**Joint Submission to the Committee on Economic, Social and Cultural Rights regarding the draft General Comment No.26 (2021) on land and economic, social and cultural rights**

27 July 2021

**Background**

1. This document was compiled by 17 Thai civil society organisations, namely: Cross-Cultural Foundation; Chumchonthai Foundation; Center for Protection and Revival of Local Community Rights; Area-based-Social Innovation Research Center, Mae Fah Luang University; Community Resource Centre Foundation; College of Social Innovation, Rangsit University; ETOs Watch Coalition; Northern Development Foundation; the Mekong Butterfly; ActionAid Thailand; Land Watch THAI; ENLAWTHAI Foundation; Local Development Institute; Princess Maha Chakri Sirindhorn Anthropology Centre (Public Organisation); Food Security of Andaman Association; Prorights Foundation; and Union for Civil Liberty.
2. The recommendations made in this submission have been complied through an online seminar entitled “Land rights: International Principles and Situation in Thailand”, organized on 28 May 2021. Participants included representatives of the above-mentioned civil society organisations. The event was organized with the support of Dr. Seree Nonthasoot, member of the UN Committee on Economic, Social and Cultural Rights (CESCR). This submission and the seminar were coordinated by the International Commission of Jurists (ICJ).[[1]](#footnote-2)
3. This submission focuses on land rights issues in Thailand and our recommendations to the draft General Comment No. 26 (2021) on land and economic, social and cultural rights (‘draft General Comment No. 26’) on the following areas: (a) participation, consultation, and transparency; (b) obligations of States parties under the ICESCR (obligation to respect); (c) obligations of States parties under the ICESCR (obligation to protect); (d) extraterritorial obligations; (e) specific topics; and (f) remedies.

**Participation, consultation and transparency**

1. The draft General Comment No. 26 recognizes that the governance of land tenure is linked to access to and management of other natural resources, such as water and mineral resources (paragraph 6) and the importance of the informed and meaningful participation and consultation of individuals and communities in all land-related policies (paragraph 18). However, we are of the opinion that the above noted “land-related policies” (paragraph 18, draft General Comment No. 26) should explicitly include policies related to minerals and natural resources underground and underwater. While ensuring the sustainable use of natural resources, participation and consultation should be guaranteed before the concessions granted to any entities or such resources be utilized for any purposes.
2. Regarding the participation and consultation of individuals and communities in all land-related policies as stated in paragraph 18, based on our experience in Thailand, we are of the view that the CESCR should also address the practice of conducting public consultations via online platforms that has been increasingly adopted, despite the fact that individuals and communities in many areas still has no access or means to participate in such online consultations. Contributing organisations are of the view that, presently, the online consultation should not entirely replace an on-site consultation with affected individuals. The online consultation should also not be the only available platform for consultations.
3. We are of the opinion that Part B of the General Comment No. 26 should also highlight the importance of town planning process. Such processes should ensure participation, consultation, transparency, respect the plans that were prepared by local communities, and aim to identify land uses that are suitable to the conditions and potential of the areas. Town planning can be a vital tool in ensuring appropriate land management practices.
4. We are also of the view that the Strategic Environmental Assessment (‘SEA’) is another vital tool in ensuring the participation and consultation of the affected individuals or communities at the policy-making process. We would appreciate it if the General Comment may explicitly refer to the SEA, which will help raise awareness of the ICESCR State parties on the importance of such process.

