

COMMITTEE AGAINST TORTURE

V.X.N. and H.N. v. Sweden

Communications Nos 130/1999 and 131/1999

15 May 2000

CAT/C/24/D/130 & 131/1999

VIEWS

Submitted by: V.X.N. and H.N. (names withheld) [represented by counsel]

Alleged victims: The authors

State party: Sweden

Date of communication: 15 February 1999

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 15 May 2000,

Having concluded its consideration of communications Nos. 130/1999 and 131/1999, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the authors of the communication, their counsel and the State party,

Adopts its

Views under article 22, paragraph 7, of the Convention

1.1 The authors of the communications are Mr. V.X.N., born on 1 December 1959, and Mr. H.N., born on 10 November 1963, two Vietnamese nationals currently residing in Sweden where they received refugee status and permanent residence permits on 18 August 1992 and 23 August 1991 respectively. The authors claim that they risk torture if they are returned to Viet Nam and that their forced return to that country would therefore constitute a violation by Sweden of article 3 of the

Convention. The authors are represented by counsel.

1.2 In view of the similarities of the two claims, the Committee decided to consider the communications together.

1.3 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted communications Nos. 130/1999 and 131/1999 to the State party on 29 April 1999. Pursuant to rule 108, paragraph 9, of the Committee's rules of procedure, the State party was requested not to expel the authors to Viet Nam pending the consideration of their cases by the Committee. In a submission dated 27 May 1999 the State party informed the Committee that the authors would not be expelled to their country of origin while their communications were under consideration by the Committee.

The facts as presented by the authors

The case of Mr. V.X.N.

2.1 The author of the first communication (No. 130/1999), Mr. V.X.N., states that he came to Sweden in 1992, recognized as a quota refugee. In 1995 the author was sentenced under Swedish law to five years' imprisonment. According to the sentence, the author was also to be expelled from Sweden after having served his sentence. The author was released from prison on 16 January 1999 and is at present awaiting expulsion to Viet Nam.

2.2 The author states that his family, in particular his father, had been collaborating with the previous regime in Viet Nam. When the Communist regime came to power in 1975 the family's property was confiscated and they were forcibly relocated to a forest region where the living conditions were difficult. The author states that, at the beginning of 1976, he was sentenced to 12 years in prison, according to the author for not having complied with a decision that he, his parents and his siblings were to stay in the area to which they had been deported. The family instead moved back to a city in the area from which they had been deported. When the police tried to make the family return to the forest, the author's uncle was shot dead and his father was treated harshly. The author claims that he resisted the police by seizing one of the policemen's weapon, which resulted in two police officers being shot dead and four injured. The author was then arrested.

2.3 The author was allegedly first detained in a remand prison for political prisoners. After approximately two weeks the author was moved to 24 Nguyen Cong Chu Nha Trang prison where he was held in detention for eight months before any judicial proceedings took place. The author claims that, while in detention, he was severely tortured on a daily basis during the first two months. The torture allegedly included beatings with weapons and batons to his head, back and chest while his hands were tied behind his back. The author also alleges that the police threatened to execute him. For the next six months, the author was kept in solitary confinement and was allegedly forced to lie locked up in his own urine and faeces. The author's submission includes a medical certificate dated 24 March 1999 from the Unit for War and Torture Injuries in Gothenburg, which indicates that the author's account appears to be credible and that the author suffers from post-traumatic stress syndrome.

2.4 The author submits that he was then sentenced to death, but owing to his young age the sentence

was commuted to 12 years in prison. After nine years' imprisonment in Dong Rang prison, which included forced labour, he eventually managed to escape and, after two years of hiding on an uninhabited island fled from Viet Nam in 1986. Together with others, he stole a boat. While they were still in Vietnamese territorial waters, the Vietnamese military attempted to prevent them from proceeding. Shots were fired on both sides and many of the fugitives were wounded. The author states that he believes that some of the soldiers were also wounded and probably killed.

2.5 The author, together with his family, eventually reached the Philippines where they stayed in a refugee camp. With the assistance of the Office of the United Nations High Commissioner for Refugees (UNHCR), the author and his family were accepted as so-called quota refugees by Sweden and received permanent residence permit in 1992.

2.6 In 1995, the Court of Appeal for Western Sweden sentenced the author to five years' imprisonment, to be followed by permanent expulsion from Sweden. The author was released from prison on 26 January 1999. On the same date, the Swedish Minister of Justice, at the request of UNHCR, decided to stay the execution of the expulsion order to allow UNHCR to pronounce on the compatibility of an expulsion with article 33.2 of the 1951 Convention relating to the Status of Refugees.

The case of Mr. H.N.

3.1 The author of the second communication (No. 131/1999), Mr. H.N., states that he came to Sweden in 1991, recognized as a quota refugee. In 1995 the author was sentenced under Swedish law to five years' imprisonment. The author was also to be expelled from Sweden after having served his sentence. The author was released from prison on 12 October 1998 and is at present awaiting expulsion to Viet Nam.

