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Just Atonement Inc. (“**JAI**”) is a legal non profit that connects and trains advocates to address threats to human rights, a livable planet, and the international rule of law.

This submission is a response to **questions 4 and 5** in the call for input issued by the Special Rapporteur on the promotion and protection of human rights in the context of climate change.[[1]](#footnote-1)

According to the IPCC’s Sixth Assessment Report, human activities are estimated to be responsible for 1.1°C of global warming since pre-industrial levels, and warming is expected to rise to 1.5°C by 2040. Countries around the world are already experiencing losses and damages (L&D) as a result of climate change—that is, adverse impacts of climate-related stressors that have not been or cannot be avoided through mitigation and adaptation efforts.[[2]](#footnote-2) Vulnerable communities are disproportionately affected by L&D due to a lack of adaptive capacity and ability to mitigate the impacts of climate change. As defined in the IPCC reports, vulnerable communities are those who are “socially, economically, culturally, politically, institutionally, or otherwise marginalized.”[[3]](#footnote-3) Providing such communities adequate remedy for L&D is an essential component of climate justice. In response to **question 4**, JAI submits an overview of how States, business enterprises, civil society and intergovernmental organizations have provided remedies for vulnerable individuals and communities who have suffered L&D as a result of climate change.

In addition, and in response to **question 5**, JAI argues that an international legal framework premised on the right to self-determination is an essential way to protect current and future generations and achieve intergenerational justice from the adverse impacts of climate change. JAI argues that the UN General Assembly must coordinate and advance the rights of peoples to self-determination in the face of climate change and climate impacts.

**QUESTION 4**

1. **STATES**

Today there is no consensus among States on what constitutes a “loss and damage” remedy. There is also disagreement as to whether certain adaptation or mitigation projects that avert future L&D should also be categorized as L&D remedies. In our research, much of the State action taken thus far on L&D has been in the form of adaptation and mitigation strategies, while there are a small number of outlier examples in which States have provided “dedicated” L&D financing distinct from mitigation and adaptation strategies. Many States assert that adaptation financing is as valuable as direct L&D financing because increased resilience will avert future L&D from extreme weather or slow-onset events. For example, the U.S. 2021 International Climate Finance Plan includes no L&D financing, and instead focuses on providing financial resources “to assist developing countries to reduce and/or avoid greenhouse gas emissions and build resilience and adapt to the impacts of climate change.” During the Paris climate talks, developing States proposed several paragraphs concerning liability and compensation for L&D. However, the United States successfully advocated for deleting all mention of liability for L&D or the possibility of a legal remedy, citing the unpopularity of such a measure with its domestic constituency.[[4]](#footnote-4)

In contrast to the predominant approach used by States, there are noteworthy examples of governments pledging funds to support vulnerable States who have faced L&D. At COP26, Scotland pledged $2.4 million to a loss and damage fund for compensating the world’s most vulnerable communities who are already suffering from the adverse impacts of climate change. The Walloon Region of Belgium followed suit, dedicating $1 million to the fund. Also at COP26, Germany pledged $10.4 million to support the Santiago Network on Loss and Damage.

Adaptation limits are most likely to be exceeded in vulnerable communities, who already suffer the greatest from the impacts of climate change. Adaptation and mitigation financing cannot provide redress for the L&D that vulnerable communities are facing. Therefore, JAI recommends that States establish separate funds for vulnerable communities and States who have experienced L&D.

1. **BUSINESS ENTERPRISES**

Similar to States, businesses focus their climate change initiatives on mitigation and adaptation projects. Research by the Center for Climate and Energy Solutions reveals that nearly all companies in the Standard & Poor’s Global 100 Index have identified physical risks that climate change poses to their businesses and have created corresponding initiatives to mitigate these risks. Yet, none of these business enterprises have either acknowledged any accountability for L&D or provided any direct L&D compensation for impacted communities.

Businesses that have significantly contributed to current and historic GHG emissions must play a larger role in remedying L&D impacts. According to CDP’s Carbon Majors Database 2017 report, just 100 companies have caused 70% of the world’s GHG emissions since 1988. Given the extent to which particular businesses have been enriched through burning fossil fuels, they have, at minimum, a moral duty to remediate the environmental harms they have caused or contributed to.

In addition, States must align themselves with international law principles and decline to shield business enterprises from liability for L&D. JAI refers to the Committee on Economic, Social and Cultural Rights General comment No. 24 (2017) as well as the Maastricht Principles with respect to the extraterritorial obligations of States and business enterprises. Where business activities aggravate climate change, international law principles militate that they be held accountable, provide compensation to those whose rights have been infringed upon, and halt their emitting activities.

