

EXPORTING ENVIRONMENTAL HUMAN RIGHTS ABUSES – WHERE DOES RESPONSIBILITY LIE

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ABSTRACT

‘First world’ countries export their industries, manufacturing and production to ‘developing’ countries, thereby exporting their carbon emissions and other elements detrimental to biodiversity and the environment. Products manufactured for United States, United Kingdom and European Union corporations are produced in China, Bangladesh, India, Mexico and countries of Africa and, increasingly, South America. This creates low-paid jobs to the benefit of corporate profits, whilst increasing pollution and associated negative environmental consequences as well as exploiting labour and promoting human rights abuses. Countries such as the US export nuclear and chemical waste, too, transferring their blight to other parts of the globe. In the 1980s the US sought to export nuclear waste to Johnson Atoll in the Pacific, however, protest (principally from Australian activists) sought to put an end to this proposal, albeit chemical waste continues to afflict Johnson Atoll and the Pacific, it island nations people, flora, fauna and land. In the 2020s, the risks created by nuclear waste export are being multiplied with the AUKUS agreement between Australia, the UK and the US, including the prospect of US nuclear waste being disposed of in Central Australia where facility for storing the waste with any possible safety measures is lacking due to the nature of the terrain. In the 1970s, nuclear testing in the Pacific was banned when Australia went to the International Court of Justice (ICJ). Now, the potential for and reality of environmental and human damage and degradation from the nuclear industry will be not on Australia’s doorstep, but effectively in the middle of the living room. What prospects are there for international law action in relation to the export of environmental damage and human rights abuse? What prospects for legal action to ensure that corporations exporting industry and outsourcing manufacturing and production contribute proportionately to environmental protections and an end to global

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warming and climate change? Furthermore, can legal action ensure the implementation of proper industrial conditions and payment for labour in countries taking on manufacture, production, outsourcing and supply of ‘first world’ goods.

Keywords: ‘first world’ countries, ‘developing’ countries, manufacturing, production, outsourcing, nuclear and chemical waste, AUKUS, ICJ, human rights abuses, low-paid jobs, industrial conditions, climate change, CO₂ emissions, GHG emissions

INTRODUCTION

China tops the list of countries most responsible for the greatest volume of carbon emissions world-wide. The United States (US) comes next, with India, Russia, Japan, Germany, and South Korea following.¹ Although significant present-day contributors, the United Kingdom (UK) and other European Union (EU) countries do not appear on this ‘top emitters’ list. However, the former, being the first country to industrialise, has made a substantial contribution to global warming over the past 200 or so years since the Industrial Revolution² and, although industrialising later, EU countries along with the US have played a not insignificant part in the historical output of carbon emissions. This historical source of emissions provides a platform for today’s environmental degradation and contraction of biodiversity: indeed, ‘springboard’ might be a better term in that at the time, despite concern about ‘the dark satanic mills’ despoiling the English countryside,³ there was little or no recognition of the global impact industrialisation brought with it. Today’s ‘developing’ nations are undertaking industrialisation in full glare of world apprehension and indeed alarm about their effect on the world environment.

Data on which countries ‘have produced in aggregate the most CO₂ since the Industrial Revolution’ include, in order, the US, China,⁴ Russia, Germany and the

¹ Hannah Ritchie, ‘Who Emits the most CO₂ today? ...’ *Our World in Data*, 3 October 2019, Who emits the most CO₂ today? - Our World in Data (accessed 30 December 2023).

² Ritchie (n1).

³ William Blake, ‘Milton – A Poem’, Full text of “The prophetic books of William Blake: Milton” (archive.org) (accessed 30 December 2023), today better known by the title of the song (‘Jerusalem’) that incorporates Blake’s words.

⁴ Although it remains a major source (These are the products the US is most reliant on China for (qz.com) (accessed 1 October 2024; The US is relying more on China for pharmaceuticals — and vice versa - Atlantic Council (accessed 1 October 2024)), increasingly China is becoming less favoured, particularly by the US due to rising labour costs etc: More Than 90% of North American Companies Have Relocated Production and

UK.⁵ Consequently, rather than focusing on present day emissions alone, discussion at COPS22 in Glasgow centred around this prior underpinning with a robust contention that nations historically responsible for undermining the stability of the world environment should pay. This has been reluctantly agreed to, without much obvious practical commitment or follow through. Yet on top of this lies a failure to address the present-day export by ‘first world’ countries of industries or manufacturing to ‘third world’ countries, hence contributing to those countries’ emission outputs. For example, US and UK corporations outsource manufacturing, assembly and production to China, Bangladesh, India, Mexico and increasingly countries in Africa as well as South America. This creates low-paid jobs and economically advantageous production regimes to the benefit of corporate profits, whilst increasing pollution and associated environmental consequences outside the US and UK, simultaneously with exploiting labour.

