in which the aliens are residing, are determined by three basic rules of international law. Of these three rules, the objectives of which strongly overlap, the first two are primarily directed towards the rights and obligations of States; the third rule is based on a human right of individuals. Rule 1 states that a State has the right to expel aliens, but for exceptions mainly laid down by treaties. Rule 2 regards the State to which, but for comparable exceptions, an alien can always be deported: a country has the obligation to allow entry to its nationals. Rule 3 can be found in paragraph 2 of Article 12 of the International Covenant on Civil and Political Rights ("ICCPR") and in paragraph 2 of Article 2 of the Fourth Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"): "Everyone shall be free to leave any country, including his own."

Free migration of people who want to change their country of residence is obsolete. Likewise, the possibilities of a State to expel an alien are limited. The first question such a country has to address is "Where can I expel this person to?" If that State, referring to rule 1, expels an alien without an *a priori* agreement with the State of destination, it is very likely that the latter, referring to the same rule, will send the person back to the country he came from. Often, based on rule 2, only the State of origin (*i.e.*, nationality) will be open to admission. At the least, an interpretation problem will arise for the State which wants to expel the alien if the deportable alien expresses his wish, appealing to rule 3, to not be forced to return to the State he wanted to leave.

The solution to the problem just mentioned will firstly depend on the mutual demarcation of the three basic rules involved and on the demarcation with regard to "any relevant rules of international law applicable in the relations between the parties", as stated in Article 31 of the Convention on the Law of Treaties.[7] In the case of forced repatriation, the "parties" are the State wanting to expel the alien and the State of the alien's nationality.

6 Art. 3, para. 2, of the Agreement with Vietnam states that UNHCR will be invited to assist with the execution of the Agreement. Before the EC/UNHCR reintegration programme came into effect in 1989, UNHCR only cooperated with voluntary repatriation, in accordance with its statute (G.A. Res. 428-V). Chapter I of the "Statute of the UNHCR" states in the first paragraph: "The UNHCR, acting under the authority of the General Assembly, shall (...) facilitate the voluntary repatriation of (such) refugees ..."

7 Vienna Convention on the Law of Treaties, 23 May 1969, U.N. Doc. A/Conf.39/27.

A Rule 1: A State has the right to expel irregular aliens

This relevant general rule of international customary law is undisputed. The national aliens law of all States is based on this rule. The international law concerning aliens (mainly treaty law) provides for a right of residence for many aliens and that law is normally incorporated and expanded within national law. Moreover, national law can contain additional entitlements to residency. However, an alien who is allowed entry in accordance with applicable law can be expelled. If an alien, who is notified to leave, does not leave voluntarily, he can be forced to leave the territory. Article 5, paragraph 1, *sub* f, of the ECHR indicates that the right of freedom for all can be limited when force becomes necessary for a lawful deportation.

Expulsion ("deportation" in the original English text of Article 5 of the ECHR) always means transfer to another country. Forced transfer is only lawful if the receiving country consents and accepts this explicitly or by tacit consent. This is not only the result of the rule as listed, but also of the generally accepted rule that no State will take up enforcement measures against anyone on the territory of another State without its permission.

In addition to the consent requirement, deprivation of liberty for the purpose of deportation is also influenced by whether the rights as protected by, *inter alia*, the ECHR will be threatened with violation. If deportation will lead to a real risk that those rights will be violated, deportation to the country where this risk of violation is present does not serve a lawful purpose.

On these grounds, a Danish organisation for the protection of children considered detention of Vietnamese youth for the purpose of deportation unlawful. Abuse, a violation of Article 3 of the ECHR, was about to take place in the intended destination country, according to the organisation. After exhausting domestic legal remedies, the ECHR Commission ruled that there was no violation of Article 3 to be expected as the Danish and Vietnamese Governments had made agreements with UNHCR and with the Danish and Vietnamese Red Cross, to ensure a proper accommodation for the children. Resulting from these agreements, there were "no serious reasons to believe that the children would face treatment contrary to Article 3."[8]

