

Declaration of Nguyen Dinh Thang and Grover Joseph Rees

Re: Montagnard asylum seekers from Vietnam

1. Declarants Nguyen Dinh Thang and Grover Joseph Rees respectfully request that the facts and observations set forth in this declaration be considered by the United Nations High Commissioner for Refugees (UNHCR) in adjudicating applications for refugee status determination, appeals from decisions not to recognize refugee status, and motions for reopening and/or reconsideration of such decisions in cases filed by Vietnamese nationals who are members of Montagnard ethnic minority groups, including _____ and all other such applications and motions based on similar facts and circumstances.

BACKGROUND AND INTRODUCTION

2. Declarant Nguyen Dinh Thang, Ph.D., has served since 1990 as Executive Director of Boat People SOS (BPSOS), a non-governmental organization that works on human rights, refugees, and related humanitarian matters, with a particular focus on Viet Nam. Prior to serving in this capacity he worked as a volunteer advocate, counselor, and youth leader on behalf of refugees since shortly after his own resettlement as a refugee in 1979. He is in frequent communication with a wide range of contacts within Viet Nam and has closely followed the situation of Montagnards and other particularly vulnerable people in Viet Nam for over 20 years. For the past three years he has traveled extensively to Thailand to interview a large number of Vietnamese, including Montagnards, who recently escaped from Vietnam. He has given expert testimony before committees of the United States Congress, the US Commission on International

Religious Freedom, and immigration courts on refugee issues and on human rights practices in Viet Nam. He edits Vietnam Country Report, an annual publication of the BPSOS-sponsored Vietnam Study Group.

3. Declarant Grover Joseph Rees is a former law professor, judge, diplomat, and United States government official who has had extensive experience in refugee and asylum law and policy as well as with human rights law and practices. He retired in January 2009 after 24 years in the executive, legislative, and judicial branches of the United States Government, including service as General Counsel of the U.S. Immigration and Naturalization Service (1991-93); Staff Director and Chief Counsel, Subcommittee on International Operations and Human Rights, Committee on International Relations, United States House of Representatives (1995-2000); Counsel, Committee on International Relations, U.S. House of Representatives (2001-02); United States Ambassador to East Timor (2002-2006); Acting United States Representative to the United Nations Economic and Social Council (2007); and Deputy Assistant Secretary of State for International Organizations (2008-09). He has written and spoken extensively on refugee law and policy and on human rights law and practices, has given expert testimony on refugees and related human rights questions before committees of the United States Congress and in the United States Immigration Courts, and delivered the official statements of the United States of America on refugees and on UNHCR in the United Nations General Assembly during its 62nd session. Since January 2009 he has been associated with Boat People SOS as Senior Counselor for International Initiatives.
4. Both declarants, Dr. Thang and Ambassador Rees, have personally interviewed numerous Montagnard refugees and asylum seekers, including several of the applicants whose cases are listed in paragraph 1, not only about the interviewees' own experiences with persecution but also about a broad range of related information about the situation of Montagnards in Viet Nam. Both declarants have also had extensive discussions of the situation of Montagnards, including discussions on how best to evaluate these reports by refugees and asylum seekers, with numerous other human rights and refugee experts whose work focuses in whole or in part on Viet Nam.
5. Based on the communications, discussions, interviews, and other processes described above and for the specific reasons set forth below, declarants have concluded that the UNHCR Notices of Decision in the cases listed in paragraph 1 reflect a pattern of serious errors of law and fact whose effect is to underestimate dramatically the likelihood that the applicants and similarly situated Montagnards will face persecution on account of race, nationality, religion, political opinion, and/or membership in a particular social group upon return to Vietnam. Declarants therefore respectfully request that UNHCR consider carefully the facts and observations set forth in this memorandum in adjudicating appeals and/or motions to reopen or reconsider in these cases and in adjudicating other cases involving similarly situated Montagnards.