This is not the only export from the ‘first’ to the ‘third’ world that requires attention when environmental pollution and biodiversity degradation impacting on global warming are in issue. Export of nuclear waste and associated harmful products is significant. In the 1980s the US sought to export nuclear waste to Johnson Atoll in the Pacific. Protest (principally from Australian activists) was understood to put an end to this proposal. Yet if the protest did succeed, it was a pyrrhic victory. Since at least 1971 the US has been using Johnson Atoll and other Pacific islands as dumping grounds for chemical weapons and waste.⁶ The harm and risks created by nuclear waste export have not disappeared, either, being multiplied in the 2020s with the AUKUS agreement between Australia, the UK and the US to supply Australia with nuclear powered submarines and including provision for US nuclear waste export. Beneath the ocean or Central Australia seem the most likely destination. Central Australia has no facility for storing waste in compliance with any possible safety measures due to the nature of the terrain. The ocean floor is also no proper place for left-overs from nuclear weapons or domestic use. In the 1970s, nuclear testing in the Pacific was banned when Australia went to the International Court of Justice (ICJ). Now, the potential for and reality of human and environmental damage and degradation from the nuclear

Sourcing Over the Past Five Years (bcg.com) (accessed 1 October 2024); and a return to local manufacturing: Global manufacturing scorecard: How the US compares to 18 other nations (brookings.edu) (accessed 1 October 2024).

⁵ Biggest Contributors To Global Warming In The World By Country - WorldAtlas (accessed 30 December 2023).

⁶ Jon Mitchell, *Poisoning the Pacific – The US Military’s Secret Dumping of Plutonium, Chemical Weapons, and Agent Orange (Asia/Pacific/Perspectives)* (Rowman and Littlefield, 2020).

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industry will be not on Australia’s doorstep, but effectively in the middle of the living room. What prospects are there for international law action in relation to this export of environmental human rights abuse, and what of the prospects of legal action to ensure that corporations exporting industry contribute proportionately to environmental protections and import proper industrial conditions and payment for labour in the countries that take on manufacture and production of ‘first world’ goods? These questions demand attention and, better still, answers.

A focus on the export of manufacturing and outsourcing by ‘first’ world to ‘third’ world or ‘developing’ countries is essential if equity and responsibility are to play a real part in addressing climate change and the steps required to mitigate it. Similarly, the global warming impact and degradation of the environment at the heart of the industrial complex underpinning the defence industry must be addressed, if there is to be any real possibility for abatement.

PART 1 – EXPORTING CARBON EMISSIONS AND CREATING HUMAN RIGHTS ABUSES VIA OUTSOURCING PRODUCTION, MANUFACTURE AND SUPPLY

National government and corporate responsibility for climate change and environmental degradation is recognised through:

- COPs (Conference of the Parties to the United Nations (UN) international treaty the Framework Convention on Climate Change (UNFCCC)⁷ held annually by the UN since 1992);⁸
- Kyoto Protocol or Kyoto Agreement (incorporating individual country commitments to limiting and reducing carbon emissions);⁹
- SDG 30s (Sustainable Development Goals, seventeen in number, adopted by the UN in 2015 – set for the next ten years) and aiming at peace and prosperity for all the world’s people by 2030 – do not reference climate change explicitly but can be read so as to incorporate it);¹⁰

⁷ UNFCCC, *UN*, 1992, <https://unfccc.int/resource/docs/convkp/conveng.pdf> (accessed 30 December 2023).

⁸ What is COP? | NOAA Climate.gov (accessed 30 December 2023).

⁹ What is the Kyoto Protocol? | UNFCCC (accessed 30 December 2023).