The decision of the ECHR Commission seems to indicate that, in doubtful cases, proper arrangements have to be made between the deporting and admitting States with regard to minimum guarantees for treatment, and with regard to monitoring compliance with these guarantees, which both States want to enforce regarding the deportees.[9] By including these arrangements in a treaty, forced deportations, otherwise unlawful, can sometimes be made legitimate. The above decision of the Commission furthermore refers to a problem which also arises when discussing rule 3: A country forcing transfer to another country which upholds completely different views regarding human rights, runs a risk; it runs the risk of co-operating in the violation of ECHR protected rights of the individual, to be committed in the State of destination.[10] Article 1 of the ECHR states that all parties to this convention "shall secure to everyone within their jurisdiction the rights and freedoms defined ..." The ECHR Court noted, for example, in the so-called

8 Commission Decisions and Reports. 215 (Appl. No. 7011/75).

9 See also ECHR Commission, 10 March 1994, Appl. No. 19465/92. The Commission observes in this case that expulsion of an applicant to Algeria will be a violation of Art. 3 ECHR, *inter alia*, since the French authorities have made no arrangement with the Algerian authorities about acceptable reception conditions.

10 See extensively the *Soering* case of the European Court for Human Rights, 7 July 1989, Appl. No. 14038/88, paras. 85 and 86.

Drozd case[11] that "the term jurisdiction is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory".

In conclusion, two conditions at least have to be met for a lawful (forced) expulsion. First, the State of destination must agree to the entry of the deportee within its territory. Second, the expulsion may not lead to a real risk of exposure to torture or inhuman or degrading treatment or punishment, as mentioned in Article 3 of the ECHR, or to any other serious violation of human rights.

B Rule 2: A State has the obligation to allow entry to its nationals

In considering the question whether an alien may be forced to return to the State of which he has the nationality, the generally accepted rule of international customary law has to be taken into consideration, which specifies the responsibility of a State for its own citizens: "A State is obliged to allow entry to its own citizens, ..." according to P.H. Kooijmans in his "Internationaal publiekrecht in vogelvlucht".[12] Kooijmans was preceded in this attitude by many experts in international law. Some examples are from H.F. van Panhuys in 1959, in his book entitled "The Role of Nationality in International Law"[13], referring to many predecessors, and P. Weiss in his ever prominent publication "Nationality and Statelessness in International Law."[14]

The indicated rule is directed at the obligation of the State to accept its nationals and the corresponding right of those States who are unable to relocate aliens anywhere else, and if no other rules of international law prevent this, to have these aliens be readmitted into the State of nationality. This rule has no bearing on the right of (individual) aliens or nationals. The rule does, however, facilitate the possibility for the deporting State to conclude a bilateral treaty regulating the *modus quo* of the transfer, which can have far-reaching consequences for the involved individuals, especially if a repatriation treaty includes specific provisions in favour of repatriates. The willingness of the State of nationality to enter into a repatriation treaty for its own nationals is also encouraged, at least for the parties to the ICCPR, by the fourth paragraph of Article 12 of the aforementioned covenant, granting nationals the right to enter the State of his nationality. The second paragraph of Article 3 of the Fourth Protocol to the ECHR grants the same right without restriction.[15] If

11 This case considered the scope of Arts. 1, 5 and 6 ECHR. Human Rights Case Digest, Vol. III, pp. 114-117. For comment, see C. Lush, The Territorial Application of the European Convention on Human Rights: Recent Case Law, 42 I.C.L.Q. (1993), p. 897 *et seq.*

12 P.H. Kooijmans, Internationaal publiekrecht in vogelvlucht [International public law in a nutshell], Wolters-Noordhoff, Groningen, 5th ed. 1994, p. 263. Kooijmans continues this quote after the comma with: "especially when no other country is willing to grant them stay, but it has the right to exclude aliens." With this, he allows for the freedom of each deportable alien to choose the country to which he chooses to be expelled - if that country is willing to grant him residence (for an elaboration, see rule 3).