STATEMENT OF FACTS

6. Montagnards have long been subjected to harsh treatment by the government of Viet Nam for a number of reasons including traditional prejudice against ethnic minorities; distrust of the Montagnards' fervent Christianity, which many in the government consider a subversive 'foreign' religion; hostility on account of the close association of many Montagnards with United States forces allied with the Republic of Viet Nam prior to 1975; and an ongoing policy by the government to resettle ethnic Vietnamese from the North in the Central Highlands on lands confiscated from Montagnards.
7. In recent years this mistreatment has intensified: the Vietnamese government responded to antigovernment demonstrations in the Central Highlands in 2001, 2002, 2004, and 2008 by arresting and imprisoning hundreds of demonstrators and other political and religious dissidents. The crackdown, implemented not only by local officials but also by the national police and military forces, has been characterized by widespread physical abuse and has resulted in several reported deaths.
8. According to Human Rights Watch¹, more than 300 Montagnards, most of them Protestants but also including some Catholics, have been imprisoned because of their participation in and/or association with the mass demonstrations of 2001 and 2004 in the Central Highlands. Although the 2008 demonstrations were smaller in scale, they have resulted in numerous additional arrests and imprisonments. Appendix I contains a list of Montagnards, which has been independently verified through trusted sources, who are currently imprisoned because of their participation in demonstrations and/or other activities related to their race and particularly to their religion and/or political opinion. This list does not include the eight Montagnards sentenced to prison since late July, 2009.
9. Human Rights Watch also makes clear that the recent pattern of persecution on account of race, religion, and/or political opinion is not limited to a small number of actual or perceived high-profile political leaders. Rather, "in an effort to eradicate dissent and independent religious activities among the Montagnards, the Vietnamese authorities have harassed, threatened, beaten, detained, and imprisoned not only Montagnards perceived to be high profile leaders, but followers, 'helpers', and people simply trying to flee the country to seek asylum elsewhere."²
10. The 2008 Report of the U.S. Commission for International Religious Freedom, an independent commission established by the United States Government to find facts and make recommendations on the denial of religious freedom in countries around the world, notes that "the Central Highlands region,

¹ Briefing Note by Human Rights Watch, November 2009.

² Id.

the scene of protests for land rights and religious freedom in 2001 and 2004 that were violently dispersed by the authorities, continues to be the site of particularly severe religious freedom and other human rights violations. Since the demonstrations, officials have imprisoned those believed to have organized or taken part in the protests and those who sought asylum in Cambodia during police crackdowns after the demonstrations. Some Montagnard villages and communes remain under tight government control, and no international observer has been allowed unobstructed access to the region. Even 'approved' churches face problems in this region; one-third of the SECV [Southern Evangelical Church of Vietnam] churches in Dak Lak province that were closed in 2001 continue to face serious restrictions on their activities and police regularly break up meetings." ³

11. Human Rights Watch adds that "in mid-April 2008 Montagnards in several districts in Gia Lai and Dak Lak provinces attempted to conduct demonstrations calling for land rights and religious freedom. Security forces, reportedly including two military divisions, were sent to the villages, barring people from freely leaving their villages for almost two weeks. As with similar - but much larger protests in the Central Highlands in 2001 and 2004, police and soldiers forcibly dispersed the demonstrators and arrested dozens of Montagnards." ⁴
12. Despite the tight government control on information about the Central Highlands, human rights advocates outside Vietnam have compiled detailed accounts of numerous arrests, trials, convictions, and ongoing imprisonment of people since the 2008 demonstrations. According to Human Rights Watch's annual World Report, during 2009 the Vietnamese government stepped up repression of Montagnard Christians suspected of resisting government control of their churches: "In the Central Highlands, authorities in 2009 arrested dozens of Montagnard Christians accused of belonging to unregistered house churches considered subversive by the government, planning land rights protests, or conveying information about rights abuses to activists abroad. A focus of the crackdown was Gia Lai province, where more than 50 Montagnards were arrested during the year.... On several occasions police beat and shocked Montagnards with electric batons when they refused to sign pledges to join the government sanctioned church."
13. Vietnamese state news media reported that at least nine Montagnards were tried and sentenced to prison on national security charges during 2009, with another two sentenced in January 2010. These included the following:

³ United States Commission on International Religious Freedom, *USCIRF Annual Report 2009 - Countries of Particular Concern: Vietnam*, 1 May 2009, available at <http://www.unhcr.org/refworld/docid/4a4f27302.html>

⁴ Human Rights Watch World Report, 2009 (Vietnam).