¹⁰ Sustainable Development Goals | United Nations Development Programme (undp.org) (accessed 30 December 2023); Jocelyne A Scutt, ‘Climate Change as Threat to Indigenous Peoples’ Rights – A Role for SDGs and UNDRIP?’ in Sarah Sargent (ed),

- Paris Agreement (legally binding agreement under the UNFCCC adopted by 126 states parties at COP21 in 2015, coming into force from 2016);¹¹
- UN Human Rights Committee applying ICCPR (International Covenant on Civil and Political Rights) in 2022 to hold Australia responsible for failure to implement climate change protections for Torres Strait Islanders;¹²
- UN Convention on the Law of the Sea – test case on oceanic pollution and rising sea levels: Commission of Small Island States on Climate Change and International Law (Cosis) contending defendant countries must amongst other obligations undertake emission reduction and repair of marine environments damages by CO₂ pollution;¹³
- International Criminal Court (ICC) says it will prosecute CEOs of companies generating environmental crimes as crimes against humanity (although academic doubts are expressed as to any real potential for carrying this through).¹⁴

Indigenous Rights and Sustainable Development Goals 2030, Trivent Publishing (forthcoming).

¹¹ The Paris Agreement | UNFCCC (accessed 30 December 2023).

¹² *Daniel Billy et al v Australia* (2022), *Billy et al v Australia* (3624/2019) Views of 21 July 2022 (ag.gov.au) (accessed 30 December 2023); *Billy et al v Australia* (3624/2019) Views of 21 July 2022 | Attorney-General's Department (ag.gov.au) (accessed 30 December 2023).

¹³ Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (itlos.org) (accessed 30 December 2023); Small island nations take high-emitting countries to court to protect the ocean | Pollution | The Guardian (accessed 12 September 2023) (Bahamas, Niue, Palau, St Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis, The Bahamas, Tuvalu, Vanuatu, Antigua and Barbuda); Part XII of the United Nations Convention on the Law of the Sea and the Duty to Mitigate Against Climate Change on JSTOR (accessed 30 December 2023); Navigating the Intersection of Climate Change and the Law of the Sea: Exploring the ITLOS Advisory Opinion's Substantive Content - Climate Law Blog (columbia.edu) (accessed 30 December 2023); https://itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf (accessed 1 October 2024).

¹⁴ Office of the Prosecutor, *Policy paper on case selection and prosecution*, ICC, 15 September 2016, 20160915_OTP-Policy_Case-Selection_Eng.pdf (icc-cpi.int) (accessed 30 December 2023); ICC, 15 September 2016, ICC Prosecutor, Fatou Bensouda, publishes comprehensive Policy Paper on Case Selection and Prioritisation | International Criminal Court (icc-cpi.int) (accessed 30 December 2023); Catriona McKinnon, 'Climate crimes must be brought to justice', *The Unesco Courier*, 7 August 2019, Climate crimes must be brought to justice | The UNESCO Courier (accessed 30 December 2023); Molly Naylor-Komyattee, 'Crime Without Punishment ...', *New Sociological Perspectives*, vol 1, no 1, 2021, Crime Without Punishment: Exploring Corporate Liability for Climate Crimes at

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Responsibility for historical contribution of countries and governments to global warming is being recognised and acknowledged to some extent by declarations if not actions. But what about nations exporting industries to other countries so divesting themselves of pollution, carbon emissions, environmental degradation and global warming liability by transferring this to ‘developing’ countries - together with low-paid jobs, poor industrial conditions, health and safety risks, and labour exploitation including child labour?

‘First world’ nation states assert they are acting responsibly – by setting targets for ending fossil fuel reliance and carbon emissions in their own countries. Developing nation states are frequently targeted and blamed for their fossil fuel reliance and increasing carbon emissions. Yet do those countries alone bear responsibility?