3.2 The author states that his father was a high ranking military officer in the South Vietnamese Army until he was murdered by the Viet Cong in 1970. The author states that in 1975, when the North Vietnamese came to power in Viet Nam, he was no longer allowed to continue his primary education as he was the son of a South Vietnamese soldier. In his early twenties, the author, together with a small group of like-minded friends, created a resistance movement to work against the Communist regime. Its activities consisted mainly in producing and putting up anti-Government posters at night.

3.3 The author alleges that he was arrested and sent to a work camp, where he and many other children of South Vietnamese military personnel had to clear minefields. According to the author, many were either killed or injured. After one month, the author managed to escape and resumed his activities with the resistance, in hiding.

3.4 In 1985, after one year in hiding, the author was again arrested. According to the author, he was tortured during interrogation. The torture included beatings with rifles on his chest until he lost consciousness. The author further alleges that rifle barrels were put into his mouth and that he was threatened with death. The torture continued for several days, until the author was taken to hospital. Despite the fact that the author was tied up with rope to his hospital bed, he managed to escape. The author's submission includes a medical certificate dated 1 April 1999 from the Unit for War and

Torture Injuries in Gothenburg, which states that the author's account appears credible and that the author "with great probability has been subjected to cruel and inhuman treatment and torture in his home country". Between September 1985 and August 1988, the author, together with his wife, hid in the mountains.

3.5 In August 1988 the author, his wife, their child and other compatriots managed to leave Viet Nam by boat. While still in Vietnamese territorial waters, they were intercepted by the military who attempted to prevent them from leaving the country, which resulted in shots being fired on both sides. Many of the fugitives were wounded. The author states that he believes that some of the soldiers were also wounded and probably killed.

3.6 The author and his family eventually reached the Philippines on 25 August 1988 where they stayed in a refugee camp. With the assistance of UNHCR, the author and his family were accepted as so-called quota refugees by Sweden and received permanent residence permits in 1991.

3.7 In 1995, the Court of Appeal for Western Sweden sentenced the author to five years' imprisonment, to be followed by permanent expulsion from Sweden. The author was released from prison on 12 October 1998. On 26 January 1999 the Swedish Minister of Justice, at the request of UNHCR, decided to stay the execution of the expulsion order to allow UNHCR to pronounce on the compatibility of an expulsion with article 33.2 of the 1951 Convention relating to the Statut of Refugees.

3.8 In order to support their individual submissions, both authors refer to the general human rights situation in Viet Nam, noting that Amnesty International is not allowed to work in Viet Nam and that it is therefore difficult to establish clear evidence of the extent to which torture is being used in the country. However, the view of Amnesty International is that torture by the police during detention and in prisons is common.

Complaint

4. The authors submit that, upon return to Viet Nam, they will be apprehended, tortured and sentenced to death and that their forced return to Viet Nam by Sweden would therefore constitute a violation of article 3 of the Convention.

Observations by the State party on admissibility and merits

5.1 In its submissions of 3 September 1999, the State party refers to article 22, paragraph 5 (a) of the Convention, according to which the Committee shall not consider any communication from an individual unless it has ascertained that the same matter has not been and is not being examined under another procedure of international investigation or settlement. In this context, the State party draws the attention of the Committee to the fact that UNHCR has already examined the cases of the authors. In a letter dated 16 March 1999, the UNHCR Regional Representative for the Baltic and Nordic Countries informed the Swedish Minister of Justice that an expulsion of the authors would not be a breach of article 33 of the 1951 Convention relating to the Status of Refugees.

5.2 Moreover, the State party submits that the present communication should be considered

inadmissible in accordance with article 22, paragraph 2 of the Convention for being incompatible with its provisions due to the lack of the necessary substantiation of the claim. Concerning the merits, the State party contends that the present communication reveals no violation of the Convention.

5.3 With respect to the merits of the communication, the State party draws the attention of the Committee to the fact that according to the Swedish 1989 Aliens Act, an alien must not be expelled from Sweden on account of having committed a criminal offence unless certain conditions are met. Firstly, the alien must be convicted of a crime that is punishable by imprisonment. Secondly, the alien may only be expelled if he is sentenced to a punishment more severe than a fine and if (a) it may be assumed that the alien will continue criminal activity in Sweden; or (b) the offence is of such a serious character that the alien should not be allowed to remain in Sweden.

5.4 The State party further notes that special conditions apply for aliens who are considered to be refugees. Such aliens may be expelled if they have committed a particularly serious crime and public order and security would be seriously endangered if they were allowed to remain in Sweden. Pursuant to the 1989 Aliens Act, there is an absolute impediment to expelling an alien to a country where there are reasonable grounds for believing that he/she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment.

