**Written contributions to the draft general comment on Land and Economic, Social and Cultural Rights.**

**Dr Kirsteen Shields and Megan MacInnes**

**August 2021**

We welcome the opportunity to comment on the Draft General Comment and commend the CESCR for addressing this timely issue. Dr Kirsteen Shields is an academic at the Global Academy of Agriculture and Food Security, University of Edinburgh, and Senior Consultant on Human Rights to the World Bank. Megan MacInnes is an independent researcher with 20 years of experience working on land and natural resource rights in the global north and south, and within international frameworks. This written contribution is submitted independently of our organisational affiliations.

Our recommendations for revisions to the Draft General Comment are as follows:

1. More clearly distinguish between the benefits of different forms of ownership (individual, community and collective), and also between land access and land use rights.
	* We agree that *“Full ownership of land … is not the only mechanism for distributing land rights or tenure security”* (para 5), however the Scottish experience suggests that particular benefits and empowerment can result from securing ownership, in comparison to simply securing access and use rights.[[1]](#footnote-1) The Draft Comment could more explicitly recognise the rights-related benefits that result from communities *owning* land, buildings and natural resources, in comparison to the benefits of land access and use rights.
	* Further attention could also be paid to the importance of formalising collective land ownership, for example, in para 33.
2. Provide further guidance on practical ways in which international human rights obligations relating to land could be incorporated and implemented at the national level.
	* Para 6 of the Draft Comment could be strengthened by providing practical examples for how States can incorporate land governance related international human rights instruments into domestic legislation and policies. For example, the Land Reform (Scotland) Act 2016 creates a requirement for Ministers to have regard for both the International Covenant on Economic, Social and Cultural Rights within decision-making relating to the community right to buy land and assets[[2]](#footnote-2), and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security in relation to broader land reform policies[[3]](#footnote-3); and the establishment of a Scottish Land Commission, with a statutory duty to research and advise the Scottish Government on matters relating to land.[[4]](#footnote-4)
3. Provide further guidance on the integration of international ESC rights obligations within national level policy frameworks*.*
	* Further and more substantial means through which Scotland has used policy tools to progressively realise economic, social and cultural rights related to land (in the absence of those rights yet being incorporated into national legislation) is the adoption of the Land Rights and Responsibilities Statement.[[5]](#footnote-5) This policy (adopted in Sept 2017) outlines the Government’s human rights-based approach to land rights and the responsibilities that go along with such rights. Furthermore, the Statement recognises that those responsibilities include the delivery of public good from owning land *“The principles within this statement are intended to be mutually supportive. They underpin the Scottish Government's vision for a stronger relationship between the people of Scotland and the land, where ownership and use of land delivers greater public benefits through a democratically accountable and transparent system of land rights and responsibilities”.*[[6]](#footnote-6)
4. Further emphasise the positive duty on states to respect, protect and fulfil rights through regulation of non-state actors such as business entities and private investors.
	* We are encouraged by the inclusion of a “*positive duty to take legislative and other measures to provide clear standards for non-State actors such as business entities and private investors in the context of large-scale land acquisitions and leases at home and abroad, among others*” in para 32 and reference to state duties in respect of private actors throughout paras 29-33. Reference to *UN CESCR General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* indicates that this duty is not confined ‘to obligation to protect’. For example, CESCR General Comment No 24, Para 12 under the heading ‘Obligation to respect’ states; *“[T]he obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights. This may occur for instance when forced evictions are ordered in the context of investment projects. Indigenous peoples’ cultural values and rights associated with their ancestral lands are particularly at risk. States parties and businesses should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired.” [[7]](#footnote-7)* Further, para 13; *“States parties should identify any potential conflict between their obligations under the Covenant and under trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist, as required under the principle of the binding character of treaties.”