- On January 14-15, 2010, the Gia Lai provincial people's court sentenced two Montagnard Christians to sentences of nine and 12 years, respectively, on charges of "undermining national unity," for allegedly organizing an "reactionary underground" network.
- In September 2009 the Gia Lai court sentenced three Montagnards to sentences of 7-10 years. Accused of planning demonstrations, they were charged with "undermining national unity."
- In a trial on July 21, 2009, three Montagnards from Chu Se district, Gia Lai province - who were arrested in March 2009 - were sentenced to prison terms of 7 to 12 years on national security charges.
- In April 2009, three Montagnards from Gia Lai province, accused of planning a demonstration, were sentenced to prison terms of up to 12 years on charges of "undermining national unity."
- In August 2008, four Montagnards in Dak Nong province were imprisoned on national security charges for allegedly organizing protests in 2008 and helping people flee to Cambodia.

14. The 2009 report of the United States Commission for International Religious Freedom⁵ (the "USCIRF 2009 Report") provides further detail on numerous recent instances of persecution of Montagnards associated with independent religious groups. It states in pertinent part:

- "[I]n the past year, Montagnard Protestants have been subject to a number of short-term detentions, disappearances, and one possible beating death in custody."
- "According to reports from NGOs and several members of the European Parliament, Montagnard Protestant Puih H'Bat was arrested in April 2008 for leading an illegal prayer service in her home in Chu Se district, Gia Lai province – an area where there have been protests over land rights and religious freedom abuses in the past."
- "Also in the same Gia Lai province district, as many as 11 Montagnard Protestants were detained in February 2009, after police reportedly entered a worship service and asked everyone present to renounce their faith or join the officially recognized Southern Evangelical Church of Vietnam (SECV). Everyone who refused was arrested. Nine were released a month later, and two remain in detention at this writing. The State Department was able to confirm, from other religious leaders in the region, that these individuals were arrested for trying to organize an independent Protestant organization, an activity the Vietnamese government has refused to allow in this area since the large religious freedom protests in 2001 and 2004."

⁵ United States Commission on International Religious Freedom, *USCIRF Annual Report 2009 - Countries of Particular Concern: Vietnam*, 1 May 2009, available at <http://www.unhcr.org/refworld/docid/4a4f27302.html>

- “In March 2008, religious leaders from the Inter-Evangelistic Movement (IEM) in Bien Phuoc were reportedly beaten and insulted by police when they traveled to Dak Nong province to hold services.”
- “On November 11, 2008, Vietnamese government officials issued fines and summons to everyone affiliated with an independent Protestant church of EahLeo hamlet, Dak Lak province. Charges were later filed accusing the church of operating an illegal Bible school for people outside the province, and ordering it to dismantle the school and to cease religious activity because it was not legally recognized. The church continues to meet in another location.”
- “Also in November, in EaSup hamlet, Dak Lak province, police and provincial officials confiscated lumber purchased to build a chapel and issued an order telling the church in EaSup not to meet.”
- “In December 2008, hundreds of police and provincial officials destroyed a new Protestant church structure in Cu Dram hamlet; ethnic minority Protestants who protested the demolition were beaten with sticks and electric prods, some were severely injured and later were refused medical treatment. Leaders of this Cu Drom hamlet church continue to be threatened with arrest at this writing.”
- “Other independent ethnic minority congregations in EaSol and Thay Ynge hamlets and Krong Bong district of Dak Lak report that their leaders are regularly summoned to police stations and forced to sign papers agreeing that they will not gather "new" Christians for worship and that churches cannot be organized with believers from other hamlets or districts.”
- “Vietnamese government policy does not permit anyone who belongs to an unofficial religious group to speak publicly about their beliefs.”

15. As noted in the 2009 USCIRF Report, the ongoing crackdown on religious and political activity by Montagnards appears also to have resulted in at least one reported death. According to the U.S. State Department’s most recent Country Report on Human Rights Practices, “[o]n May 1, [2008,] Y Ben Hdok, a Montagnard from Dak Lak, died while in detention in the Buon Ma Thuot provincial police station. Police detained him on April 28 for questioning regarding his suspected involvement in inciting demonstrations. Officials stated that the suspect hanged himself during a break in questioning, but family members said his corpse was bruised.”

