

THAILAND: NGO assessment of the follow-up actions of the State party in implementing UN Human Rights Committee's recommendations

Submitted by
Cross-Culture Foundation (CrCF)
4 May 2020

Introduction

1. Following the UN Human Rights Committee's Concluding Observations to Thailand issued after the review of the 2nd Periodic Report of Thailand, the Cross-Culture Foundation (CrCF) would like to submit additional information that supplements CrCF's assessment of the implementation of the Committee's recommendations selected for its follow-up procedure, which was submitted to the Committee by CrCF together with the International Commission of Jurists (ICJ) and Thai Lawyers for Human Rights (TLHR) on 24 April 2020.² CrCF believes that the information provided through this additional submission needs be taken into account by the Committee, when evaluating Thailand's follow-up action, in order for it to grasp more comprehensive picture of the situation on the ground and context. Three main ICCPR related topics addressed in this submission are as follows:

- interpretative declarations on and derogations from the Covenant during a state of emergency (Paragraph 5 and 6);
- extrajudicial killings, enforced disappearances and torture (Paragraph 19 to 22); and
- right to liberty and security of the person and humane treatment of persons deprived of their liberty (Paragraph 25 and 26).

Interpretative declarations on and derogations from the Covenant during a state of emergency

2. The CrCF³ has concerned over the broad executive power and the lack of parliamentary and judiciary oversights on Thailand's security laws, in particular, the Martial Law Act B.E. 2457 (1914) (ML)⁴ and Emergency Decree on Public Administration in State of Emergency B.E. 2548 (2005) (ED).⁵ No provision under the ML and ED permits the

² The Cross-Culture Foundation also had another submission to the UN Human Rights Committee together with the International Commission of Jurists (ICJ) and Thai Lawyers for Human Rights (TLHR) on 24 April 2020, available at <https://www.icj.org/thailand-the-icj-and-other-human-rights-groups-make-supplementary-submission-to-the-un-human-rights-committee/>

³ For more than 10 years, the Cross-Cultural Foundation and its partners have promoted human rights in the southern border provinces of Thailand. These populations were non-discriminately affected by armed conflict and the ongoing counter-insurgency in the region. Human rights violations are committed by some officials and also by non-state armed groups. Therefore, it is essential that local populations pursue the defense and protection of their human rights. CrCF partner is consisting of Duayjai Group, Patani Human Rights Network (HAP), Child Rights Protection Network (CPN) and JASAD. <https://youtu.be/ol95z9J0uzg>

⁴ The ML, available at <https://www.icj.org/se-asia-security-law/martial-law-1914/>

⁵ The ED, available at <https://www.icj.org/se-asia-security-law/emergency-decree-on-public-administration-in-emergency-situation/>

parliamentary body to review justification of the ML and ED announcement, as well as, and efficiency and effectiveness of the special measures applied in the circumstance.

3. The security laws have become normal in many areas of Thailand. At present, the military-led civilian power under the ML has been enforced in the border areas of Thailand, including the southern border provinces for longtime.⁶ In the southern border provinces, the serious emergency situation under the ED has been applied since 20 July 2005.⁷ The Cabinet has, in every three months, announced the extension of the serious emergency situation for almost 60 times. And recently, the Prime Minister announced the emergency situation under the ED all over the country due to the pandemic Covid-19 outbreak.⁸ It appears that Thailand has not yet notified other state parties to ICCPR via the Secretary General regarding the invocation of ML and ED and the exercise of right of derogation with regards to the insurgency situation in the southern border provinces.
4. The CrCF has concerned about the provision under ML and ED, which limits the role of the judiciary body to review the special measures. The ML limits the right of person to claim for compensation with regards to the lawful military operation.⁹ In addition, the civilian is unable to file a criminal lawsuit against a perpetrator, who is a military personal, to the criminal court.¹⁰ The ED also has a provision to disregard the judicial review of the administrative action.¹¹ In consequence, a person, who their right has been violated, faces difficulty to ask the Court to review the legality and proportionality of the special ML or ED measures applied in the specific circumstance in order to seek redress.¹²
5. **Recommendation 1:** The CrCF recommends *Grade 'C'* over the issue of interpretative declarations on and derogations from the Covenant during a state of emergency. The ML and ED should be reviewed and amended to comply with the ICCPR and international

⁶ The ML is still enforced in 31 provinces and 185 districts –limited to only districts adjoined with neighboring countries. Regarding the southern border provinces, the ML is still enforced in all districts of Narathiwat, Pattani and Yala (except Betong District in Yala, Maeland District in Pattani, Sugai-koloh and Sukirin District in Narathiwat province)

⁷ The announcement of serious emergency situation under the ED has been currently enforced in provinces of Narathiwat (except in Srisakorn, Sungaikolok and Sukirin districts), Pattani (except in Maelarn district) and Yala (except in Betong district).