US and UK corporations manufacture, produce and outsource in China, Bangladesh, India, Mexico and other developing countries. Where does responsibility lie for fossil fuel use and carbon emissions generated by US and UK manufacturing/production/sourcing in developing countries? US brands made in China include L.L.Bean, Levi Strauss & Co, New Balance, Radio Flyer, Melissa & Doug Toys, Brach’s Confections, Inc., US Major League Baseballs, and Chevy Silverado.¹⁵ As for US companies with a ‘strong presence’ in China (‘at 25% or below revenue’), these include Apple, Boeing, Caterpillar, General Motors, Starbucks, Nike, and Ford.¹⁶ Additionally, when it comes to percentages of US companies based in China, varying computations assess this at:

- **30%** US-based multinational corporations’ non-US employees based in China;
- **45%** surveyed American companies assess China as primary or among top three investment destinations – ‘largest drop in the survey’s 25-year history’;
- China = **\$4.19 trillion** or **13%** of top 100 companies’ total market cap value, and it has **14** companies of its own in world’s top 100;

the International Criminal Court - New Sociological Perspectives (lse.ac.uk) (accessed 30 December 2023); CIVICUS Staff, ‘ECOCIDE ...’, *resilience*, 17 June 2021, ECOCIDE: ‘Perpetrators of environmental destruction should be prosecuted just like war criminals are’ - resilience (accessed 30 December 2023).

¹⁵ All-American Brands That Are Actually Made In China and Other Countries :: Sunmark Credit Union | The Bright Way To Bank - New York Capital Region (accessed 26 September 2023).

¹⁶ 10 US Companies With Highest Revenue Exposure To China (yahoo.com) (accessed 26 September 2023).

- Overall assessment - US companies have ‘significant presence’ in China, accepting there are ‘some challenges and uncertainties’ in the Chinese market.¹⁷

A current ‘significant’ shift from China as the ‘primary export platform for north American markets’, driven by ‘geopolitical uncertainties and high US tariffs’, does not mean that production and manufacturing are returning to developed countries.¹⁸ In addition to south and other parts of East Asia as alternatives, developing nations elsewhere are becoming first world targets. Statistics indicate that over 90% of companies from the US and Canada relocating production and sourcing, this shift occurring in 2018–2023. This period saw a repositioning of manufacturing and sourcing to Mexico, India, and Southeast Asia, these countries ‘rapidly emerging as future export manufacturing powerhouses for US manufacturers’.¹⁹

Production in India continues to grow rapidly, the country being ‘the third most sought-after manufacturing destination in the world’, its exporting potential calculated to the value of ‘US\$ 1 trillion by 2030 ... with a skilled workforce and lower cost of labour’.²⁰ The fashion industry figures prominently for the UK as well as the US. Companies include Tu Clothing, LightintheBox, Temu, Amazon UK, Daniel Footwear All Products, Polo Ralph Lauren UK, H&M and Gap.²¹ Concerns are not limited to their contribution to carbon emissions and pollution generating global warming. More direct human rights and employment abuses come into focus. Hence. more than ten years after the Rani building collapse in Bangladesh killed 1134 workers with a further 2000 injured, reports indicate that

¹⁷ Survey: US Companies in China No Longer See It as Primary Investment Destination (voanews.com) (accessed 26 September 2023); How much money do the top 100 global companies make? | World Economic Forum (weforum.org) (accessed 26 September 2023); All-American Brands That Are Actually Made In China and Other Countries :: Sunmark Credit Union | The Bright Way To Bank - New York Capital Region (accessed 26 September 2023).

¹⁸ More Than 90% of North American Companies Have Relocated Production and Sourcing Over the Past Five Years (bcg.com) (accessed 26 September 2023).

¹⁹ More than 90% of North American Companies (n18).

²⁰ Manufacturing Sector in India: Market Size, FDI, Govt Initiatives | IBEF (accessed 26 September 2023).

²¹ 5 Top Garments Manufacturers in Bangladesh (accessed 25 September 2024); The Top 15 International Made In Bangladesh Clothing Brands (accessed 26 September 2024); uk clothing manufacturers in india - Bing – Shopping (accessed 26 September 2023).

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worker abuses there remain ‘rife’.²² The vast majority of those killed or injured were women workers making clothing for international fashion brands including Primark (registered office London),²³ Bonmarché (registered office Manchester),²⁴ and Loblaw (Canada).²⁵ A decade on, women in the clothing industry remain the major targets there and, similarly, in India where factory workers supplying major brands allege routine exploitation and abuses.