FACTUAL ISSUES PRESENTED BY THE NOTICES OF DECISION

16. The applicants listed in paragraph 1 all reported that they left Viet Nam on account of persecution and/or imminent threats of persecution that were fully consistent with the country of origin information set forth in paragraphs 6-15 above. For example:

- The applicant in _____ testified that the police attacked two religious ceremonies in which he participated. In one of these attacks the police

shot and killed his uncle. In the other attack the applicant himself was beaten with an electric baton. Later he participated in a demonstration to protest confiscation of church lands. He was again beaten with electric batons and forced to sign a statement admitting to criminal activities. Later the police came to his home and beat his father and mother as well as the applicant himself and his brother.

- The applicant in _____, like several of the other applicants in these cases, was a member of a prohibited pro-democracy organization. He had joined this organization while a student in Saigon and had campaigned to get other Montagnard youth to join the group. He was summoned to “working sessions” by local security officials because of his activities with this organization. One such summons, which the applicant has provided to UNHCR, refers to the applicant’s “connections with bad elements, using your freedom to conduct subversive activities against the Socialist Republic of Viet Nam.” He was beaten and tortured during interrogation. He fled the country after one of his closest associates in the pro-democracy group was arrested and charged with crimes punishable by up to six years in prison.
- The applicants in _____ and _____, like several of the other applicants, were victims of human trafficking from Vietnam to Malaysia. When one of these applicants attempted to visit the Labor Protective Association in Malaysia, she was threatened with death. They escaped and returned to Viet Nam, only to be detained, interrogated, and threatened by police officers that “whoever open[s] mouth about Malaysia will be killed.”
- The applicant in _____ was also an export laborer in Malaysia and encountered slavery-like conditions. When he complained to the Vietnamese government after his return, he was “accused as a betrayer” and forced to sign a statement admitting his guilt in the matter and to pay compensation to the labor export company that had trafficked. He had also been imprisoned and tortured by the Vietnamese government because of his religious activities. Like several other applicants, he reported that his family had long been on a blacklist because his father had been an officer in the Army of the Republic of Viet Nam and subsequently belonged to the separatist organization FULRO.
- The applicant in _____ reported a long series of arrests, beatings, torture, and other mistreatment by local authorities dating back several years, most of which were on account of his religious activities. This applicant, like several of the others, is a Catholic. Although Catholicism is not a prohibited religion, its activities still fall under government oversight and control. This applicant and others were punished for unauthorized activities such as organizing efforts to give food and money to the poor in the name of the church rather than the state. In an effort to escape his untenable situation in Vietnam, this applicant paid thousands of dollars to participate in a government-backed labor export scheme that turned out to be a human trafficking operation. When he returned to

Vietnam before the end of his labor contract, he was once again arrested, detained, beaten, and tortured with electric batons. The authorities threatened him with four years' imprisonment if he did not pay double the amount he allegedly owed under his labor contract. He then fled to Thailand.

- The applicant in _____ also returned prematurely from what turned out to be a forced labor program in Malaysia. He reported what had happened to him to the provincial authorities in Viet Nam, only to be told that he was a liar. They held a gun to his head and threatened to kill him if he did not compensate the government for having broken his labor contract. On the way home from this interrogation he was again accosted by police officers who once again held a gun to his head, this time accusing him of conspiring with religious organizations to overthrow the state. Instead of returning home he went into hiding in the countryside. When his mother told him the police had been to his house looking for him and had beaten his father and brother for refusing to disclose his whereabouts, he fled the country.
- The applicant in _____ was repeatedly and severely beaten and threatened with death for participating in unauthorized religious ceremonies. He was also beaten after filing a petition to recover family land that had been confiscated by the government. Later, when he complained about working conditions in the government-supported export labor program, he was again beaten and accused of being “a reactionary element against the government.”
- The applicant in _____ was sentenced to four years in prison after having been accused of “using the Bible to do things against the government” and of being “a criminal to betray one’s Nation” after he joined a pro-democracy organization.
- The applicants in _____, _____, and _____ were members of a church youth group that was attacked by a gang of thugs with sticks, inflicting serious injuries on several members of the group. One applicant recognized several gang members as police officers. The men in the group fought back in an attempt to defend the women, although they had only their bare hands and the attackers had sticks. The police then went to the applicants’ homes saying that they had committed crimes against the national security and would be sentenced to several years in prison. Two of these applicants had also participated in an August 2008 demonstration in a village in which land belonging to their family had been confiscated. The demonstration was broken up by the police and the military, who inflicted serious injuries on a number of the demonstrators. The applicant in NI-23262 reported a series of arrests, detentions, beatings, threats of grave violence, and other serious mistreatment going back to the 1990s. While living in Saigon as a student he had met with a number of visiting United States government officials under the auspices of the U.S. Consulate General, and he was accused in 2001 of “colluding with foreign governments to oppose the Vietnamese government.” During one period