**Obligations to respect under the ICESCR relating to land**

1. The draft General Comment No. 26 emphasises that States parties should recognise the social, cultural, spiritual, economic, environmental and political value of land for communities and to recognise customary, collective or traditional tenure rights (e.g. paragraphs 19-21 and 24). Contributing organisations are of the view that General Comment No. 26 should explicitly require States parties to reflect the recognition of such customary, collective or traditional tenure rights in their domestic legislations, including their Constitutions. For example, by defining the term ‘land’ in the above noted legislations to embrace their social, cultural, spiritual, economic, environmental, and political value to communities, so it will be implemented broadly by relevant officials and agencies.
2. We welcome that paragragh 22 of the draft General Comment No. 26 affirms that land administration should be based on accessible and non-discriminatory services implemented by accountable agencies whose actions are reviewed by judicial bodies. Additionally, we, however, would like to recommend that there should be a single agency governing land administration or, if there are several agencies, they should coordinate with each other in order to avoid any possible “overlapping” by many agencies' regulatory jurisdictions. Land administration services should also be carried out by “specialized” administrative authorities that have been trained on economic, social, and cultural rights, not security forces.
3. Paragraph 23 of the draft General Comment No. 26 guarantees the right of the indigenous peoples[[2]](#footnote-3) over the lands and territories that they have traditionally occupied and the right of the communities concerned to manage the lands according to their internal modes of organization. In this regard, we would appreciate it if the CESCR may consider adding the the term “indigenous peoples' traditional livelihood practices, such as traditional rotation farming system or traditional fishing practices” in the said paragraph in order to guarantee that such practices will be duly protected, particularly crop rotation farming practice that that has been unfairly stigmatized as the culprit of deforestation in Thailand. Several indigenous peoples in Thailand were criminally prosecuted for engaging into such practices.[[3]](#footnote-4)
4. In addition, the draft General Comment No. 26 also refers to States parties’ obligation to protect the access to the sea or to rivers, fishing grounds, and the access to land of legitimate tenure rights holders, including those that depend on the commons. These include by ensuring that they are not otherwise extinguished or infringed by third parties (paragraphs 15, 24 and 29-32). In Thailand, there were a number of instances where forests and resources-dependent communities -- e.g. Moken ethnic group - also known as the "sea gypsies" or “chao ley”, an indigenous group whose livelihoods depend on the Andaman Sea for around 300 years -- whose economic, social and cultural rights related to lands were affected by tourism industry and the declaration of marine national park on the areas that they had lived or relied upon. As a result, they could not access to their traditional fishing grounds for fishing or to support their livelihood. Communities were forced to relocate.[[4]](#footnote-5) We are of the view that the General Comment No. 26 should address the impacts of tourism promotion policies on economic, social, and cultural rights relating to land. States parties should pay attention to custom, culture, and traditional way of life of the local residents before determining any tourism promotion policies, or before granting tourism sector investors any benefits.
5. General Comment No. 26 recognises the right of all legitimate tenure right holders - not only those with formal land titles, but also those with customary, collective or traditional tenure rights that might not be recognized by law (paragraphs 19-22). Contributing organisations are of the opinion that the General Comment should clearly indicates that, in identifying the legitimate tenure right holders, State parties’ administrative and judicial authorities should admit historical or customary evidences, for example, remains from the ancestral cemetery in the area, customary land maps, and oral testimonies of the residents living in the disputed lands.[[5]](#footnote-6)
6. Paragraph 25 of the General Comment No. 26 underlines the right to a reasonable degree of tenure security that guarantees legal protection against forced evictions. However, we note that the draft General Comment No. 26 only addressed forest conservation-related evictions to a limited extent. In several occasions, forest conservation policies in Thailand led to forced evictions and prosecutions for criminal trespassing against forest-dependent individuals and communities,[[6]](#footnote-7) who had occupied or relied on such lands for generations before they were declared as national parks, national reserved forests, wildlife sanctuaries, forest sanctuaries or other protected areas. Forest dwellers are stigmatised as criminals and threats to national security. We, therefore, would appreciate it if the CESCR may highlight in the General Comment that the protection of environment and of human rights, including in relation to land, are "interdependent priorities" as opposed to competing goals. It is thus crucial that State parties’ conservation policies integrate these human rights, including the ICESCR. In addition, human rights dimensions must always be considered before forcibly removing forest-dependent individuals from the lands or territories they had occupied or relied on. These notions were also highlighted by the UN special procedures in several occasions. [[7]](#footnote-8)
7. Aside from those stated in the preceding paragraph, in Thailand, there was an instance where indigenous peoples were forcibly evicted from their traditional land because the relevant authorities would like such forest sanctuary to be recognized as a natural world heritage site. Due to this, we are of the opinion that General Comment No. 26 should specify that human rights, including those in relation to land, and the livelihood, spiritual and cultural value of land for communities who had relied on them, must be at front and center in the process of enlisting natural world heritage sites.[[8]](#footnote-9)
8. Paragraph 28 of the draft General Comment No. 26 recommends that States parties should put in place laws and policies that allow for the recognition of informal tenure, paying particular attention to, among others, tenants. We are of the view that this General Comment should explain the right of informal tenure such as tenants in more detail. This will serve as a guideline for State parties in terminating rental agreements in a human rights compliant manner and providing tenants with adequate remedies. In Thailand, particularly in the special economic zones, a lot of landowners and farmers had their rental contracts terminated and evicted in order to free up the land to sell to investors. In several cases, the rental agreements were terminated without remedy or compensation.[[9]](#footnote-10)
9. We are of the view that it should be clearly stated in the General Comment No. 26 that the State parties shall support the urban poor to access adequate lands and housing.[[10]](#footnote-11) As provided in another General Comment, housing must be adequate, it should be specified in this General Comment as well that the allocated land must also be adequate, including by locating in a good location with accessibility and availability of public services, facilities and infrastructure; being sufficient to ensure the livelihoods of affected individuals and households; and allowing access to employment options.