1. **CIVIL SOCIETY**

Civil society has addressed L&D in two general ways: philanthropic support of L&D funds and policy advocacy.

First, philanthropies have offered to set aside funds exclusively for L&D. In November 2021, large philanthropies offered $3 million in kick-start funding for a prospective COP26 L&D Facility to support vulnerable countries suffering from climate change. Also at COP26, the philanthropic Climate Justice Resilience Fund partnered with the Government of Scotland to deploy its initial commitment of $1.4 million to a loss and damage fund.

 Civil society organizations (CSOs) are also advocating for greater action on L&D to governments at all levels. For example, ahead of COP25, 152 CSOs signed an open letter calling for a new fund to support survivors of climate disasters in the Global South.[[5]](#footnote-5) In addition, in February 2022, Southeast Asian civil society organizations and movements called on the Association of Southeast Asian Nations (ASEAN) to establish a formal mechanism to address L&D.[[6]](#footnote-6)

 Civil society plays a key role in supporting impacted communities where governments lack the capacity or will to do so. Moreover, CSO advocates are important partners in the movement in favor of increased L&D funding from governments and intergovernmental organizations. JAI recommends that civil society continue these activities while also increasing its engagement with local actors and its support for grassroots-level initiatives for those impacted by L&D.

1. **INTERGOVERNMENTAL ORGANIZATIONS**

Similar to States, intergovernmental organizations (IGOs) mostly focus their responses to L&D on adaptation projects rather than providing separate L&D compensation to developing States. Within the UN Framework Convention on Climate Change (UNFCCC), the Green Climate Fund (GCF) is the primary multilateral source of financing that addresses L&D.[[7]](#footnote-7) GCF is a climate fund that supports developing countries in realizing their Nationally Determined Contributions in accordance with the Paris Agreement. GCF implements projects through partnerships with Accredited Entities, which include UN agencies and other IGOs. About 16% of GCF’s projects have an express goal to avert, minimize or otherwise address L&D.[[8]](#footnote-8) These include its Readiness and Preparatory Support Programme (the Readiness Programme), Project Preparation Facility (PFF), and other projects and programs relevant for the Executive Committee of the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts (WIM) workstreams.[[9]](#footnote-9)

The GCF Readiness Programme provides grants and technical assistance to developing countries to efficiently engage with GCF itself. IGOs have used this program to help States avert, minimize, and address L&D. For example, the Caribbean Community (CARICOM) Development Fund and its partners have used GCF resources to establish a Credit Risk Abatement Facility for CARICOM States, which aims to increase their access to finance.[[10]](#footnote-10) Moreover, any resources of the GCF must be managed according to the Fund’s Environmental and Social Safeguards System, Indigenous Peoples Policy, and Gender Policy.

The GCF PPF provides financial and technical assistance for the preparation of GCF project and program funding proposals. PPF resources have also been used by IGOs to develop projects that address L&D. For example, the International Union for Conservation of Nature (IUCN) is a key partner in the Melanesia Coastal and Marine Ecosystem Resilience to Climate Change Programme, which is a PFF program that aims to avert future L&D for Melanesian Pacific Island people by protecting and restoring its coastal and marine ecosystems.

Finally, among the projects related to the WIM workstreams, many of them include most vulnerable people and communities as an area of focus (or “result area”).[[11]](#footnote-11) There are numerous examples of IGOs working on these WIM workstream projects, including the IUCN, UN Development Programme, UN World Food Programme, Pacific Regional Environment Programme, International Bank for Reconstruction and Development, and International Development Association.

Outside of the UNFCCC framework, there are limited examples of IGOs addressing L&D. An example is African Risk Capacity (ARC), a specialized agency within the African Union. ARC in partnership with the African Development Bank aims to remedy L&D by providing targeted responses to disasters in a more timely, cost-effective, objective, and transparent manner. The ARC also aims to make response to natural disasters more equitable, where relief is mobilized toward the people who need it the most.[[12]](#footnote-12) For example, in 2020, $2.13 million dollars was provided to the Republic of Madagascar to cover anticipated livelihood losses for vulnerable Malagasy people who experienced recent drought-related crop failures.

Finally, there are some IGO projects that do not focus exclusively on L&D, but are partly motivated by the goal of avoiding future L&D. However, none of these examples involve compensation for communities impacted by L&D. For example, ASEAN has signed a Memorandum of Understanding (MoU) with the International Federation of Red Cross and Red Crescent Societies (IFRC) on the Strengthening of Community Resilience in Southeast Asia. The focus of the MoU is to promote engagement in the area of disaster management. Although the project is not expressly focused on redressing L&D, the IFRC Secretary General stated that one goal is to avert L&D.