of detention in 2007 he was severely beaten on numerous occasions and warned that if he continued his “reactionary” activities he would spend many years in prison. These applicants are particularly disliked by the authorities because they had close family members in the South Vietnamese Army (Army of the Republic of Vietnam, or ARVN) and in FULRO and are themselves members of an unauthorized Vietnamese pro-democracy organization.⁶

17. None of the Notices of Decision contained negative credibility findings or, indeed, any suggestion that any of the applicants was not fully truthful. From our interviews with several of these applicants and from our review of the documents provided to UNHCR by applicants on appeal, declarants agree with what appears to have been the UNHCR adjudicators’ conclusion that all of the applicants were telling the truth about the facts and circumstances that caused them to flee Viet Nam.
18. Nevertheless, UNHCR rejected all of the applications⁷, issuing Notices of Decision that were virtually identical in all the cases. As we shall suggest in paragraphs 27-40 below, declarants believe these Notices reflected the application of erroneous legal standards that effectively impose a far higher burden of proof on Montagnard applicants than is imposed on other asylum seekers. Aside from these legal issues, however, we respectfully suggest that the Notices of Decision contain several erroneous and/or misleading statements of fact, all of which are central to the basis on which the applications were rejected.
19. First, the Notices rely heavily on a statement attributed to the United Kingdom Home Office Country of Origin Information Report and Operational Guidance Note of 2009 [cited hereinafter as UK Guidance] to the effect that “only persons with a heightened religious or political profile [are] likely to face scrutiny, investigation and interrogation rising [to] the level of persecution.”
20. The Notices of Decision do not define or explain what it means to have a “heightened” religious or political profile. Illustrations in the UK Guidance suggest that the term may mean only that Montagnards face a serious risk of

⁶ This list is intended as illustrative, not exhaustive. Other applicants also reported that they left Viet Nam after similar forms of harsh treatment by the authorities, and some of the applicants listed in paragraph 16 also listed other forms of persecution and mistreatment in addition to those set forth in this illustrative list. The listed applicants have provided Declarants with copies of their UNHCR Notices of Decision, their statements on appeal, and/or written summaries of what they recall having been asked and answered at their refugee status determination interviews. The factual statements about applicants’ cases in this Declaration are drawn from those documents. (Several of the applicants reported that in their interviews with UNHCR they were not given a chance to tell about everything that had happened to them, since the interviewer or interpreter would interrupt the answer to one question in order to ask another. These applicants indicated that they then provided fuller accounts of their experiences to UNHCR in their statements on appeal.)

⁷ Declarants are aware of only one case in recent years in which UNHCR in Bangkok has recognized a Montagnard as a refugee. While most of the facts and circumstances reported by the principal applicant in that case were quite similar to those reported by the rejected applicants, that applicant also reported additional facts raising another issue that was not present in these cases.)

persecution if the government identifies them as actively involved with unregistered religious groups or anti-government political activities. See Appendix II. If this were the standard, however, then most or all of the applicants would have been recognized as refugees, since all reported credibly that they fled after they, their family members, and/or close associates were identified by government officials as active in suspect or prohibited religious or political activities. Indeed, most of the applicants reported having been arrested, detained, beaten, and/or otherwise mistreated by the authorities on account of these activities. Surely this is the very definition of a “high profile” individual.

