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[Just Atonement Inc. (JAI)](http://www.justatonement.org/), a not-for-profit law firm and civil society organization, incites transformative social change by empowering lawyers and law students with the opportunities, training and means to defend democracy, human rights, and a livable planet. JAI was founded in the United States of America in 2017.

JAI submits this written submission in response to the invitation by the Special Rapporteur on human rights and the environment, with respect to the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.

JAI calls to the attention of the Special Rapporteur the following recommendations of how water can and should be protected within the context of the climate crisis:

1. ***Mobilize the Public Trust Doctrine***: In line with realizing SDG 6, “Safe water and sanitation for all,” enact obligations to preserve water as part of public trust to restore the view of public and/or state ownership of water and certain natural resources that benefit all.
2. ***Public Participation and Reporting****:* Guarantee the right of access to information through implementing effective and independent environmental impact studies; Encourage greater public participation in policies and decision-making that could affect the environment to discuss and manage climate risk.
3. ***The Right to Life****:* Recognize to right to water to be seen in conjunction with other rights, such as the right to life.

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1. **Mobilize the Public Trust Doctrine**

*In line with realizing SDG 6, “Safe water and sanitation for all,” enact obligations to preserve water as part of public trust to restore the view of public and state ownership of water and certain natural resources that benefit all.*

As water becomes treated as a commodity by multinational corporations rather than a human right, it is essential to reshape the narrative and policies governing water at the local level. With the COVID-19 pandemic, the need to preserve clean water for sanitation purposes has become even more crucial and highlights the fragility of water access in the context of an imminent climate breakdown.

To effectively protect water from misuse and mitigate against unsustainable water consumption, ***water must be maintained as a public trust***.

The public trust doctrine is the concept that “certain natural resources belong to all and cannot be privately owned or controlled because of their inherent importance to each individual and society as a whole.” [[1]](#footnote-1)

The doctrine positions the government as the public guardian of natural resources which are not capable of self-regeneration.[[2]](#footnote-2) In this role, the government has a fiduciary duty of care and responsibility to the general public much as has a trustee to the beneficiary.[[3]](#footnote-3)

The doctrine charges states to exercise affirmative duties of care over natural resources and embodies key principles of environmental protection: regulation, communal responsibility, and sustainability. [[4]](#footnote-4)

In the United States, the public trust is a well-established doctrine with deep roots that courts have used since the founding of the nation.[[5]](#footnote-5) The doctrine has particular persuasive weight in water resources litigation, as judges may favor the fair and equitable nature of the public trust, which champions the underrepresented or inchoate interests.[[6]](#footnote-6) Beyond its legal history, the doctrine is also persuasive because it reflects timeless values of that are being revived by the public through the course of the current environmental reawakening.[[7]](#footnote-7) The doctrine champions sustainability to benefit present and future generations.

As one practitioner commented:

*The beauty of the doctrine is that it makes old values new again; it is the wisdom of the ages applied to modern challenges. Its power in advocacy is that it is an old, entrenched doctrine.[[8]](#footnote-8)*

In the U.S. context, the doctrine exists as a state-based doctrine, therefore, the doctrine has a more limited scope and application unique to each state.[[9]](#footnote-9) Effective application of the doctrine involves a three-tiered framework: a robust and updated common law, a constitutional declaration of public ownership of water, and statutory incorporation of the doctrine into water resources legislation.[[10]](#footnote-10)

The below referenced manual by the Center for Progressive Reform, “Water Resources and the Public Trust Doctrine, A Manual for Advocates,”[[11]](#footnote-11) outlines the elements of a successful public trust claim. One of the priority elements involves a clear Statement of public or state ownership, where the state must have a clear statement of public or state ownership of water resources, as well as a corresponding statement of the state’s ongoing duties and obligations to protect and manage those resources for future generations.[[12]](#footnote-12) Generally, as common law alone, the public trust doctrine can fill in the gaps where statutory law does not yet reach. If the common law doctrine and statutory provisions coexist, courts may look to one to interpret or give context to the other.[[13]](#footnote-13) Moreover, as a firmly established legal principle, the doctrine cannot be easily eliminated or rendered inapplicable by state legislatures.[[14]](#footnote-14)