[[8]](#footnote-8)* See also para 23*;* “*The obligation to fulfil requires States parties to take necessary steps, to the maximum of their available resources, to facilitate and promote the enjoyment of Covenant rights, and, in certain cases, to directly provide goods and services essential to such enjoyment. Discharging such duties may require the mobilization of resources by the State, including by enforcing progressive taxation schemes. It may require seeking business cooperation and support to implement the Covenant rights and comply with other human rights standards and principles*.” [[9]](#footnote-9)Also para 24; “*This obligation also requires directing the efforts of business entities towards the fulfilment of Covenant rights [continues].”[[10]](#footnote-10)*
5. Include greater recognition of the potential risks resulting from new and emerging land markets for natural capital and carbon sequestration and the resulting actions that States can take to mitigate them.
	* For example, paras 2, 54 and 55 could be updated to reflect this emerging trend and further outline that it is legitimate for States to intervene with measures to protect economic, social and cultural rights. Scotland is one of a number of countries[[11]](#footnote-11) which is experiencing changes in its land markets as a result of increasing demand for land and natural resources as a result of their carbon sequestration natural capital potential. To demonstrate; Scotland saw a 30% increase in the number of forest-land transactions registered in 2020-21 in comparison to the previous year and the market value of these sales increase significantly[[12]](#footnote-12) and estate agents note a surge in interest since 2020 in buying large Scottish rural estates for natural capital and forestry.[[13]](#footnote-13) Alarm is being raised amongst some communities and civil society in Scotland about this financialization of land for carbon sequestration purposes, as it undermines their own efforts to further realise their economic, social and cultural rights.[[14]](#footnote-14) The surge in demand for land with sequestration potential pushes it market prices far beyond the reach of local communities or individuals and runs contrary to the Government’s commitment to a Just Transition in response to the climate emergency.[[15]](#footnote-15) Furthermore, until mechanisms for sharing the benefits resulting from such projects with local communities are a statutory requirement, they risk furthering the concentration of land ownership and privileges (as noted in the draft comment para 32). In contrast, strong evidence suggests that where communities in rural and urban settings in Scotland own their land and built assets it represents the greatest advantage in furthering economic, social and cultural rights, as well as managing land for climate mitigation and adaptation purposes.[[16]](#footnote-16) This changing market demand trend for land is only expected to escalate as the “rule book” for international emissions trading under Article 6 of the Paris Agreement is finalised.
6. Include further guidance as to how land designated for biodiversity or conservation is managed and owned and how benefits are distributed.
* For example, para 7 could address how esc rights and environmental benefits should be prioritised.
* For example, para 29 could note that where displacement occurs as a result of conservation initiatives, those affected must be adequately compensated and concern should be paid to ensuring that any interference with rights is proportionate and does not adversely affect those already disadvantaged.
1. Revise the structure of the overall draft comment to address the specific obligations in the Convention to be sequentially in Section “II. Provisions in the Covenant relating to land”, and generally more connection to these specific articles could facilitate use as a reference document.
2. Strengthen the provisions relating to participation, consultation and transparency in para 18.
	* ‘Financial barriers to participation’ could be included as a relevant consideration.
	* We welcome the inclusion of transparency within this section in terms of it being a key principle for the implementation of the Covenant obligations. We acknowledge the use of complex company structures and secrecy jurisdictions to hide those ultimately in control of land holdings is an increasing concern in a number of countries.[[17]](#footnote-17) We therefore recommend that the draft comment specifies that land-related transparency does not just include disclosure of the entity holding a particular land title, but also the ultimate beneficial owners of that entity, and that it is legitimate for State parties to requiring such transparency of land holdings.