21. As applied in these cases, however, the “heightened profile” standard appears to mean that only a few particularly prominent political or religious leaders are at risk of persecution. As noted by Human Rights Watch, however, persecution has not been limited to “leaders” but has also been inflicted on “helpers” and even on people whose “only crime is affiliation” or who are suspected only of trying to flee the country. See paragraph 9. See also the sources excerpted in Appendix II, all of which indicate that any Montagnard who is suspected of anti-government political activities, including but not limited to resisting land confiscation, and/or of involvement in unauthorized religious institutions or activities is at serious risk of persecution.
22. The serious factual error implicit in the application of the “heightened profile” standard in these cases is best illustrated by noting that if any of the people whose persecution is described in paragraphs 8-15 had managed instead to elude arrest, flee the country, and apply to UNHCR for refugee status determination, most or all would have been rejected under this standard. Some of those people, like the applicants in the present cases, were undoubtedly known and disliked by local authorities. But few if any of them appear to have been nationally prominent -- or even well known to human rights observers working for governments or for nongovernmental or international organizations --- prior to the serious persecution that has resulted in their current “high profile”. Nor would most of the approximately 100 Montagnards in Appendix I who are imprisoned for their political and/or religious activities have been regarded as “high profile” in this sense prior to the arrests that led to their imprisonment. In the case of Y Ben Hdok, he was not “high profile” until his death in police custody.
23. The Notices of Decision also use the terms “monitoring during religious events” and “prohibition of certain organized religious activities” to describe the infringements on religious freedom that applicants may face if they return to Viet Nam. However, these terms do not accurately portray the severity of the sanctions recently and/or currently imposed by the Vietnamese authorities on numerous Montagnard religious groups and individual members of such groups in the Central Highlands.
24. Severe restrictions are being placed on the religious freedom of Montagnards in the Central Highlands by the Vietnamese authorities, and the sanctions imposed

by the Vietnamese authorities on those Montagnards whose attempts to practice their religion are perceived by the Vietnamese authorities to threaten the desired religious order in Vietnam are extremely harsh. Please see examples of these sanctions set forth in Appendix II.

25. The Notices of Decision address applicants' fears of persecution for their resistance to government confiscation of Montagnard lands by acknowledging that "difficulties persist in obtaining compensation for confiscated land" This is yet another dramatic understatement. As noted above and in Appendix II, in April 2008 Montagnards in some areas of the Central Highlands organized and participated in protests demanding compensation for confiscated land. As in the 2001 and 2004 protests, the Vietnamese authorities brutally suppressed these demonstrations and those who organized and participated in them.
26. The misleading and/or erroneous statements of fact described above are part of a systematic pattern in which the Notices of Decision describe grave mistreatment of Montagnards in terms that would ordinarily be used to describe far less serious mistreatment. For instance, two of the applicants fled Viet Nam after being caught up in an incident in which a gang of thugs attacked members of a church youth group on their way home from choir practice. One of these applicants stated that he recognized several members of the gang as police officers who had broken up demonstrations and beaten Montagnards on previous occasions. The Notices of Decision denying recognition of refugee status to these applicants characterized this attack as a "fight", perhaps because one applicant admitted that he attempted to defend the women in the group who were being beaten by the gang members. The effect of the use of the word "fight" in this context is to create the illusion of moral and legal equivalency between the quasi-official gang that attacked a group of young men and women on their way home from choir practice and beat them with sticks, and the victims who attempted to defend themselves with their bare hands.

LEGAL ISSUES PRESENTED BY THE NOTICES OF DECISION

27. Declarants respectfully suggest that the Notices of Decisions' pivotal reliance on the idea that only Montagnards with a "heightened political or religious profile" are in danger of persecution is inconsistent (at least as applied in these cases) not only with the facts on the ground in Viet Nam --- see paragraphs 16-26 above --- but also with fundamental principles of refugee law. The "heightened profile" doctrine effectively imposes a requirement that an applicant show that he or she has already been singled out by the authorities in order to show a well-founded fear of persecution. This violates two fundamental principles of refugee law, both of which are set forth in UNHCR's "Note on the Standard of Proof in the Refugee Cases. Paragraph 19 of the UNHCR Note states that "[w]hile past persecution or mistreatment would weigh heavily in favor of a positive assessment of risk of future persecution, its absence is not a decisive factor." And paragraph 17 of the Note adds that "jurisprudence largely supports the view that

there is no requirement to prove well-foundedness conclusively beyond doubt, or even that persecution is more probable than not. To establish 'well-foundedness,' persecution must be proved to be reasonably possible."