While this approach may be unique to states with a common law tradition, it includes lessons that are transferrable to other kinds of legal systems. Using the public trust doctrine is a helpful legal tool to bring about water reform. Long term, the development of the legislative process of the doctrine may ultimately produce comprehensive water regulations, while in the short term, the doctrine is a tool that can immediately be used in water protection efforts because it does not solely depend on the legislative process.[[15]](#footnote-15)

1. **Public Participation and Reporting**

*Guarantee the right of access to information through implementing effective and independent environmental impact studies; Encourage greater public participation in policies and decision-making that could affect the environment to discuss and manage climate risk.*

In line with General Comment No. 15[[16]](#footnote-16) by the Committee on Economic, Social and Cultural Rights (CESCR), effective reporting mechanisms and regulatory systems must be established, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance with Article 11 and 12 of the International Covenant on Economic, Social and Cultural Rights. [[17]](#footnote-17) Public participation in environmental decision-making is also essential.

States should encourage public participation in determining the use and management of a water resource, such as outlined by the establishment of the public trust doctrine in the preceding section. It is also essential to amplify the voices of small island developing states, who are at the frontlines of climate change and play a vital role in advancing climate action.[[18]](#footnote-18)

1. **The Intersection of Right to Water and the Right to Life**

General Comment 15 begins by stating, “The human right to water is indispensable for leading a life in human dignity... It is a prerequisite for the realization of other human rights.”[[19]](#footnote-19) Moreover, the elements of the right to water must be adequate for human dignity, life and health, in accordance with Articles 11, paragraph 1, and 12. To this end, in line with the CESCR’s recommendations[[20]](#footnote-20), we urge the international community to recognize to right to water to be seen in conjunction with the right to life as enshrined in the International Bill of Human Rights.

Courts have already noted that climate change will bring sea level rise, increase the spread of infectious diseases (something which global governance does not seem prepared for, in light of the COVID-19 pandemic), bring severe flooding as a result of torrential rainfall, and disrupt the production of food and the supply of drinking water.[[21]](#footnote-21) Such disruptions will inevitably impact vulnerable populations and prevent these individuals from enjoying their right to life with dignity.

In General Comment No. 36 on Article 6 of the ICCPR, the Human Rights Committee (hereafter “the Committee”) expands on the right to life in terms of state’s duties in protection of the right to life.[[22]](#footnote-22) The Committee specifically includes water in its list of measures to address adequate conditions for protecting the right to life.[[23]](#footnote-23) Moreover, the Committee states that the right to life is a right that should not be interpreted narrowly, as “it concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.”[[24]](#footnote-24)

The standard for protecting the right to life is higher than the right to water. The Committee illuminates the prohibition against arbitrary deprivation of life: “States parties are expected to take all necessary measures to prevent arbitrary deprivation of life.”[[25]](#footnote-25) States are expected to be proactive in taking measures to protect the right to life.

To this end, the right to water should be recognized in conjunction with the right to life. By juxtaposing these two fundamental rights, we can shift the narrative where the right to water is seen as a prerequisite for the enjoyment of other fundamental human rights, which can be informed by other human rights, such as the right to life. Furthermore, framing the right to water as part of the state’s heightened obligation to protect the right to life and prevent arbitrary deprivation of life provides additional weight to hold states to account for their obligations under the ICCPR.