⁸ Declaration of an Emergency Situation in all areas of the Kingdom of Thailand, dated 25 March 2020, available at <http://www.mfa.go.th/main/contents/files/news3-20200326-161207-994002.pdf> and Bangkok Post, 'Emergency decree extended' 27 April 2020, available at <https://www.bangkokpost.com/thailand/general/1908545/emergency-decree-extended>

⁹ Article 16 of the ML

¹⁰ The Constitution Military Court Act B.E. 2498 (1955) states that a crime committed solely by a military personal is subject to a jurisdiction of the Military Court. See: Article 13 and 14 of the Constitution Military Court Act B.E. 2498 (1955), available at http://asean-law.senate.go.th/en/law-detail-en.php?law_id=333&country_id=9 (only in Thai)

¹¹ Article 16 of the ED stipulates that regulations and measures under the ED are not subject to the Administrative Court jurisdiction.

¹² For example see: Order of Central Administrative Court, Black Case Number 933/2563 dated 1 April 2020, available at http://admincourt.go.th/admincourt/site/08hotsuit_detail.php?ids=19401 (only in Thai) and Bangkok Post, 'Fit-to-fly order challenged,' 28 March 2020, available at <https://www.bangkokpost.com/thailand/general/1888315/fit-to-fly-order-challenged>

principles and standards. The security laws and their special measures should be temporary and proportionate to specific circumstance. The security laws should ensure the role of the parliamentary and judiciary bodies to review justification of an emergency announcement, as well as, legality, necessity and proportionality of the special measures.

Extrajudicial killings, enforced disappearances and torture

6. The CrCF has concerned over Thailand's lack of progress to enact the law to suppress and prevent torture and enforce disappearance. Although a bill on the 'Suppression and Prevention of Torture and Enforced Disappearance Act' was once approved by the Cabinet¹³ and adopted in principle by the National Legislative Assembly of Thailand (NLA) in December 2018,¹⁴ but the NLA consideration progress was overdue and finally the bill was taken back from the parliament and currently under reconsideration by the Ministry of Justice.¹⁵
7. While the CrCF wants to have the law on suppression and prevention of torture and enforce disappearance in Thailand, the CrCF also concerns that the government bill may not yet fully comply with international human rights obligation.¹⁶ Therefore, the CrCF together with 12 partner human rights organizations developed the CSO version to fulfill the government bill. The bill (CSO version) was proposed to the parliament (the Standing Committee on Legal Affairs, Justice, and Human Rights) and the interested political parties.¹⁷
8. The bill (CSO version) contains the provisions to fulfill international obligations to the government bill. The example are as follows:
 - the definition of crimes of torture, enforced disappearance and cruel, inhuman and degrading treatment to be in compliance with the CAT and ICPED;
 - the continuous nature of the crime of enforced disappearance, which requires the investigation until the fate and whereabouts of the disappeared person has been clarified;
 - the rights of the victim's family in the criminal justice;
 - the command responsibility to be held accountable of the crime;
 - the specific measures with regards to the death in custody;
 - the judiciary review by the civilian Court, whether the perpetrator is the military or civilian personal, and to offer immediate remedies for the victims;

¹³ The Cabinet resolution dated 27 December 2016, available at http://www.cabinet.soc.go.th/doc_image/2559/9932249311.pdf (only in Thai)

¹⁴ The National Legislative Assembly of Thailand, session 86/2561, dated 20 December 2018, available at https://www.senate.go.th/document/mReport/Ext42/42723_0001.PDF (only in Thai)

¹⁵ The Cabinet resolution dated 29 October 2019, available at http://www.cabinet.soc.go.th/doc_image/2562/993338113.pdf (only in Thai)

¹⁶ <https://www.bangkokpost.com/thailand/general/1847414/house-urged-to-back-torture-rights-bill>

¹⁷ Draft prevention and suppression of torture and enforced disappearance, Nov 2029 available at <https://crcfthailand.org/2020/05/04/translation-draft-prevention-and-suppression-of-torture-and-enforced-disappearance-act-b-e-people-version/> available in Thai and English.