5.5 The State party confirms that the authors were granted permanent residence permits and refugee status as quota refugees in Sweden, in 1992 and 1991 respectively. In accordance with the State party's practice prevailing at the time, they were accepted as quota refugees without any detailed examination of their individual reasons for flight. The Swedish Immigration Board decided to grant asylum to the authors following an interview conducted with the authors by the local police authority.

5.6 The State party states that in April 1995 the two authors were sentenced by the District Court of Halmstad to six years' imprisonment for gross rape, committed together with two other Vietnamese nationals. The authors had previously been found guilty of crimes of violence on several occasions. Owing to the authors' refugee status, the District Court rejected the public prosecutor's request that the authors be expelled from Sweden. Both the authors and the prosecutor appealed the judgement to the Court of Appeal for Western Sweden.

5.7 The Court of Appeal, after holding an oral hearing at which the authors were present together with their public defence lawyer, found that the requirements for expulsion were fulfilled. In its judgement of 15 June 1995, the Court of Appeal lowered the sentences to five years' imprisonment and ordered that the authors should be expelled from Sweden after having served their sentences. The authors appealed the judgement to the Supreme Court, which refused leave to appeal. While still serving his five-year prison sentence, Mr. V.X.N. was found guilty of assault, gross assault and rape. Mr. H.N. was similarly found guilty of complicity in rape.

5.8 In December 1998, the Vietnamese Embassy in Stockholm informed the Ministry for Foreign Affairs that the Ministry of Public Security of Viet Nam had accepted the repatriation of the authors.

5.9 Following a petition from UNHCR in January 1999, the Minister of Justice stayed the enforcement of the expulsion order, awaiting the advice of UNHCR Regional Representative for the Baltic and Nordic Countries as to the compatibility of the expulsion with article 33, paragraph 2, of the 1951 Convention relating to the Status of Refugees, in accordance with which the protection against "refoulement" can not be claimed "by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country." On 16 March 1999, UNHCR informed the Minister of Justice that the decision to expel the authors did not violate the 1951 Refugee Convention.

5.10 The State party further informs the Committee that since January 1999, Mr. V.X.N. has three times requested the Government to cancel the expulsion order, or to grant him a temporary residence permit. At the time of the State party's submission, two requests had been denied, and the third was pending. Since January 1998, Mr. H.N. has made six similar requests to the Government. At the time of the State party's submission, five requests had been turned down while the sixth was still pending.

5.11 The State party underlines that when determining whether the forced return of the authors to Viet Nam would constitute a breach of article 3 of the Convention, the following considerations are relevant: (a) the general situation of human rights in Viet Nam and (b) the personal risk of the authors of being subjected to torture if returned to Viet Nam.

5.12 The State party submits that when the Court of Appeal found, on 15 June 1995, that no impediments existed to expulsion of the authors, account was taken of the opinion of the Swedish Immigration Board that no obstacles of a general character existed to expelling persons who had fled Viet Nam. As for impediments of an individual character, the Board had found that the scanty information available regarding the authors' personal circumstances did not indicate that there was any impediment of such kind. In addition, on 21 May 1999 and 1 June 1999, the authors were interviewed by the Board at the request of the Ministry of Justice but no impediments to expulsion were identified as a result.

5.13 As to the general situation of human rights in Viet Nam today, the State party submits that according to various reports from international and other sources, such as Amnesty International, the United States Department of State and the Swedish Embassy in Hanoi, measurable improvements have been made in a few areas, although serious problems remain, particularly as to the enjoyment of the freedom of speech, assembly, association and religion. Arbitrary arrests and detentions occur quite frequently and prison conditions are harsh, but reports of torture of detainees are rare. Although there are reports of police brutality, there is no evidence that torture is practised regularly nor that prisoners are tortured.

5.14 The State party further submits that illegal departure from Viet Nam in the middle of the 1980s is no longer considered to be a criminal offence. The majority of the people who departed illegally at that time have now returned with the assistance of UNHCR. A large number of returnees come from the same part of Viet Nam as the authors. Among those who have been repatriated involuntarily, some have served prison sentences for crimes committed in countries of first asylum, but according to UNHCR there are no reports of retribution or discrimination after their return. The State party further underlines that the majority of the approximately 500 returnees who have faced

legal action upon return on charges of crimes committed before departure from Viet Nam have been sentenced for crimes of violence and none for political crimes. UNHCR has been able to visit all of them in private. Finally, the State party points out that several children of former leaders of the South Vietnamese Army travel between Sweden and Viet Nam without encountering any difficulties with the Vietnamese authorities.

5.15 As for the assessment of the individual risks of the authors of being subjected to torture, the State party recalls that according to the jurisprudence of the Committee this risk must be foreseeable, real and personal, and submits the following.

The case of Mr. V.X.N.