13 H.F. van Panhuijs, The Role of Nationality in International Law, A.W. Sijthoff, Leiden, 1959, p. 55.

14 See the second edition of this study of one of the first legal officers of the UNHCR. Published by Sijthoff & Noordhoff, Alphen aan den Rijn, 1979, pp. 45-61. Weiss points out (p. 59) that the explicit obligation for admission of a national exists, "unless another State is willing to admit him" (for an elaboration, see rule 3).

15 Art. 12, para. 4, ICCPR states: "No one shall be arbitrarily deprived of the right to enter his country." In Art. 3, para. 2, of Fourth Protocol to the ECHR the word "arbitrarily" was omitted.

a large number of citizens stayed somewhere else but are now in danger of being subject to expulsion, still however have the right to enter, it is usually better for the State which has to grant admission to orderly organise repatriation and to regulate readmission by entering into a treaty.

C *Rule 3: "Everyone shall be free to leave any country, including his own"*

This third rule, which needs to be invoked in regard to the question whether the return of an alien is in accordance with international law, originates, as mentioned, from Article 12, paragraph 2, of the ICCPR. The second paragraph of Article 2 of the Fourth Protocol to the ECHR is similar. The right of a State to have a group of aliens of a certain nationality readmitted by a State whose nationals the State of residency wants to get rid of, interferes with the rule above: When by treaty provision, someone is free to leave his own country, it could be concluded that, in principle, no party to the treaty would be justified in forcing the person to return to his own country. Also the State of residence of that person does not have this right.

Does this mean that a State wishing to expel an alien to his own country is unable to do that lawfully if the involved person indicates he does not want to return to his country of origin? The answer would seem to be affirmative, if there is another country which that person prefers and which also would be willing to admit him. Under these circumstances the right of each State to expel irregular aliens (rule 1) can be honoured, without violating the right "to leave any country, including his own." Forced repatriation of aliens who are able and willing to emigrate to a third State is unlawful. To prevent an infringement of Article 12, paragraph 2, of the ICCPR, the State attempting expulsion will have to make an effort to find a more suitable State for those aliens who do not want to be repatriated.

The right to leave any country does not imply the right to stay in the country where the alien presently resides. By designating all other countries, which are open for admission, as countries where the alien does not want to stay, the alien will end up in the situation where he has no authorised residence in any State for which he does not have authorised residence based on other grounds. A contrary interpretation of the applicable ICCPR and ECHR provisions, possible only within a literal interpretation, is in contradiction with the intended freedom and is unreasonable. If people do not want to return to their own country, any other offer elsewhere will soon have to be regarded as acceptable.

If no other State, except the State of nationality of the alien, can be found to grant admission, what then remains of the right to leave one's country? This fundamental freedom, which applies to all States, must be considered against the right of the State which wants to expel, and referring to rule 2, to indeed proceed with repatriation – even against the wishes of those involved, but surrounded with all kinds of reasonable guarantees.

This consideration depends on the one hand, on the right of each State to determine who its inhabitants are and not allowing this to be influenced by any – for this State randomly occurring – leakage from any part of the population of another State. On the other hand, an important fundamental freedom is at stake. This fundamental freedom protects, in as far as it can be effectuated, against nearly every violation of human rights by the "own State". The international practice, and certainly the European state practice, acknowledges at least three human rights that forbid repatriation.

Forced repatriation of those who are in danger of being subject to persecution, as intended in the 1951 Refugee Convention[16], or who are in danger of being subject to torture or inhuman or degrading treatment or punishment, as meant by Article 3 of the

16 1951 Convention relating to the Status of Refugees, Trb. 1951, No. 131.