- the fundamental safeguards for any person deprived of liberty, including, but not limited to, search, arrest and detention under the ML and ED, to prevent the secret detention or incommunicado detention;
 - the inadmissibility of evidence obtained by torture or enforced disappearance;
 - the protection for a whistle-blower in order to prevent the strategic lawsuit against the public participation (SLAPP); and
 - the non-refoulement, and non-justifiable in any circumstances, even in time of public emergencies.
9. **Recommendation 2:** The CrCF recommends *Grade 'C'* over the issue of extrajudicial killings, enforced disappearances and torture. The legislation on the Suppression and Prevention of Torture and Enforced Disappearance Act should be fully comply with the international human rights obligations and standards.

Right to liberty and security of the person and humane treatment of persons deprived of their liberty

10. The CrCF has concerned over the application of security laws applied in the southern border provinces, which allows the military-led-civilian operation in response of insurgency in the southern border areas for over 15 years. With regards to the recent announcement on the emergency situation all over the country, the military is still in charges of the operation in response with the pandemic Covid-19 outbreak.
11. The CrCF worries about the special measures operated by the military at the check-point, cordon and search, invitation, arrest and detention without criminal charges in the military facility. It was unclear of which security laws, the ML or ED, the military has been used for the operation in the circumstance. The CrCF was reported that the military went into the village talked about the Covid-19 outbreak, at the same time, the military also took DNA from peoples without informed consent according to Thai criminal procedure code.¹⁹

Special measure in taking DNA sample without voluntary

12. The CrCF has received numerous reports that the security officers consistently and systematically used this power to raid houses and collect DNA samples of Malay Muslims in the southern border provinces including women and children especially those are members of detainees, former detainees or suspect insurgents. According to the information received, the authorities frequently claim that the collected DNA samples will be used as evidence to prosecute alleged insurgents.
13. From January to September 2019, CrCF has received at least 139 reports of forced DNA collection in the southern border provinces. Key cases include the collection of DNA samples from 30 Cambodian students of Madrasah Al-Falah Islamic School in Pattani's Mayo district, and that of 60 villagers from Baan Hae, Yala's Than To District. In all cases,

¹⁹ The collection of DNA samples can be lawful under conditions of Criminal Procedure Code. Sections 131 and 131/1 of the Criminal Procedure Code provided that: (1) the collectors shall be inquiry officials (commissioned police officers) or doctors and experts in relevant areas; (2) the DNA collection shall be useful for criminal offenses with over 3-year imprisonment; (3) the DNA samples can only be collected from (a) alleged offenders who have been informed about allegations, (b) injured persons, and (c) concerned persons; and (4) the officials shall obtain consent before collecting the DNA-samples. However, if there is no reasonable ground, the alleged offenders are able to refuse to give consent.

the authorities target suspected insurgents, especially Malay Muslim residents of Red Zones which are the areas in which the government believes non-state militants are most active. In some cases, the officials allegedly instructed the DNA owners to sign a consent form after the collection is completed whereas in other cases, the owners were not allowed to decide if they would consent to the collection at all.

14. During the annual military conscription between 4 and 11 April 2019, the military integrated the practice of DNA collection as part of the conscription process in residing in three districts of the southern border provinces and four districts of Songkla. According to the information received, at least 20,250 men who underwent the conscription allowed the officers to take their DNA samples. Many men contacted and reported to CrCF that the officers demanded them to sign a letter of consent before collecting their DNA samples; none of them were provided with the information about what the DNA samples would be used for, where they would be stored, who has access to them and whether there is a timeframe in which the DNA samples will be destroyed. In addition, most of them were not aware that they have to right to refuse or not giving consent for the DNA samples.
15. Furthermore, the 'special' counterinsurgency laws, including the ML, the ED and the Internal Security Act B.E. 2551 do not contain any provisions that authorize the officials to collect the DNA samples in such a manner either.
16. Apart from the illegality of the forced DNA collection itself, instructing the DNA owners to sign their names on the boxes violates the chain of custody principle. It invades the owners' right to privacy and stigmatizes them despite their legal status as innocent. Such a practice can negatively impact the transparency of evidence examination and facilitates corruption. Hence, the DNA samples collected in this manner shall be deemed as inadmissible in court because it is not properly obtained and can lead to a violation of the right to a fair trial.
17. The practice of forced DNA collection illuminates the core of Thailand's counterinsurgency tactics- that is, state surveillance on the local population. It emerges alongside many other policies in the southern border provinces, such as mandatory facial scans through SIM card registration, setting up checkpoints on the road and randomly stopping those perceived as Malay Muslims to take photos of their ID cards and car number plates.