6.1 The State party recalls that the author has invoked three different reasons why he would be exposed to a risk of torture if expelled to his country of origin. He maintains that he would be apprehended and tortured by the Government or some governmental agency for having escaped from prison, where he was serving a 12-year sentence for having killed two policemen and injured four. Secondly, some of the pursuing soldiers may have been injured or shot to death when the author and others escaped Viet Nam by boat. Thirdly, the author has also stated that he has received death threats from the owner of the boat which he stole in order to escape. The State party draws the Committee's attention to the fact that the author of the present communication has not belonged to any political organisation, nor has he been politically active in his home country.

6.2 The State party submits that during the examination of the author's case, contradictions, inconsistencies and peculiarities concerning essential points raised serious doubts as to the credibility of the author's claims. Firstly, it seems that the author did not raise the subject of torture until he submitted his complaint to the Committee at the beginning of 1999. During the interview conducted with him by the local police authority in 1992, the author did not, according to the State party, mention that he had previously been ill-treated or tortured nor that he feared being tortured upon return. Similarly, no mention of torture was made during the proceedings before the District Court and the Court of Appeal, in his request to the Supreme Court for leave to appeal, or in his request to the Government in January 1999 to quash the expulsion order.

6.3 Although noting the medical certificate submitted by the author to support his claim, the State party points to inconsistencies as regards the author's account of the nature and extent of his alleged previous torture. During the medical examination of March 1999, the author stated that he had been in custody for eight months and was tortured on a daily basis during the first two months. In the interview held by the Swedish Immigration Board on 21 May 1999, the author stated that he was tortured daily during one month and thereafter three times a week. Finally, during the last interview held by the Board on 1 June 1999, the author stated that he was in custody for six months and tortured almost every day. In addition, the author's description of the alleged torture has become increasingly dramatic during the proceedings. Initially the author only mentioned that he had been kicked and beaten, while in the last interview he mentions for the first time electric shocks and having been forced to drink water mixed with detergent.

6.4 The State party draws the Committee's attention to the fact that during the initial local police interview in 1992, the author did not mention that he had been sentenced to 12 years' imprisonment,

nor that he had escaped from prison. His account at that time was that he had tried to escape from Viet Nam in March 1981 but failed in his attempt and was sentenced to three years' imprisonment, a sentence which he served. According to the records of 1992, the author claimed that he again tried to leave the country in October 1984 but was sentenced to prison for two years and ten days upon discovery. In his petition to the Government submitted in January 1999 he stated that he had been sentenced to 12 years' imprisonment because he had run away from the place in the jungle to which his family had been forcibly moved and had participated in the organization of a group which aim was to help others who were still left in the jungle to escape. He then claimed that he was caught together with four others, three of whom were sentenced to death and one to 17 years in prison. It is also noted by the State party that the author has provided no evidence to substantiate his claim that he was sentenced to 12 years' imprisonment.

6.5 The State party also refers to other peculiarities and inconsistencies, such as the fact that if the author's most recent account is true, his three eldest children must have been conceived in prison, and that it is unlikely that any uninhabited islands are to be found in the area where the author claims to have hidden after his escape from prison. The State party maintains that these inconsistencies are reasons to doubt the credibility and veracity of the first claim of the author, based on his alleged past experience of torture and escape from prison.

6.6 With reference to the inconsistencies mentioned, the State party submits that all three interviews held with the author were conducted in the presence of a Vietnamese interpreter and that the author stated that he understood the interpreter well.

6.7 With reference to the author's flight from Viet Nam, the State party draws the attention of the Committee to the fact that the author has only mentioned pursuing soldiers having been injured or killed in his submission to the Committee and in his request to the Government for leave to appeal, and that no information to this effect was given during the initial police interview, the judicial proceedings or during the interview conducted by the Swedish Immigration Board in May 1999. The State party submits that this indicates that the author does not attach any particular importance to the circumstance and that he does not fear that it will entail any serious consequences for him, particularly as it has not been asserted that the author himself is, or is suspected of being, personally responsible for the shooting. Furthermore, it is submitted that accounts of shootings in connection with escapes from Viet Nam in the 1980s are common but that in no case has it been possible to verify this information.

6.8 As regards the risk of the author being ill-treated by a private person, i.e. the owner of the boat which the author stole in order to escape, the State party recalls the definition of torture as contained in article 1 of the Convention, as well as the Committee's views regarding the case of *G.R.B. v. Sweden* (communication No. 83/1997) adopted on 15 May 1998. The State party submits that the risk of ill-treatment by a private person, without the consent or acquiescence of the Government of the country to which expulsion is to take place, falls outside the scope of article 3 of the Convention.

6.9 The State party submits that, according to the Swedish Embassy in Hanoi, there is no indication that the author is of any particular interest to the Vietnamese authorities at present. No evidence has been brought forward by the author to support the claim that he is wanted by the police after his escape from Viet Nam. Reiterating its doubts as to the veracity of the author's claim, the State party

submits that even if this information was to be considered as credible and if it was assumed that the author would in fact be detained and imprisoned upon his return, the risk of detention and imprisonment as such is not sufficient to prompt the absolute protection provided for in article 3 of the Convention. In this context, the State party recalls that there is little evidence that torture is practised in Viet Nam.