ECHR (Article 7 of the ICCPR), or for whom repatriation affects family life in the country of residence unacceptably (Article 8 of the ECHR and Article 23 of the ICCPR) may never result due to those considerations. If one has to choose between immigration or repatriation, at least according to the state practice within the Council of Europe, possibly temporary, immigration would prevail, in light of the aforementioned human rights. People who have this right to enter can not be expelled. They do not fall under the scope of rule 1. With reference to all other human rights, whose violation can be evaded by emigration, the right of the State of residence prevails to engage in forced repatriation, according to the same state practice. If the country of origin is lacking, for example, freedom of speech, the right to have elections, the right to privacy, union rights, the prohibition to be sentenced to jail for private debt, the prohibition on forced labour: the absence of all these – by the ECHR or its protocols as well as the ICCPR – protected rights do not lead to a prohibition of forced repatriation to the State of nationality of the involved alien, in the case where no other State is willing to grant entry. Only where the violation of one or more of the aforementioned rights have such serious results that one must speak of torture or persecution, *refoulement* is out of the question.

If a State uses its jurisdiction to repatriate an alien to a State which tends to violate the human rights in such a way that it does not lead to a prohibition of repatriation, is this without legal consequence? In the previously quoted *Drozd* case[17], the ECHR Court in Strasbourg underlined that the "jurisdiction" of the Parties to the convention, according to Article 1 of the ECHR, "shall secure to everyone", can have effect also outside their own territories: "their responsibility can be involved because of acts of their authorities producing effects outside their own territory". If the authority of a State proceeds with forced repatriation to a State which does not tend to uphold some of the rights earlier mentioned, that State uses its jurisdiction in a way which can have negative effects on securing[18] those rights within the territory of the receiving State. The latter is obviously primarily responsible for any treaty violations after repatriation. The question is raised whether the State repatriating bears any responsibility? If expulsion to the State of origin presents a real risk of serious violation of Article 3 of the ECHR (torture), then repatriation is not allowed to occur, according to the now undisputed European jurisprudence.[19] Except in cases of violation of the rights to family life (Article 8 of the ECHR), serious violation of other ECHR articles as a result of repatriation does not have the same legal consequence. Nevertheless, in making an effort to comply with the whole ECHR, also outside its territories, is it not the duty of the repatriating State to enter into an agreement with the State to whose territory is expelled, so that support for any of the human rights, as much as is reasonably possible, is encouraged by a bilateral treaty? If an alien does not want to return to his own country, appealing to for example the Fourth Protocol to the ECHR and he is nonetheless forced to return to his own country, the repatriation itself may be lawful, but that alien seems to have more than a moral right to receive support from the state forcing him to repatriate, especially when compared to violation of ECHR rights other than those mentioned in Articles 8 and 3. A repatriation treaty to which he can appeal, can in fact be an

17 See *supra* note 11.

18 As in the meaning of "secure" from Art. 1 ECHR.

19 The words "real risk" were used by the European Court for Human Rights in relation to the prospect of a breach of Art. 3 ECHR by deportation, more specifically for the first time in the so-called *Soering* case in 1989 and furthermore in the *Cruz-Varas* case in March 1991 and the case with five Tamil asylum seekers on 30 October 1991. See with regard to the latter case, and with reference to earlier cases, the annotation written by B.P. Vermeulen, in: Rechtspraak Vreemdelingenrecht 1991, p. 83 *et seq.*

important support and diminish the real risk of serious human rights violations, at least in the case of forced return to some countries of origin.

7.3 Repatriation treaties

Entering into a treaty with a certain State of which many nationals are susceptible to repatriation, to regulate the return, depends on how similar the two States are with regard to the repatriates and whether this similarity leads to acceptance of institutions which have the responsibility to promote the observance of the treaty. No repatriation treaty should be concluded with states where the instability and disorder is such that observance of any repatriation treaty cannot be counted on by any repatriate.[20] However, all reasonably stable States are possible parties to a treaty to promote the return of those who, having exhausted all available domestic legal remedies, have not been granted residence and are also unable to go somewhere else. Forced return within the context of a treaty to which repatriates can appeal is always preferable, compared to forced repatriation without any agreement between the State expelling and the State receiving. This is particularly the case if the treaty provisions have direct effect, in other words, a repatriate will have the possibility to appeal to the treaty provisions himself and, furthermore, if there exist international and national institutions, provided for in the treaty, to which every repatriate can turn if in his view a treaty provision has been violated.