3. Include obligations relating to monitoring protocols, personnel in government resourcing and budgeting within the assessment and monitoring measures (para 49).
	* Recent examples of how such practical measures have been introduced in Scotland include:
		1. Statutory requirements for Scottish Minsters to review the Land Rights and Responsibilities Statement within five years of its introduction, including requirements for public consultation and parliamentary oversight[[18]](#footnote-18)
		2. Statutory requirements for Scottish Minsters to revise the Land Use Strategy every five years and lay the revised strategy before Parliament[[19]](#footnote-19)
4. Strengthen the recognition that it is legitimate for States to intervene to address monopoly and highly concentrated patterns of land ownership.
	* We welcome the inclusion of reference to the risks resulting from increasingly concentrated ownership of land and privileges of land tenure systems (para 32). Indeed, Scotland faces a very highly concentrated pattern of land ownership, with 0.025% of private owners owning 67% of the country’s private rural land.[[20]](#footnote-20) The negative economic, social and cultural consequences of this de facto unregulated monopoly land ownership pattern (for example when the land of entire island communities is owned by one individual) is well documented.[[21]](#footnote-21) Action to tackle such monopolies of land ownership has been committed to within the Scottish Parliament[[22]](#footnote-22) and various political parties in the May 2021 election.[[23]](#footnote-23) However, there are concerns among civil society about how ambitious legislative action can be, given the need to balance the progressive realisation of economic, social and cultural rights with the protection of property rights. Therefore, we would encourage the draft comment to go further in terms of outlining the legitimate steps that States can take to address the problem or future risk of monopoly and highly concentrated land ownership patterns, and promote the diversification of land ownership as a means of furthering economic, social and cultural rights.
1. Community Land Scotland (2021) Community Land Owners and the Climate Emergency <https://www.communitylandscotland.org.uk/wp-content/uploads/2021/03/Community-Landowners-the-Climate-Emergency_Report.pdf>; Scottish Land Commission (2018) Review of the effectiveness of current community ownership mechanisms and of options for supporting the expansion of community ownership in Scotland <https://www.landcommission.gov.scot/downloads/5dd698fa2e391_1-Community-Ownership-Mechanisms-SRUC-Final-Report-For-Publication.pdf> [↑](#footnote-ref-1)
2. Community Empowerment Act (Scotland) 2015, Schedule 4, 8(6)(b); and Land Reform (Scotland) Act 2016, Part 4, 44(11)(b) and Part 5, 56(14)(b). [↑](#footnote-ref-2)
3. Land Reform (Scotland) Act 2016, Part 1(1)(5) and Part 4 (44)(4). [↑](#footnote-ref-3)
4. Land Reform (Scotland) Act2016, Part 2, Chapter 2 (22)(1). [↑](#footnote-ref-4)
5. [Scottish land rights and responsibilities statement - gov.scot (www.gov.scot)](https://www.gov.scot/publications/scottish-land-rights-responsibilities-statement/pages/3/#:~:text=Part%202%20-%20Scottish%20Land%20Rights%20and%20Responsibilities,community%27s%20wellbeing%20and%20future%20development.%20More%20items...%20) as enacted by Land Reform (Scotland) Act 2016, Part 1. [↑](#footnote-ref-5)
6. [Scottish land rights and responsibilities statement - gov.scot (www.gov.scot)](https://www.gov.scot/publications/scottish-land-rights-responsibilities-statement/pages/2/) Part 1, Overview of the Scottish Land Rights and Responsibilities Statement [↑](#footnote-ref-6)
7. [UN CESCR General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities](https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcIMOuuG4TpS9jwIhCJcXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUbw6ujlnCawQrJx3hlK8Odka6DUwG3Y). Para 12. [↑](#footnote-ref-7)
8. Ibid. Para 13. [↑](#footnote-ref-8)
9. Ibid. Para 23. [↑](#footnote-ref-9)
10. Ibid. Para 24. [↑](#footnote-ref-10)
11. See further detail on the global context of this trend at [Status of Legal Recognition of Indigenous Peoples’, Local Communities’ and Afro-descendant Peoples’ Rights to Carbon Stored in Tropical Lands and Forests | Rights + Resources (rightsandresources.org)](https://rightsandresources.org/publication/carbon-rights-brief/) [↑](#footnote-ref-11)
12. Registers of Scotland (2021) Property Market Report 2020-21 A long-term statistical review of the Scottish property market, <https://www.ros.gov.uk/about/news/2021/property-market-report-2020-21>, pages 42 and 43 [↑](#footnote-ref-12)
13. Examples include: <https://www.savills.co.uk/insight-and-opinion/savills-news/312011-0/a--new-era-for-the-scottish-estate---with-a-surge-in-green-buyers>