6.10 Finally, the State party informs the Committee that one of the Vietnamese nationals who were convicted of gross rape in the same trial as the author was expelled to Viet Nam in April 1998. Although the expelled person claimed that he had left the country illegally and had committed a crime in connection with his escape, the information received by the State party regarding his current situation does not indicate that he has been treated badly by the Vietnamese authorities since his return.

The case of Mr. H.N.

7.1 The State party recalls that the author has invoked three different reasons why he would be exposed to a risk of being subjected to torture if expelled to his country of origin. He maintains that he would be apprehended and tortured by the Government or some governmental agency for having run away from the mine clearance work that he was forced to perform. Secondly, the author claims that he belonged to a resistance movement and was suspected of carrying out hostile activities against the Government, such as putting up posters. Finally, the author fears reprisals for having killed several policemen in connection with his escape from Viet Nam. Some of the pursuing soldiers may have been injured or shot to death when the author and others escaped Viet Nam by boat.

7.2 The State party notes that the author has alleged that he was apprehended and subjected to torture in 1985. According to the medical certificate issued after an examination of the author by a psychiatrist in April 1999, it is very likely that the author was subjected to cruel and inhuman treatment and torture in his country. However, the State party draws the attention of the Committee to the fact that no mention is made of the author suffering from a post-traumatic stress disorder, nor is there any reference to physical signs of torture.

7.3 The State party submits that during the examination of the author's case, contradictions and inconsistencies concerning essential points raised serious doubts as to the credibility of the author's claims. The Committee's attention is drawn to the fact that the author, when interviewed by the police authorities in 1991, did not mention that he had been apprehended and tortured in Viet Nam. Nor did the author bring up the subject of torture during the proceedings in the District Court, the Court of Appeal or in his request to the Supreme Court for leave to appeal. Not until January 1998, in his petition to the Government, did the author claim that he had previously been tortured and that he feared imprisonment if expelled.

7.4 Further, the State party points out that the author has given the following different versions as to why he was apprehended and tortured by the police in 1985: (a) in his petition to the Government in January 1998 he stated that he was discovered when planning his escape from Viet Nam; (b) according to the medical report of April 1999, he was interrogated and tortured to reveal the names of his comrades in the resistance movement; (c) during the interview before the Swedish

Immigration Board in May 1999, the author claimed that he was apprehended for carrying arms and evading mine clearance duty; (d) during the interview before the Board in June 1999, the author stated that he was suspected of revolutionary activities and of putting up posters; and (e) in the author's complaint to the Committee, he invokes his escape from mine clearance duty as the reason for having been tortured.

7.5 The State party draws the attention of the Committee to the fact that, when interviewed by the police in 1991, the author mentioned that he had been forced to perform hard work in a place where there were mines, but made no mention of having evaded mine clearance duty. When interviewed in June 1999, the author stated that he risked being tortured upon return to Viet Nam for having shot policemen and for being an opponent of the regime. In view of the fact that the author did not expressly refer to the escape from mine clearance duty as a reason why he would be in danger of being tortured, the State party concludes that the author himself does not fear that this circumstance will entail any serious consequences for him. In addition, the State party submits that there is no information indicating that such an act would be considered a punishable offence in Viet Nam today, let alone be punished with imprisonment.

7.6 With reference to the author's claim to have engaged in activities within the resistance movement, the State party points out that during the initial interview, in 1991, the author did not make any such claim; nor were political activities expressly mentioned in the author's communication to the Committee, they were only mentioned in the medical certificate issued in April 1999. The records of the medical examination further indicate that the author claimed to have been "organized" in the resistance movement and was apprehended for hostile activities against the Government and put in a labour camp. After having escaped he allegedly again joined the resistance, after which he was apprehended and tortured. However, the State party points out that during the interview before the Swedish Immigration Board in May 1999, the author submitted that he was "the founder" of the resistance movement which consisted of five members.

7.7 Apart from the above inconsistencies, the State party points out that the author himself has stated before the Board that if the Vietnamese authorities had known anything about the resistance movement, the author would have been executed. According to the State party, this clearly indicates that the movement was unknown to the authorities. In addition, the State party submits that according to information from UNHCR and human rights organisations in the area of Nha Trang, no armed resistance movement or any resistance group devoting itself to putting up posters in the city has ever been heard of. It is also emphasized that the Vietnamese authorities would not at present have an interest in punishing a person for writing and putting up anti-governmental posters about 15 years ago.