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1. Klass & Huang, *Restoring the Trust: Water Resources and the Public Trust Doctrine, A Manual for Advocates*, Center for Progressive Reform (Sept. 2009), https://cpr-assets.s3.amazonaws.com/documents/CPR\_Public\_Trust\_Doctrine\_Manual.pdf; *See also* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473 (1970); Cohen, *The Constitution, The Public Trust Doctrine, and the Environment*, 1970 Utah L. Rev. 388 (1970). [↑](#footnote-ref-1)
2. Cohen *supra* note 1 at 388; *See also* Nanda & Ris, *The Public Trust Doctrine: A Viable Approach to International Environmental Protection*, Vol. 5, No. 2 Ecology Law Quarterly, 291 (1976). [↑](#footnote-ref-2)
3. *Id.*  [↑](#footnote-ref-3)
4. Klass *supra* note 1, at 16; *see generally* Nanda & Ris *supra* note 2. [↑](#footnote-ref-4)
5. Klass *supra* note 1, at 16; Cohen *supra* note 1 at 392. [↑](#footnote-ref-5)
6. Klass *supra* note 1, at 16; Cohen *supra* note 1 at 389. [↑](#footnote-ref-6)
7. Klass *supra* note 1, at 16. Cohen *supra* note 1 at 393. [↑](#footnote-ref-7)
8. Klass *supra* note 1, at 16, *citing* a Telephone Interview with Chris Bzdok, Principal, Olson, Bzdok, & Howard P.C., in Traverse City, Mich. (Feb. 12, 2009). [↑](#footnote-ref-8)
9. Klass *supra* note 1, at 7. [↑](#footnote-ref-9)
10. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82, 701, Notre Dame L. Rev. 699 (2006); Klass *supra* note 1 at 8. [↑](#footnote-ref-10)
11. Klass *supra* note 1, at 8 [↑](#footnote-ref-11)
12. *Id*. [↑](#footnote-ref-12)
13. Axline, *The Limits of Statutory Law and the Wisdom of Common Law*, 38 Envtl. L. Rep. News & Analysis 10268 (2008). *See also* Klass, supra note 1, at 7. [↑](#footnote-ref-13)
14. *See* Klass *supra* note 1, at 15; *see* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892); San Carlos Apache Tribe v. Super. Ct., 972 P.2d 179 (Ariz. 1999). [↑](#footnote-ref-14)
15. *See* Klass *supra* note 1, at 15. [↑](#footnote-ref-15)
16. *General Comment No. 15: The Right to Water* (Arts. 11 and 12 of the Covenant), Committee on Economic, Social and Cultural Rights, The United Nations Office of the High Commissioner for Human Rights, Jan. 20, 2013. [↑](#footnote-ref-16)
17. *General Comment No. 15: The Right to Water* (Arts. 11 and 12 of the Covenant), Committee on Economic, Social and Cultural Rights, The United Nations Office of the High Commissioner for Human Rights, Jan. 20, 2013. [↑](#footnote-ref-17)
18. *See Pacific islands play vital role in advancing action on climate change, Goal 13: Climate Action, Secretary-General, UN News Centre, Oct. 1, 2015, https://www.un.org/sustainabledevelopment/blog/2015/10/pacific-islands-play-vital-role-in-advancing-action-on-climate-change-ban-tells-leaders*; *See also* Frake & Comar, *Climate Change and Small Island Developing States (SIDS),* Just Atonement, Inc., Oct. 15, 2018. *see* Annex B. [↑](#footnote-ref-18)
19. *General Comment No. 15 supra* note15. [↑](#footnote-ref-19)
20. *General Comment No. 15 supra* note15, paragraph 3. [↑](#footnote-ref-20)
21. *See Urgenda v. Netherlands*, Dutch Supreme Court. [↑](#footnote-ref-21)
22. *General Comment No. 36: The Right to Life (*Article 6 of the ICCPR), The Human Rights Committee, CCPR/C/GC/36, Oct. 30 2018. [↑](#footnote-ref-22)
23. *General Comment No. 36 supra* note 21; *Toussaint v. Canada* (CCPR/C/123/D/2348/2014), para. 11.3. See also CCPR/C/ISR/CO/4, para. 12. [↑](#footnote-ref-23)
24. *General Comment No. 36 supra* note 21. [↑](#footnote-ref-24)
25. *Id.*  [↑](#footnote-ref-25)