As the world’s ‘second-largest manufacturer and exporter of garments’ after China, India’s 12.9 million workers in the clothing industry work in factories or as piece or outworkers. In 2020 workers manufacturing clothing under the iconic fashion brand Ralph Lauren spoke with BBC journalist Rajini Valdyanathan, exposing exploitation from ‘bosses bothered only about production’. Conditions included being ‘forced to stay overnight to complete orders, sometimes ... sleep[ing] on factory floor[s]’, being ‘made to work continuously, often through the night, sleeping at 3am then waking up by 5am for another full day ...’²⁶ Workers ‘making clothes for H&M and other brands’ reported ‘persistent workplace sexual violence and verbal abuse’ against female workers. They said male supervisors exercised ‘total power’, extending to both unmarried and married women with sexual violence ‘going on for years’, occurring often on night shifts.²⁷ Reports from Gap and Next UK mirrored these concerns with daily abuse said to be the reality of industrial conditions for female garment workers.²⁸ Women workers were ‘all living in poverty in a rural area of South India’, routinely experiencing

²² Abuses ‘still rife’: 10 years on from Bangladesh’s Rana Plaza disaster | Rana Plaza | The Guardian (accessed 23 September 2023).

²³ Primark Stores Limited, PRIMARK STORES LIMITED overview - Find and update company information - GOV.UK (company-information.service.gov.uk) (accessed 26 September 2023).

²⁴ Pure Pay Limited, Contact Us (bonmarche.co.uk) (accessed 26 September 2023).

²⁵ Loblaw Companies Ltd. | Live Life Well® (accessed 26 September 2023). Ironically, the trademark logo for the company is ‘Helping Canadians Live Life Well®’ with the additional statement: ‘We provide the building blocks to help Canadians create the best life, and future that they can.’

²⁶ Rajini Valdyanathan, ‘Indian factory workers supplying major brands ...’, *BBC News*, 17 November 2020, Indian factory workers supplying major brands allege routine exploitation - BBC News (accessed 26 September 2023).

²⁷ Annie Kelly, ‘Female workers at H&M ...’, 9 March 2021, Female workers at H&M supplier in India allege widespread sexual violence | Global development | The Guardian (accessed 26 September 2023).

²⁸ Abuse is daily reality for female garment workers for Gap and H&M, says report | Global development | The Guardian (accessed 26 September 2023); Sarah Johnson, ‘Tesco and Next among brands linked to labour abuses ...’, 28 May 2021, Tesco and Next among

‘forced overtime, verbal abuse and poor working conditions’.²⁹ Such were ‘not confined to the garment industry’, with low wages and substandard health and safety regimes supported by ‘weak labour laws [making] India an attractive place for foreign brands looking to outsource work’. Supermarket chains including Tesco, Marks & Spencer and Sainsbury’s were equally implicated, with Valdyanathan reporting that claims ‘appear to violate India’s Factories Act, which states that no worker should exceed more than 48 hours a week (or 60 hours with overtime), nor should they be made to work for more than nine hours in one day’, whilst the law also provides that women ‘should work night shifts only if they choose to do so’.³⁰ Each company said it complied with labour laws and adhered to ethical standards, Ralph Lauren saying it would investigate the allegations whilst the factory supplying its products asserted it was ‘complaint with the law’, and the supermarket chains expressing ‘shock’ at hearing the reports, adding that they were ‘working together to ensure the issues were remedied’. Nonetheless, Vogue Business claims worker abuses in India are increasing,³¹ whilst Human Rights Watch alleges ‘poorly enforced laws’ leave ‘informal’ workers no recourse.³² The BBC report shows that as profits are squeezed, women often find themselves losing out: ‘Payslips seen by the BBC show women working in garment factories can earn as little as £2.50 per day, making items which, in some cases, sell for hundreds of pounds’.³³

Manufacturing in Bangladesh bears a similar profile both in terms of the export from developed countries of manufacturing emissions and pollution, along with human rights abuses and breaches of industrial conditions.³⁴ In Bangladesh, goods and products in pharmaceuticals, electronics, textiles, clothing, food and

brands linked to labour abuses in India spinning mills | Workers’ rights | The Guardian (accessed 26 November 2023).

²⁹ Custom Slim Soft Cotton Polo Shirt for Men | Ralph Lauren® UK (accessed 26 September 2023); Valdyanathan (n26).

³⁰ Human Rights Watch alleges ‘poorly enforced laws’ leave ‘informal’ workers no recourse – ‘India: Women at Risk of Sexual Abuse at Work’, India: Women at Risk of Sexual Abuse at Work | Human Rights Watch (hrw.org) (accessed 26 September 2023).