7.8 With reference to the author's escape from Viet Nam, the State party draws the attention of the Committee to the fact that during the initial police interview, in 1991, the author did not mention that he had fired at policemen in connection with his escape. Not until July 1998, in his petition to the Government, and in subsequent interviews, did the author indicate that he had shot and killed one or several policemen. The State party underlines that according to the author, there were a large number of people on the boat and the escape, which took place from a big city, was tumultuous. In such circumstances, it would, according to the State party, be surprising if the police were able to identify a perpetrator. Further, the State party draws the attention of the Committee to the fact that

the author has not asserted he is being sought by the police in connection with the alleged killings and that there is no indication that the police have issued a warrant for his arrest.

7.9 The State party also submits that the author has given inconsistent and contradictory information *inter alia* regarding his family in Viet Nam and whether or not his wife was with him when he was hiding from the authorities between 1985 and 1988.

7.10 With reference to the inconsistencies mentioned, the State party submits that all three interviews with the author were conducted in the presence of a Vietnamese interpreter. The State party acknowledges that during the last interview before the Board, held in June 1999, the author stated that the interpreter spoke a different dialect and that there were certain things he had not understood, without specifying what. However, the State party underlines that the interpreter had no difficulties understanding the author and that it has been informed that speakers of different Vietnamese dialects can easily understand each other.

7.11 The State party submits that according to the Swedish Embassy in Hanoi, there is no indication that the author is of any particular interest of the Vietnamese authorities today. No evidence has been brought forward by the author to support the claim that he is wanted by the police following his escape from Viet Nam. Reiterating its doubts as to the veracity of the author's claim, the State party submits that even if this information were credible, it would not be sufficient to prompt the absolute protection provided for in article 3 of the Convention (see para. 6.9 above).

7.12 Finally, the State party refers to the case of another Vietnamese national, convicted of gross rape in the same trial as the author and expelled to Viet Nam in April 1998 (see para. 6.10 above).

Additional observations by the State party

8.1 In its supplementary submissions dated 5 and 19 October 1999, the State party draws the attention of the Committee to a letter from the Ministry of Public Security of Viet Nam to the Swedish Embassy in Hanoi, stating that neither of the authors have any criminal record in Viet Nam.

8.2 It is further submitted that the second of the Vietnamese nationals expelled to his country of origin after servicing a prison sentence in Sweden for a crime committed together with the authors has addressed a petition to the Government of Sweden to be reunited with his family in Sweden. The State party informs the Committee that before his expulsion, this Vietnamese national claimed that he was suspected of stealing a police boat and murdering two policemen in connection with his escape from Viet Nam. He also maintained that he had previously been imprisoned three times in Viet Nam and that he had been tortured. The State party draws the attention of the Committee to the fact that in his new petition, made more than a year after his return to Viet Nam, there is no indication that he has been of interest to the Vietnamese authorities since his return.

Counsel's comments

9.1 Counsel dismisses the State party's argument that the authors' communications should be considered inadmissible in accordance with article 22, paragraph 5 (a) of the Convention. It is submitted that there is no UNHCR procedure of international investigation or settlement provided

for by the 1951 Refugee Convention. In addition, the issue considered by the UNHCR Regional Representative for the Baltic and Nordic Countries was the compatibility of the expulsion decision with article 33 of the 1951 Refugee Convention and not the question which is pending before the Committee, i.e. whether the authors' face a risk of torture upon return to Viet Nam.

9.2 Counsel informs the Committee that although the Ministry of Public Security of Viet Nam accepted the repatriation of the authors in December 1998, Viet Nam had a few months earlier refused such repatriation. According to a Swedish newspaper, the reason for the refusal was said to that the authors were accused of committing serious crimes in Viet Nam prior to their escape.

9.3 With reference to the interviews conducted with the authors by the Swedish Immigration Board in May and June 1999, counsel draws the attention of the Committee to the fact that these took place after the submission of the authors' communications to the Committee, and only after the submission of a request by counsel to the Ministry of Justice, stating that "the written opinion of the Swedish Immigration Board which was the basis of the Court of Appeal's decision to expel [the authors], contains only general statements".

9.4 Counsel recalls that when the authors were initially interviewed by the police, in 1992 and 1991 respectively, they were already accepted as quota refugees and did not applied for asylum under the same circumstances as normal asylum-seekers arriving in Sweden. During the interviews no questions were asked about previous torture and ill-treatment in Viet Nam, nor were the authors asked about the risks they would face should they be returned.

9.5 In the case of the first author, Mr. V.X.N., counsel submits that the subject of past or future risk of torture was never brought up during the criminal proceedings, either by the courts, or by the author's defence counsel and the author therefore did not know that the issue would be of any significance. In Mr. H.N.'s case, counsel submits that the author's defence brought the issue to the attention of the District Court. However, in the District Court's decision not to expel the authors, reference was only made to the fact that, even though conditions in Viet Nam had recently improved considerably, it could not be maintained that the defendants were no longer refugees. The issue of fear of future torture was not brought up by the defence counsel before the Court of Appeal, as the defence counsel, in view of the decision made by the District Court, did not believe that the Court of Appeal would agree to expulsion.