The contents of a repatriation treaty will have to vary according to the prevailing political and legal situation in the State of origin of the alien to be expelled. The majority of people subject to repatriation will be within the scope of returning to a dictatorship. Indeed, the majority of the countries of the world and the world population are ruled by systems of government which – according to the standards within the Council of Europe – should not be regarded as such. Thus, adopting European standards of treatment will often be impossible. Nonetheless, minimum requirements for repatriation treaties can be formulated; requirements which are based on non-discrimination and uphold existing national and international law.

7.4 Minimum standards

A repatriation treaty surrounds the forced return with specific guarantees. In light of the above, a treaty of this kind should contain at least the following guarantees, shaped as provisions which are directly applicable to everyone:

1 The treaty contains the rule that repatriation is only possible after exhausting all national legal remedies in each individual case.[21] Indeed, the right of the State intend-

20 This is why there was no repatriation treaty with Somalia in the past. However, in The Netherlands it was recently decided to repatriate Somalian asylum seekers who have exhausted all legal remedies and to withdraw or not extend their exceptional leave to remain. Only a few areas of Somalia are still considered unsafe. See Documents of the Second Chamber of the Dutch Parliament, 1994-1995, 19 367, No. 134.

21 The rejection of an application for an *interim* provision can in certain circumstances be regarded by international law as an exhaustion of national legal remedies. Repatriation treaties should, however, never allow repatriation pending legal procedures with suspensory effect.

ing to expel remains exclusive for repatriation to the State of origin. Whether expulsion is lawful should be individually verified to the national aliens act and to, *inter alia*, the 1951 Refugee Convention, the ECHR and the Convention against Torture ("CAT"). The repatriation treaty itself is not any basis for expulsion. The treaty only regulates the manner and the conditions for repatriation.[22]

2 No repatriation will take place to the State of origin, as derived from the conjunction of the three basic rules, if the involved person wishes to travel to a third State. He will be offered a reasonable period of time and all conditions will be created which can lead to the fulfilment of this wish, if he can show that there is a reasonable chance that a third State will allow him entry.

3 In the State of origin, repatriates will be safeguarded against prosecution for acts committed prior to repatriation.[23] (Otherwise, the situation can arise for example, where extradition occurs without the specific extradition treaty as required by Article 2 of the Dutch Constitution, which only permits extradition in the event of double criminality.) The repatriate will be protected against torture, or cruel, inhuman or degrading treatment or punishment, as intended by Article 7 of the ICCPR, Article 3 of the ECHR and Article 3 of the CAT, also in the non-foreseeable future as assessed at the moment of repatriation.

4 Repatriation provisions, *inter alia*, covering the expenses of relocation, will be assigned without discrimination between repatriates, more particularly without distinguishing between voluntary and involuntary repatriation.[24]

5 All treaties, especially those regarding human rights, applicable to the parties to the treaty, are also applicable to the repatriates. After their return, repatriates will be safeguarded against any discrimination compared to any other part of the population in the country of origin.

Furthermore, a proper repatriation treaty should determine:

6 The duration of the agreement entered into. The dependency of these treaties on the presence of certain categories of aliens to be repatriated and on the actual situation in the country of origin implies that these agreements can only be entered into for a specified (short) period – notwithstanding any extension – a duration in which substantial changes causing a disadvantage to the repatriate seem very unlikely.[25]

7 The national institution responsible for the implementation of the treaty in the receiving State.

22 Even without a repatriation treaty, expulsion is possible if the admission application, in a procedure with sufficient procedural guarantees, has been denied. If, however, as we propose, a repatriation treaty has been signed, only the provisions of that treaty can be used for expulsion.

23 Through, for example, critical articles written in the country of residence about the country of origin.

24 Returning voluntary or involuntary, after a conclusive rejection of the application for residence, is a (sham) distinction so questionable that it should not in any way result in consequences for being granted either financial or other support. Moreover, the distinction is dangerous. Returning with the explicit label "involuntary" can easily lead to serious repercussions in the country of origin.