To summarize, most of these programs only use the language of L&D insofar as they aim to avert it through adaptation. There are few exceptions which provide financial compensation to vulnerable people post-disaster, such as certain GCF projects and the African Union’s ARC. JAI thus recommends that GCF establish a separate fund for L&D compensation, and that developed countries fulfill their commitment of mobilizing $100 billion dollars per year for the fund.[[13]](#footnote-13) Moreover, IGOs should better leverage their unique influence and resources to set up their own funds to provide ongoing financial compensation for vulnerable communities impacted by L&D.

1. **CONCLUSION**

In light of the Global North’s disproportionate contribution to the climate crisis, which is already causing grave L&D, there is an immediate need for developed state governments and organizations to finance L&D funds *in addition to* existing adaptation and mitigation financing.

**QUESTION 5**

The right to self-determination is “one of the essential principles of contemporary international law,”[[14]](#footnote-14) and a “fundamental human right”[[15]](#footnote-15) with erga omnes status, meaning that States are under an obligation to uphold and sustain the norm. The essence of self-determination is its protection of human collectives—“peoples”—that wish to exist as independent political realms with independent legal personalities within the Westphalian system.

The backdrop of a changing and increasingly dangerous climate system poses fundamental challenges to international governance and international law, which developed in what may have been an unusually stable period of geological history—one that no longer exists.[[16]](#footnote-16)

Self-determination will be affected by sea level rise, rising global temperatures, a warming and acidifying ocean, greater intensity and frequency of storms, and imperiled food and water systems. Legal questions related to geoengineering of the climate, the financial culpability and State responsibility of historic emitting nations vis-à-vis other States, and the resolution of climate-based conflicts and disputes will also inevitably pose international legal questions that will impact self-determination. Because of the centrality of self-determination to the international legal order and to other human rights, JAI recommends that UN organs, and in particular the General Assembly, take the lead on affirming, interpreting, and advising on how the right to self-determination should be protected and upheld at a time where the climate system is rapidly changing. In the same way that resolution 1514 (XV) organized decades of decolonization, the General Assembly should organize and adopt an international legal framework for how States should work towards a stable climate premised on the foundational right of self-determination. This guidance and interpretation of the law of self-determination can be separate and distinct from the UNFCCC consensus-driven processes. The right to self-determination is a *separate* legal obligation imposed on States by customary international law and the UN Charter that mandates *separate* obligations to stabilize the climate system, preserve the permanent access to resources and territory of States, and the sovereign equality of peoples to choose their own destiny in the international system. JAI believes that the right to self-determination provides the essential foundation to protect current and future generations and achieve intergenerational justice regarding climate change.

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1. <https://www.ohchr.org/en/calls-for-input/calls-input/call-input-promotion-and-protection-human-rights-context-mitigation> [↑](#footnote-ref-1)
2. Warner and van der Geest, 2013. [↑](#footnote-ref-2)
3. IPCC (2014). Summary for policymakers. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. [↑](#footnote-ref-3)
4. S. Huq and R. De Souza, *Not Fully Lost and Damaged: How Loss and Damage Fared in the Paris Agreement*, in Wilson Center, Dec. 22, 2015. [↑](#footnote-ref-4)
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8. Kempa, L., *Financing measures to avert, minimise and address loss and damage: options for the Green Climate Fund*. Frankfurt School-UNEP Centre research paper (2021), at 19, 27. [↑](#footnote-ref-8)
9. Green Climate Fund, *Ninth Report of the Green Climate Fund to the Conference of the Parties to the United Nations Framework Convention on Climate Change*, GCF/B.27/17, Nov. 4, 2020 (hereinafter “GCF Ninth Report”), at 25. [↑](#footnote-ref-9)
10. Green Climate Fund, *Tenth Report of the Green Climate Fund to the Conference of the Parties to the United Nations Framework Convention on Climate Change*, GCF/B.29/03, June 7, 2021, at 14. [↑](#footnote-ref-10)
11. Ninth Report at 26. [↑](#footnote-ref-11)
12. African Risk Capacity webpage on its vision and mission, available at: https://arc.int/news/vision-and-mission. [↑](#footnote-ref-12)
13. Green Climate Fund About Us webpage, available at https://www.greenclimate.fund/about/resource-mobilisation. [↑](#footnote-ref-13)
14. *Case Concerning East Timor* (Portugal v. Australia) (1995) [29]. [↑](#footnote-ref-14)
15. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 [144]. [↑](#footnote-ref-15)
16. Committee on International Law and Sea Level Rise, ‘Report of the International Law Association Committee on International Law and Sea Level Rise’ in International Law Association Report of the 78th Conference (Sydney 2018). [↑](#footnote-ref-16)