9.6 Counsel further draws the attention of the Committee to the fact that, although a Vietnamese interpreter was present during all interviews with the authors, it is claimed by the authors that there is a considerable difference between the dialects of the north and those of the south of Viet Nam. The interpreters used by the Swedish Immigration Board are normally from the north, whereas the authors are from the south. According to counsel, this circumstance explains some of the inconsistencies referred to by the State party.

9.7 In response to the State party's argument that the numerous accounts of shootings in connection with escapes from Viet Nam in the 1980s have in no case been possible to verify, counsel submits that this is logical. He submits that Vietnamese nationals already repatriated would have no interest in having this information confirmed and that it would be inappropriate for UNHCR to investigate and search for evidence against the very people they are assisting.

9.8 Counsel emphasizes that the reference of the State party in its initial observations and its supplementary comments dated 19 October 1999 to the cases of two other Vietnamese nationals who have been returned to Viet Nam should not be taken into account by the Committee, as every individual claim should be examined on its own merits.

9.9 Apart from counsel's comments applicable to both authors, he submits the following regarding the merits of the respective cases.

The case of V.X.N.

10.1 Counsel argues that in its assessment of the risks faced by the author, the State party neglects to attach due importance to the result of the medical examination. The description of the physical sufferings of the author indicates that the inconsistencies referred to by the State party to raise doubts as to the author's credibility are to be expected from a person who tries to recount his experiences of torture.

10.2 Counsel notes the State party's argument that the author has not provided any evidence, i.e. a judgement that he was in fact sentenced to 12 years' imprisonment and that it refers to certain "peculiarities" in relation to the author's stay in and escape from prison. Counsel submits that the judgement in Viet Nam was never transmitted directly to the author, but only to his defence counsel at the time, whose name he does not remember after 23 years. However, the author has given details about the trial itself, i.e. that it took place in the city of Nha Trang and that the investigation was done by the Khanh Hoa county authorities.

10.3 As to the "peculiarities" referred to by the State party, counsel submits that there is no reason to doubt the author's affirmation that his three eldest children were in fact conceived during the author's imprisonment. Prison guards could be bribed to leave prisoners and their visiting wives alone for some privacy, although it was formally forbidden. As to the unlikelihood to find any uninhabited islands in the area where the author claims to have hidden after his escape from prison, the existence of the thinly populated Vung Me island, outside Nha Trang, where the author hid can easily be confirmed.

10.4 Counsel further submits that the statements regarding prison sentencing attributed to the author during his initial interview in 1992 are the result of misunderstandings due to the fact that the author, after his sentencing in 1976, served the time until his escape nine years later in three different prisons. Counsel maintains that no other inconsistencies relating to the author's account of torture, sentencing, imprisonment and escape from prison are of substantial value, and should be seen in the light of the considerable time which has elapsed since the events took place.

10.5 Counsel further states that the protection provided for in article 3 of the Convention does not only apply to the risk of being subjected to torture by the Vietnamese State authorities, but also if the authorities are not able to provide the individual with necessary protection against criminal actions in Viet Nam. Counsel refers in this context to the jurisprudence of the European Court of Human Rights.

10.6 Finally, counsel refers to the State party's supplementary observations of 5 October 1999,

stating that the information provided by the Vietnamese authorities as to the author's criminal record is incorrect and maintaining that the author was sentenced by a court in Nha Trang in 1976 to 12 years' imprisonment.

The case of Mr. H.N.

11.1 Counsel submits that the inconsistencies referred to by the State party with regard to the information provided by the author are not of substantial character but are merely a matter of semantics. The inconsistencies can be explained simply, by the fact that different interpreters were used during the different interviews or that the author's statements may have been written down differently on different occasions. As an example, counsel notes the State party's argument that the author's petition to the Government in January 1998, in which he stated that he was discovered when planning his escape from Viet Nam and was thereafter apprehended and tortured, diminishes the credibility of the author. In this respect, counsel submits that this statement in no way contradicts the author's claim that he was of interest to the authorities for having escaped mine clearance duty or for having been active in the resistance, or for a combination of the two.

11.2 With reference to the author's activities in the resistance, counsel disputes that individuals from different human rights organisations and from UNHCR referred to by the State party would necessarily have any knowledge about the activities of a small anti-Communist resistance group operative in Nha Trang 14 years ago.

11.3 Counsel disputes the indication by the State party that the author's account of his escape and the shootings in connection with it has been "escalating". Counsel argues that rather it is the questioning during the various interviews which escalated and recalls that during the initial police interview, in 1991, the author was not asked in detail about his escape. Counsel further disputes the State party's assertion that there is no indication that an arrest warrant for the author has been issued, and reminds the Committee of the initial refusal by the Vietnamese authorities to accept the repatriation of the authors because they had committed crimes in Viet Nam prior to their escape.