25 Albeit no less than one year, as the treaty would otherwise be exempt from the Dutch Parliamentary Approval Requirements, see Art. 7, para. c, Wet goedkeuring en bekendmaking verdragen [Law regarding approval and publication of treaties].

8 The role of diplomatic representation of the sending State in the readmitting State.[26]
9 The manner in which adequate international organisations, for example UNHCR and IOM or other organisations[27], will supervise and assist the execution of the treaty.
10 The right of each repatriate to turn to the institutions as mentioned in the treaty, in order to receive assistance in compliance with the treaty, is specifically expressed in the text of the treaty. The intended organisations are both the appointed institution in the State of return as well as the diplomatic representation of the expelling State, and organisations such as UNHCR, IOM and others who will be willing to see to a proper observation of the treaty.[28]

7.5 Testing of the Agreement between The Netherlands and Vietnam

Testing of the Agreement between The Netherlands and Vietnam with the minimum standards as developed in the above, leads to the following conclusions:

Exhausting all national legal remedies
The Dutch text of Article 3, paragraph 1, of the Agreement with Vietnam only mentions implicitly that all national legal remedies should be exhausted. According to the Dutch text: "De (...) Vietnamese onderdanen (...) wier aanvrage voor toelating als vluchteling of verzoek om vergunning tot verblijf is onderzocht en afgewezen, worden naar Vietnam gerepatrieerd." The English text is more clear and states: "The Vietnamese citizens (...) whose application for refugee status or for permanent residence has been properly considered but rejected, shall be repatriated to Vietnam (...)." The Dutch text wrongfully lacks the translation of the word "properly". According to the Agreement, "The English text will prevail".

Travelling to a third country
In accordance with what we derived from the conjunction of the three basic rules, Article 2, paragraphs 2 and 3, of the Agreement with Vietnam offer the possibility to go voluntarily to a third country. The Netherlands will, in accordance with the treaty provisions, make an effort to realise those possibilities, before reverting to forced repatriation if necessary. According to Article 2, paragraph 3, the obligation for The Netherlands to perform to the best of its abilities to assist in resettlement in any other country is limited to six months after signature of the Agreement.[29] Rather, it seems appropriate to extend the duration for such a commendable treaty provision in favour of the freedom to leave his country, to six months after the coming into force of the Agreement, hence to at least six months after parliamentary approval.

26 One can also consider a "Committee of Experts" of both States, as proposed by the European Union in Art. 11 of the "Draft standard bilateral readmission agreement between a Member State and a third country", Press release 11321/94 (Presse 252-G).
27 For example, the International Red Cross or relevant EU institutions.
28 The national executive institution will supply the repatriates with addresses and phone numbers of the diplomatic representatives of the sending State and of the involved international organisation(s).
29 The obligation of The Netherlands to perform to the best of its abilities to assist in resettlement in the third country already expired on 9 December 1994, before any significant practical effect could be reported.

Protection against torture or other cruel, inhuman or degrading treatment or punishment
In response to letters of Amnesty International, the then Dutch State Secretary of Justice Kosto writes that he has answered the questions of Members of Parliament Van Traa and Leerling with "the promise that it will be discussed with the Vietnamese authorities to ensure that those Vietnamese people who have requested asylum in this country will in the case of forced return not have to fear treatment as intended by Article 3 of the ECHR."[30]

Such a guarantee is not reflected in the Agreement with Vietnam. Only in two instances (unauthorised stay abroad and breach of contract) is impunity recorded in the text. This fully enables the Vietnamese Government to punish the returned asylum seekers on different grounds. In the Agreement with Vietnam, any punishment for acts committed before repatriation should have been ruled out. Otherwise, extradition can occur without the necessary requirement of the so-called double criminality, as required by Article 2 of the Dutch Constitution.[31]

Repatriation provisions without distinction
The Agreement with Vietnam contains special provisions in favour of voluntary repatriates. The distinction between voluntary and involuntary return, as recorded in Article 3 of the Agreement with Vietnam, has no effect on the repatriation (they all have to go back), but it does affect the provisions. Those who express their intention to not voluntarily return will, according to the Agreement, be punished in three ways:

- they are not allowed to participate in the "reintegration program" (Article 5, paragraph 1);
- they shall not receive any funds (as described in Article 5, paragraph 2);
- they shall not receive any support for reintegration from the IOM (Articles 5 and 6, *passim*).