28. The Notices of Decision effectively require applicants to make a threshold showing of past persecution or mistreatment in order to establish a "heightened political or religious profile." This amounts to making the absence of past persecution a decisive factor in determining the well-foundedness of the fear of future persecution. Indeed, even those who can show past persecution --- such as applicants in _____ and _____, whose claim was based in part on what their Notices of Decision inappropriately characterize as a "fight" between Montagnard youth who had been attending a religious meeting and Vietnamese police officers who attacked them --- are being told that a showing of past persecution is not enough unless they can produce additional evidence to show that such mistreatment will happen again upon their return. This violates both the principle that past persecution should "weigh heavily" in favor of the reasonable possibility of future persecution, and the principle that the applicant should be required to show only that future persecution is reasonably possible, not that it is more likely than not.
29. The Notices of Decision go even further, however, by assuming that even if the applicants do face serious mistreatment upon return to Viet Nam, this treatment will amount to lawful punishment under laws of general application rather than persecution motivated by the authorities' hostility to the applicants on account of their ethnicity and/or their religious and political beliefs and activities. Indeed, the Notices acknowledge that applicants might face punishment by the authorities upon return to Viet Nam on account of their illegal exit from Viet Nam. The Notices further acknowledge the distinct possibility of what they call "difficulties" in connection with applicants' attempts to recover confiscated lands and/or to practice unauthorized religions. But even those applicants who were mistreated in the past, and who can show a nexus between this past mistreatment and their political/religious activity, are notified that UNHCR sees no reason to believe that the expected future mistreatment will also be on political or religious grounds.
30. In sharp contrast to the UNHCR Notice of Decisions, however, the Vietnamese law on illegal exit clearly acknowledges that punishment under this law is targeted directly at those who are regarded as enemies of the state. Article 91, on illegal exit, is per se persecutory. Unlike most such laws in other countries around the world, this law does not simply punish illegal exit from the country. Rather, Article 91 punishes only those who flee abroad "with a view to opposing the peoples' administration.". That is, it explicitly singles people out for criminal prosecution and imprisonment on account of their political opinions. Others who engage in identical conduct for some other motive -- economic, social, or even political so long as the political opinion in question is not anti-government -- are not punishable. The law is therefore not a true law of general application, even on

its face; it explicitly limits its sanctions to those who hold a particular political opinion, one of the five grounds specified in the Refugee Convention. No one would argue that a law punishing only persons of color who flee a country, or only Catholics who leave a country, was a law of general application. It is just as frivolous to make such an assertion about a law punishing only anti-government political activists who leave the country. This is an explicit link to one of the five grounds of persecution set forth in the Refugee Convention.

31. Even if Article 91 did not explicitly authorize punishment on the ground of real or imputed political opinion, declarants respectfully suggest that in light of Viet Nam's history and known country conditions it is difficult to believe that the authorities' motivations and actions when punishing a Montagnard who (1) had encountered "difficulties" on account of his or her political or religious activities; (2) had then fled the country and sought refugee status overseas; and (3) been forcibly returned, would be indistinguishable from their motivations and actions in dealing with, for instance, an ethnic Vietnamese farmer on good terms with local authorities who had used an unauthorized border crossing to visit a market in a neighboring village in Laos or Cambodia.
32. As noted above, the Notices of Decision inform applicants that although they can anticipate certain "restrictions" on the free exercise of their religion, as well as continued "difficulties" in recovering confiscated land, these restrictions and difficulties are not so severe as to constitute persecution. These statements not only constitute a significant understatement of the mistreatment inflicted on many Montagnards --- see paragraphs 4-26 above and Appendix II --- but also appear to misstate the applicable law. The test of whether a person whose government refuses to let him or her exercise an internationally recognized human right faces a risk of persecution comprehends not only whether the denial of the right is itself persecution, but also whether the actions the government is likely to take against him if he insists on exercising the right may constitute persecution.
33. The applicants in these cases have shown not only that their rights to own property, to practice their respective religions, and to express peacefully their political opinions are likely to be violated, but also that they have a propensity to resist such violations. Even if the government-imposed restrictions on the free exercise of religion and the government's refusal to return confiscated lands do not themselves amount to persecution, these applicants have a well-founded fear of persecution if there is a reasonable likelihood that they will be persecuted when they attempt to exercise religion in the prohibited ways, to protest these prohibitions by peaceful means such as petitions and demonstrations, and to take similar actions with respect to confiscated lands. The available country of origin information reflects that the Vietnamese authorities frequently respond to such nonviolent resistance by inflicting imprisonment, torture, cruel and inhuman treatment, and other forms of persecution. See paragraphs 6-15 and Appendices I and II.