Independent of Judiciary

18. The CrCF has concerned over the role of judiciary, which should robustly review the implementation of a set of security laws in the southern border provinces, in particular the arrest and detention. The CrCF has received several reports of criminal prosecutions which seemed to use information obtained during the detention under the ML and ED. The detention was usually done inside the military camp without criminal charge.
19. However, the CrCF has worried about the independent of judiciary. It included the Judicial Regulation, which designated that the security cases in the southern border provinces are subjected to be review by the superior Judge, who may not sit in the Court hearing.²⁰ The

²⁰ The Judicial Regulation on the Report of an Important Case from the Court of First Instance and the Court of Appeal to the President of the Supreme Court and the Report and Examine of Case File of the

Judicial Regulation had led to the social criticism over the passing of Justice Khanakorn Pianchana, which he claimed he was politically interfered on the independent of judiciary.²¹

20. On 4 October 2019, Justice Khanakorn Pianchana, a senior judge at a lower court in the southern border province of Yala, pulled out a pistol and shot himself inside his courtroom after a hearing. The incident shocked many parties concerned with the criminal case he was presiding over, including five defendants, their relatives, and all court officials. As his suicide attempt has been reported by the media, the CrCF found that his act might be a result of alleged interference in his administration of justice in the murder case Black Case no. 3428/ 2561 (2018) in the southern border provinces of Thailand.
21. This allegation stemmed from one crucial piece of evidence: a 25-page memo which provides details about the attempt of Justice Khanakorn's superiors to force him to change the case's verdicts. The case involved five defendants accused of committing a murder on June 11 in Yala province. Initially, one suspected criminal was arrested under the ML, which led to more arrests. Five suspects were eventually charged with the murder.
22. The interrogation was done inside a military camp under so-called "special" national security laws that permit up to 37 days of detention with neither any charge nor fundamental rights safeguards with torture allegations and complaints. The case was, thereafter, transferred to normal criminal procedure. Justice Khanakorn found the evidence is unlawfully acquired and not admissible, thereby acquitting all defendants in his verdict. However, his supervisors allegedly intervened and ordered him to rewrite the verdict handing the death penalty to three defendants and life sentence to the other two. Such a manner of interference led Justice Khanakorn to protest by publishing the memo and trying to commit suicide.
23. Since Oct 2019, Justice Khanakorn was under internal investigation by the committee set up by the Court of Justice and transferred to inactive post in his hometown in Chiangmai (Northern Thailand). There is no review of how the Court of Justice will handle the criticism on the question of independent of judiciary or publicized report of the internal investigation on the attempt suicide incident and 25 pages petition of Justice Khanakorn.
24. On 7th March 2020, Justice Khanakorn Pianchana, who previously served as a Presiding Justice at the Yala provincial court, shot himself in the heart again in Chiangmai. He died at 10.45 am at the hospital in Chiang Mai province. Justice Khanakorn Pianchana's second suicide on 7th March 2020 is undesirable. His second suicide came in the time when the review of his petition is not transparent to him and to the public.
25. The CrCF together with other human rights organization issued a joint statement on 8 Mar 2020²² and also sent a confidential letter dated 10 Mar 2020 to the Supreme Court

Regional Chief Judge Office, dated 22 January 2019. available at <https://opsc.coj.go.th/content/category/detail/id/8/cid/1142/iid/132413> (only in Thai)

²¹ ICJ, Thailand: Judge's suicide attempt underscores need for strengthening judicial independence, dated 7 October 2019, available at <https://www.icj.org/thailand-judges-suicide-attempt-underscores-need-for-strengthening-judicial-independence/> and ICJ, Thailand: ICJ mourns the passing of Judge Khanakorn Pianchana, dated 9 March 2020, available at <https://www.icj.org/thailand-icj-mourns-the-passing-of-judge-khanakorn-pianchana/>

Judge demanded promptly review and revoke any regulations, orders, or proceedings that may intervene or influence the independence of the quorum in undertaking trials and adjudication. The “independence of the judiciary” shall be strictly upheld pursuant to human rights, the rule of law, and the principles and spirit of the Constitution 2017. The reply letter dated 13 April 2020 simply said the matter is on process and will review to public later without specific time frame.

26. **Recommendation 3:** The CrCF recommends *Grade ‘C’* over the issue of right to liberty and security of the person and humane treatment of persons deprived of their liberty. The ML and ED should be lifted in the southern border provinces. The law enforcement officers must apply strictly Thai criminal procedure code while counterinsurgency. In addition, the DNA sample shall only be taken according to the Thai criminal procedure code and with informed consent. Moreover, the independence of the judiciary shall be guaranteed in order to have a robust review the implementation of security laws.

²² Joint letter submission to Parliamentarians dated 22 Jan and 30 Jan 2020 (only in Thai) available at <https://bit.ly/2Wk8LrW>