11.4 Counsel submits that it would not be possible for the author to submit any evidence other than a medical certificate to support his claim, given the circumstances of his escape. Counsel argues that it would not seem appropriate for the author to contact the Vietnamese authorities requesting documentary evidence and that the police, for obvious reasons, does not supply written evidence that torture has occurred.

11.5 Finally, counsel refers to the State party's supplementary observations of 5 October 1999, in which it is stated that the author has no criminal record in Viet Nam, submitting that this is in accordance with the author's statements that he has not been sentenced by a Vietnamese court for any crime.

Further comments by the State party

12.1 In its complementary submission dated 8 February 2000, the State party states that there was never any refusal on the part of Viet Nam to accept the repatriation of the authors. The State party adds that for many years it has been faced with difficulties when trying to repatriate Vietnamese

citizens, and that the acceptance of the Vietnamese authorities in this respect was a result of lengthy discussions between the two countries concerned regarding a large number of repatriation cases.

12.2 The State party states that the Swedish Embassy in Hanoi has confirmed that although the Vietnamese language has different dialects, with differences in pronunciation and sometimes vocabulary, these differences are not significant. The State party further points out that the written language is the same in all parts of the country.

12.3 Finally, with reference to Mr. V.X.N.'s claim that he would risk ill-treatment by a private person, the State party wishes to underline that no evidence has been brought forward to suggest that the Vietnamese authorities would be incapable of affording the author appropriate protection against such treatment. The State party states that the jurisprudence mentioned by counsel in this respects concerns solely the interpretation of the European Convention on Human Rights and is not applicable to the Convention against Torture.

Issues and proceedings before the Committee

13.1 Before considering any claims contained in a communication, the Committee against Torture must decide whether or not the communication is admissible under article 22 of the Convention. With reference to article 22, paragraph 5 (a), of the Convention, the Committee takes note of the State party's view that the cases of the authors have already been examined by UNHCR to ascertain whether or not an expulsion would be compatible with the State party's obligations under article 33.2 of the 1951 Refugee Convention. The Committee notes, however, that neither the 1951 Refugee Convention nor the Statute of UNHCR provides for the establishment of a procedure of international investigation or settlement. The Committee considers that a written opinion or advice given by a regional or international body on a matter of interpretation of international law in relation to a particular case does not imply that the matter has been subject to international investigation or settlement.

13.2 The Committee is further of the opinion that all domestic remedies have been exhausted and finds that no further obstacles to the admissibility of the communications exist. Since both the State party and the authors' counsel have provided observations on the merits of the communications, the Committee proceeds with the consideration of those merits.

13.3 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the authors would be in danger of being subjected to torture upon return to Viet Nam. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individuals concerned would be personally at risk of being subjected to torture in the country to which they would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his/her return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a

consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

13.4 The Committee recalls the absolute character of the obligation of State parties contained in article 3, paragraph 1, of the Convention. In this connection the Committee notes that pursuant to the Swedish 1989 Aliens Act there is an absolute impediment to expulsion an alien to a country where there are reasonable grounds for believing that he/she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment.

13.5 The Committee notes that the decision by the Court of Appeal to expel the authors was taken on the basis of what the Swedish Immigration Board characterized as "scanty" available information regarding the authors' personal circumstances. It is further noted that the complementary interviews with the authors, conducted to provide a basis for a risk assessment, were not conducted until after the submission of the authors' communications to the Committee and only upon request from counsel to the Ministry of Justice.

13.6 Having noted the above, the Committee considers that the authors' activities in Viet Nam and their history of detention and torture are relevant in determining whether they would be in danger of being subjected to torture upon their return. The Committee notes in that respect that the State party has pointed to inconsistencies in the authors' accounts of events and has contested the general veracity of their claim. In the present case, although a number of disparities may be explained by difficulties in translation, the considerable time which has elapsed since the authors' escape from Viet Nam and the procedural circumstances, the Committee considers that some doubts as to the authors' credibility remain.

13.7 Notwithstanding the above, the Committee is aware of the human rights situation in Viet Nam, but considers that given, *inter alia*, the considerable time which has elapsed since the escape of the authors and the fact that the illegal departure from Viet Nam in the middle of the 1980s is no longer considered an offence by the Vietnamese authorities, the authors have not substantiated their claims that they will personally be at risk of being subjected to torture if returned to Viet Nam at present. In this connection the Committee notes that a risk of being imprisoned upon return as such is not sufficient to trigger the protection of article 3 of the Convention.

13.8 The Committee recalls that, for the purposes of the Convention, one of the prerequisites for "torture" is that it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The Committee considers that the issue whether a State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a private person, without the consent or acquiescence of the State, falls outside the scope of article 3 of the Convention.

14. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is of the view that the facts as found by the Committee do not reveal a breach of article 3 of the Convention.

[Done in English, French, Russian and Spanish, the English text being the original version.]