**Obligations to protect under the ICESCR relating to land**

1. Paragraph 30 of the draft General Comment No. 26 advises State parties to develop laws and policies to guarantee that land-based investments are done in a responsible manner. In this respect, we are of the opinion that the General Comment No. 26 should require State parties to ensure in their domestic laws or regulations that, in order to be determined as a responsible investor, the residents’ economic, social, and cultural rights under the ICESCR as well as this General Comment must always be followed in every step of land-based investment.
2. Paragraph 32 of the draft General Comment No. 26 recommends States parties to adopt a legal framework requiring the business entities to exercise human rights due diligence. We are of the view that the General Comment should clearly state that such legal framework should adopt the United Nations Guiding Principles on Business and Human Rights as a center for exercising their human rights due diligence. We think adding such term is important because, currently, in Thailand, there is a due diligence policy that sounds similar with human rights due diligence but it is not conformed with the United Nations Guiding Principles on Business and Human Rights. Such policy required all listed companied in Thailand to self-assess themselves and disclose information regarding its business and human rights practice in their annual report (56-1 One report).[[11]](#footnote-12)
3. Paragraphs 31 and 36 of the draft General Comment No. 26 protects legitimate tenure rights in the context of large-scale land investments and urges State parties to provide adequate safeguards against land concentration, such as land ceiling laws, etc. In this regard, we are of the view that another useful tool for this is the effective enforcement of taxation law, including by imposing progressive taxation scheme with large-scale landowners who have not utilised their lands.

**Extraterritorial obligations**

1. The draft General Comment No. 26 urges States parties to refrain from actions that interfere with the enjoyment of the economic, social, and cultural rights in land-related contexts outside their territories (paragraphs 39-44). However, presently, each country has its own set of environmental protection laws and regulations, including in relation to land. Their protections can be varied. Due to this, we would therefore appreciate it if the General Comment may require States parties to enact laws to regulate extraterritorial investment. Such legislation should include a precise language requiring investors to comply with laws of the host or home States that require higher environmental protection standards to be adopted, including in land-related contexts.

**Specific topics: human rights defenders**

1. In paragraph 53 of the draft General Comment No. 26, the CESCR expressed concerns on threats and attacks aimed at human rights defenders. Paragraph 22 of the draft provides that legal support should be provided to disadvantaged and marginalized individuals and groups. In Thailand, prosecuted human rights defenders were normally those in poverty, who had lived or relied on the land, and seek to protect their economic, social and cultural rights or those of others due to the State land management practices. They have no resources to effectively defend themselves in courts and, in several occasions, were not entitled to legal support from the government. Due to this, we are of the view that the General Comment should encourage its States parties to set up the legal assistance fund for human rights defenders, which are accessible, prompt and effective.
2. Additionally, in relation to human rights defenders, we are of the opinion that the General Comment should also emphasize the States’ obligation to review, revise and repeal laws that are being misused to prosecute human rights defenders, particularly those that impose criminal penalty and are not in compliance with international law and standards. States parties should also end the use of certain laws against their original intents. For example, in Thailand, provision punishing those contributing to climate change was used by authorities to claim compensation from the evicted residents, who claimed that they had settled in such area before it was declared as protected, for all alleged environmental damages caused by them to the protected area.[[12]](#footnote-13)

**Remedies**

1. Paragraph 56 of the General Comment No. 26 notes that State parties should ensure access to justice, including access to procedures to address the impact of business activities, both in the countries where they are domiciled but also where the violations have been caused. The contributing organisations are of the opinion that this General Comment should reinstate the obligation of all State parties, like in another General Comment, to address barriers in accessing justice for individuals and communities who are affected by cross border investments, including in land-related contexts. These include to overcome obstacles caused by short statutes of limitations, the conflict of laws and other jurisdictional hurdles.[[13]](#footnote-14)