34. The Notices of Decision also notify the applicants that there “have been some improvements whereby the Government has allowed for registered churches to operate in the Central Highlands.”
35. The currently available country of origin information reports state that while some Protestant churches in the Central Highlands are now being registered under the 2004 Ordinance on Religion and Belief (the “Ordinance”), the registration provisions in the Ordinance are unclear, and the Vietnamese authorities’ implementation of these is patchy at best; whether or not churches are allowed to register under the Ordinance appears to be largely determined by the attitude of the local officials in the areas where registration is applied for. Please see examples of this set out in Appendix II.
36. In any event, improvement in the treatment of registered churches has little relevance to the claims of the applicants in these cases, most of whom were either members of unregistered Protestant churches or, in several cases, Catholics who had been mistreated by the authorities not for being Catholics per se, but rather because these authorities seemed to regard their particular religious activities and/or related political activities as a threat to what the Vietnamese authorities call “the national unity.”
37. It is therefore important that in deciding appeals and/or motions to reopen or reconsider by Montagnard applicants, UNHCR take each individual claim on its own facts and merits and not assume that just because local authorities in some areas appear to be displaying a more tolerant attitude toward some or all Montagnard Christians, this is the case across the board and these particular applicants face no risk of persecution.
38. Finally, the Notices of Decision assure the applicants that “the Government continues to address economic and employment issues in ethnically populated Central Highlands of Vietnam” Declarants respectfully suggest that this statement, even more than some of the others we have discussed above, reflects an underlying “one-size-fits-all” attitude toward refugee protection applications made by Montagnards. The existence of social and economic programs for Montagnards in general is irrelevant to the refugee protection concerns of an individual Montagnard who has credibly reported specific forms of mistreatment and/or threats of mistreatment not just because he or she is a Montagnard, but on account of specific characteristics, beliefs, and activities. As UNHCR well knows, the government of Viet Nam is hardly the first authoritarian regime that persecutes some members of vulnerable populations even while it subsidizes others.
39. UNHCR should also bear in mind that rhetoric does not always reflect reality in Vietnam and that while the official policy of the Vietnamese Government may be one of non-discrimination toward Montagnards and other ethnic minorities, this is not always put into practice at the local level. Even more important from the

standpoint of refugee protection, such an official policy says next to nothing about how local authorities will respond to particular Montagnards whose religious and/or political activities these authorities see as evidence of insufficient gratitude for the social and economic benefits the government has provided.

40. UNHCR should therefore re-examine the Montagnards' claims on an individual, case by case basis and should determine whether, in light of the particular experiences each individual applicant has credibly reported as well as the evidence set forth in this Declaration and its appendices, there is a reasonable possibility that this applicant will face persecution if he or she is forcibly returned to Vietnam and continues to resist and/or protest against government policies including restrictions on the right to free exercise of religion, government confiscation of land, and export labor schemes involving forced labor and other human rights violations.


CONCLUSION

Declarants respectfully request that UNHCR reverse the decisions listed in paragraph 1 on appeal (or, in cases where this has become the only recourse available to the applicant, on motions to reopen and/or reconsider) and recognize the applicants in these cases and all other similarly situated Montagnard applicants as refugees.



Nguyen Dinh Thang

Date: January 27, 2010



Grover Joseph Rees

Date: January 27, 2010

APPENDIX I:
List of Montagnards in
Prison for Religious and/or
Political Activity