The provisions in the Agreement with Vietnam are not equally vested among voluntary and involuntary repatriates. Moreover, involuntary repatriates are stigmatised opposite the regime. This can in the long run have far-reaching consequences.

30 Letter of 18 February 1992, reference No. 181750/92/DVZ/91/253. See also Proceedings of the Second Chamber of the Dutch Parliament, 4 February 1992, p. 47-3073.

31 In the minutes of the negotiations of 18 December 1993, the so-called "agreed minutes", it was allegedly mentioned that the Dutch party brought to the attention, the matter of not prosecuting acts committed abroad including: reading illegal newspapers; assisting in the distribution of such papers; financially aiding the publication of such papers; the writing of articles for these papers; discussing political matters with other Vietnamese citizens or partaking in demonstrations for better payment; and better working conditions or more freedom. During these negotiations, Vietnam declared it would not engage in prosecution of such acts (Proceedings of the Second Chamber of the Dutch Parliament, 1993-1994, 22 475, No. 6, p. 2). No part of these "agreed minutes" is reflected in the Agreement with Vietnam. When asked, Minister Kooijmans indicated that such minutes are, by themselves, not an international legal agreement, but are part of the context of the treaty, according to Art. 31 of the Vienna Convention on the Law of Treaties, and hence should indeed be involved in the interpretation of the treaty. This is in no way any guarantee against violation of other human rights which should be incorporated in the text of the expulsion or repatriation treaties. It is absolutely insufficient to only file such minutes, from which the very limited guarantees against punishment of repatriated Vietnamese people ought to be deducted, for inspection by Members of Parliament.

Duration, institutions and right of complaint
The Agreement with Vietnam both lacks a provision determining the duration during which the Agreement is valid, as well as a termination clause. In such an agreement, both are indispensable.

Also, the institutions which are to implement the Agreement are inadequately specified. It is unknown how the IOM and UNHCR have accepted the invitation as mentioned in Article 3, paragraph 2. The Agreement does mention the Vietnamese Ministry of Labour, Invalid and Social Affairs in Article 5, paragraph 4, yet it is insufficiently clear since it does not specify the particular responsibilities assigned to the Ministry.

The right of each repatriate to turn to the involved international institutions and to the Dutch Embassy, in connection with (complaints about) observation of the Agreement and of the ICCPR is not mentioned explicitly. In view of the prevailing rules and opinions of that country, inclusion of such a right seems indispensable.

7.6 Conclusions

Concluding from the above, the Agreement between The Netherlands and Vietnam is not an example of a standard agreement to be followed. However, a repatriation treaty can be very necessary, if only because of the sheer numbers of repatriates (for example, after ending a policy of exceptional leave to remain). In those cases, a treaty offers the possibility to safeguard a gradual, orderly return and actual reception and support in the country of origin.

A second argument in favour of a repatriation treaty may originate from the overall human rights situation in the country of origin. This situation should be such that it does not lead to unlawful extradition. In view of the overall human rights situation in certain countries of origin, additional safeguards, taking the shape of a repatriation agreement, may nevertheless be necessary. The legal basis for such an agreement is the collective responsibility of countries party to the human rights conventions, to guarantee observation of human rights in its broadest sense. Similar considerations led the Second Chamber of the Dutch Parliament to conclude that the forced return of Vietnamese people to Vietnam should be accompanied with additional safeguards to prevent the violation of human rights.[32] Based on these considerations, future repatriation agreements should incorporate the necessary safeguards for a proper treatment and enforcement of human rights. Forced repatriation should not lead to potential infringements of international human rights, no matter how much a repatriation as agreed to by treaty, is preferable.

32 Proceedings of the Second Chamber of the Dutch Parliament, 1991-1992, p. 47-3073.