**Contributing organisations**

1. Cross-Cultural Foundation
2. Chumchonthai Foundation
3. Center for Protection and Revival of Local Community Rights
4. Area-based-Social Innovation Research Center, Mae Fah Luang University
5. Community Resource Centre Foundation
6. College of Social Innovation, Rangsit University
7. ETOs Watch Coalition
8. Northern Development Foundation
9. the Mekong Butterfly
10. ActionAid Thailand
11. Land Watch THAI
12. ENLAWTHAI Foundation
13. Local Development Institute
14. Princess Maha Chakri Sirindhorn Anthropology Centre (Public Organisation)
15. Food Security of Andaman Association
16. Prorights Foundation
17. Union for Civil Liberty
1. ICJ, ‘Thailand civil society, government, discuss improving laws governing land rights to protect economic, social, and cultural rights’, 1 June 2021, available at: <https://www.icj.org/thailand-civil-society-government-discuss-improving-laws-governing-land-rights-to-protect-economic-social-and-cultural-rights/> [↑](#footnote-ref-2)
2. Notably, Thailand does not recognize that there are indigenous peoples, as defined by international law, in its territory. Thailand refers to them as "tribal peoples" or "ethnic minorities". [↑](#footnote-ref-3)
3. For example, Bangkok Post, ‘Forest dictatorship at Kaeng Krachan’, 3 March 2021, available at: <https://www.bangkokpost.com/opinion/opinion/2077291/> [↑](#footnote-ref-4)
4. Rina Chandran, ‘Tourism and marine parks threaten Thailand's 'people of the sea'’, Thomson Reuters Foundation, 4 December 2018, available at: <https://www.reuters.com/article/us-oceans-rights-thailand-idUSKBN1O30EX>; Bangkok Post, ‘Pandemic respite for 'sea gypsies' threatened by mass tourism’, 23 November 2020, available at: <https://www.bangkokpost.com/thailand/general/2024031/pandemic-respite-for-sea-gypsies-threatened-by-mass-tourism>; and Lydia Hansen, ‘Pushed Off the Land, Out of the Sea’, 7 August 2020, available at: <https://www.usnews.com/news/best-countries/articles/2020-08-07/thailands-indigenous-chao-lay-struggle-to-preserve-identity> [↑](#footnote-ref-5)
5. Bangkok Post, ‘A land dispute with grave consequences’, 24 January 2016, available at: <https://www.bangkokpost.com/thailand/special-reports/836800/a-land-dispute-with-grave-consequences> [↑](#footnote-ref-6)
6. For example, Mandates of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to nondiscrimination in this context; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on extreme poverty and human rights, ‘AL THA 7/2019’, 19 August 2019, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24775> (‘Communication REF AL THA 7/2019’) [↑](#footnote-ref-7)
7. For example, Mandates of the Special Rapporteur on the rights of indigenous peoples; the Working Group on Enforced or Involuntary Dissappearance; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; and the Special Rapporteur on the situation of human rights defenders, ‘AL THA 4/2020’, 20 April 2020, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25162> (‘Communication REF AL THA 4/2020’) and Communication REF AL THA 7/2019 [↑](#footnote-ref-8)
8. [Communication REF AL THA 4/2020](https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25162); Bangkok Post, ‘Karen to oppose Kaeng Krachan world heritage bid’, 22 July 2021, available at: <https://www.bangkokpost.com/thailand/general/2152727/karen-to-oppose-kaeng-krachan-world-heritage-bid> and Bangkok Post, ‘Kaeng Krachan added to world heritage list’, 26 July 2021, available at: <https://www.bangkokpost.com/thailand/general/2155099/kaeng-krachan-added-to-world-heritage-list> [↑](#footnote-ref-9)
9. ICJ, ‘The Human Rights Consequences of the Eastern Economic Corridor and Special Economic Zones in Thailand’, July 2020, available at: <https://www.icj.org/wp-content/uploads/2021/03/Thailand-SEZs-Publication-2020-ENG.pdf> [↑](#footnote-ref-10)
10. Thai Post, ‘เครือข่ายคนจนเรียกร้อง ‘ศักดิ์สยาม’ รมว.คมนาคมจัดประชุมแก้ปัญหาที่ดิน รฟท. หลังชาวบ้านโดนฟ้องขับไล่เกือบ 60 ราย’, 1 June 2021, available at: <https://www.thaipost.net/main/detail/104925> (in Thai) [↑](#footnote-ref-11)
11. The Securities and Exchange Commission, ‘SEC signs MoU with Faculty of Law, Chulalongkorn University to provide training courses on business and human rights for business sector in capital market and develop personal information protection standards’, 8 December 2020, available at: <https://www.sec.or.th/EN/Pages/News_Detail.aspx?SECID=8798&NewsNo=229&NewsYear=2020&Lang=EN> [↑](#footnote-ref-12)
12. Communication REF AL THA 7/2019 [↑](#footnote-ref-13)
13. ICJ, ‘Thailand: Barriers persist in access to justice for victims of human rights abuses involving Thai transnational corporations abroad – ICJ report’, 11 February 2021, available at: <https://www.icj.org/thailand-barriers-persist-in-access-to-justice-for-victims-of-human-rights-abuses-involving-thai-transnational-corporations-abroad-icj-report/> [↑](#footnote-ref-14)