<https://www.savills.co.uk/blog/article/300694/rural-property/woodland-carbon--the-answer-to-green-growth-post-pandemic-.aspx>

<https://www.galbraithgroup.com/blog/scottish-estatesthe-changing-face-of-the-modern-estate-buyer>

<https://www.savills.co.uk/research_articles/229130/309215-0> [↑](#footnote-ref-13)
14. As described in this article: [David Ross: Fairness key amid surge of ‘green lairds’ (pressandjournal.co.uhttps://www.pressandjournal.co.uk/fp/opinion/columnists/david-ross/3014725/fairness-key-amid-surge-of-green-lairds/)](https://www.pressandjournal.co.uk/fp/opinion/columnists/david-ross/3014725/fairness-key-amid-surge-of-green-lairds/) [↑](#footnote-ref-14)
15. Just Transition Commission (2021) A National Mission for A Fairer Greener Scotland, <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2021/03/transition-commission-national-mission-fairer-greener-scotland/documents/transition-commission-national-mission-fairer-greener-scotland/transition-commission-national-mission-fairer-greener-scotland/govscot%3Adocument/transition-commission-national-mission-fairer-greener-scotland.pdf> [↑](#footnote-ref-15)
16. Community Land Scotland (2021) Community Land Owners and the Climate Emergency <https://www.communitylandscotland.org.uk/wp-content/uploads/2021/03/Community-Landowners-the-Climate-Emergency_Report.pdf> [↑](#footnote-ref-16)
17. Examples of how companies are using corporate structures to evade disclosure of ownership of land holdings include: <https://www-cdn.oxfam.org/s3fs-public/file_attachments/rr-divide-and-purchase-land-concentration-colombia-270913-en_0.pdf> and <https://www.globalwitness.org/en/campaigns/land-deals/rubberbarons/>. Action the UK government has recently taken to improve the disclosure of beneficial ownership of companies and property is summarised here: https://researchbriefings.files.parliament.uk/documents/CBP-8259/CBP-8259.pdf [↑](#footnote-ref-17)
18. Land Reform (Scotland) Act 2016, Part 1(2)(4-6) [↑](#footnote-ref-18)
19. Climate Change (Scotland) Act, Part 5, Chapter 2 (57)(6) [Climate Change (Scotland) Act 2009 (legislation.gov.uk)](https://www.legislation.gov.uk/asp/2009/12/contents) [↑](#footnote-ref-19)
20. Charles Warren (2009) Managing Scotland’s Environment, (Edinburgh University Press), Edinburgh, pp 48-49. [↑](#footnote-ref-20)
21. This has been a core topic of research and analysis by the Scottish Land Commission, eg: <https://www.landcommission.gov.scot/our-work/ownership/scale-and-concentration-of-land-ownership> and further contributing analysis has been done by Community Land Scotland: https://www.communitylandscotland.org.uk/2020/12/new-report-from-community-land-scotland-highlights-negative-effects-of-monopoly-rural-land-ownership/ [↑](#footnote-ref-21)
22. On 21 March 2019 the Scottish Parliament held a debate in which consideration was given to the Scottish Land Commission’s report and recommendations (see footnote 20). The Scottish Parliament agreed a motion that noted the importance of land and urged the Scottish Government “to support the recommendations of the Scottish Land Commission on how to deliver interventions in the operation of Scotland’s land markets and ownerships that will provide disincentives to the future accrual of large privately owned land holdings and help deliver a more equitable distribution in the ownership of Scotland’s land assets in the public interest.” Further information is available here https://www.landcommission.gov.scot/downloads/601acfc4ea58a\_Legislative%20proposals%20to%20address%20the%20impact%20of%20Scotland%E2%80%99s%20concentration%20of%20land%20ownership%20-%20Discussion%20Paper%20Feb%202021.pdf [↑](#footnote-ref-22)
23. For example the manifesto of the Scottish National Party <https://www.snp.org/manifesto/>, the Scottish Green Party <https://greens.scot/ourfuture>, and the Scottish Labour Party https://scottishlabour.org.uk/where-we-stand/national-recovery-plan/ [↑](#footnote-ref-23)