³¹ Rachel Cernansky, ‘India’s garment worker abuse worsens ...’, 21 April 2022, India’s garment worker abuse worsens, report says | Vogue Business (accessed 25 September 2023).

³² Human Rights Watch, ‘India: Women at Risk ...’, India: Women at Risk of Sexual Abuse at Work | Human Rights Watch (hrw.org) (accessed 26 September 2023).

³³ Valdyanathan (n26).

³⁴ Annie Kelly and Redwan Ahmed, ‘Workers for fast fashion brands fear starvation ...’, 7 November 2023, Workers for fast fashion brands fear starvation as they fight for higher wages | Global development | The Guardian (accessed 30 December 2023).

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beverage are outsourced and out-manufactured. Firms include LightintheBox, Amazon UK, Nisbets UK, Temu, Whistle, The White Company, Bonmarche, Next UK, QVC UK, NewLook, Spreadshirt UK ...³⁵ Business Insider reports that garments produced in Bangladesh ‘account for approximately “\$20 billion (£15,333,308.00) in exports” with “59%” exported to the EU, “26%” to the US and “5%” to Canada’.³⁶

The perceived and real advantages to manufacturers going offshore to manage production, manufacturing and sourcing of products are crudely based in ‘the bottom line’.³⁷ In adhering to a policy of profits at all costs, they take advantage of developing countries’ need for expansion of their GDP through employment (including the multiplier effect on small and local businesses) and production (itself generating or building associated small-scale enterprises). Yet in doing so, in addition to profits, they divest themselves of responsibility for addressing negative environmental and biodiversity consequences of their product manufacture by adding to the developing countries’ contribution to global warming and climate change. Developing countries, seeing themselves as dependent upon this ‘first world’ export of carbon emissions and pollution because industry is vital to their economic development and survival, are unable to apply carbon emission and other environmental controls through taxes or other business impositions to the commensurate level.³⁸ Developed countries are thereby able to conceal a significant proportion of their negative emissions and pollution impact. This pattern of

³⁵ BBC, *BBC News*, 8 January 2023, Fashion brands paid Bangladesh factories less than cost - report - BBC News (accessed 26 September 2023); Clothing, T shirt Manufacturer Bangladesh, Clothing Supplier (bdwear.com) (accessed 26 September 2023).

³⁶ Pamela Engle, ‘Here Are Some Of The Biggest Brands That Manufacture in Bangladesh’, *Business Insider*, 18 May 2019, Big Brands in Bangladesh Factories (businessinsider.com) 7 Fashion Brands Made in Bangladesh | DESIblitz (accessed 30 December 2023).

³⁷ How much money do the top 100 global companies make? | World Economic Forum (weforum.org) (accessed 26 September 2023).

³⁸ Eco-Age, a ‘sustainability consultancy and communications agency’ in evidence to the House of Commons Environmental Audit Committee in the Committee’s inquiry into the clothing industry said that countries are bound to compete against one another for ‘inward investment and production in their jurisdiction’, the competition ‘for lower wages and standards [means] they are unable to raise their minimum wage to a level that provides for a decent life, that is, a living wage’. This leads to a ‘race to the bottom in terms of wages and environmental standards’: Eco-Age, ‘Written evidence submitted by Eco-Age’, November 2019, SFI0075 - Evidence on Sustainability of the fashion industry (parliament.uk) (accessed 30 December 2023).

export is replicated in relation to first world waste, particularly that generated by the US, the UK and France.

PART 2 – EXPORTING WASTE TO EXPORT ENVIRONMENTAL DEGRADATION, HUMAN, ANIMAL AND PLANT RISK, AND BIODIVERSITY DAMAGE

In the 1950s, the UK sought sites for nuclear testing. Unable to persuade the US that it should be able to use the Nevada site where the US initially tested its nuclear capacity, the UK fixed upon the Australian outback. Operating on the assumption that the land was ‘*terre nullius*’³⁹ or, worse, unmindful of the timeless occupation and land rights of the Indigenous Australian peoples living there and whose country it was,⁴⁰ Maralinga in South Australia became the principal site, with the Montebello Islands off the Western Australian coast and Emu Field as secondary sites. Woomera (also in the South Australian desert) was used for testing the missiles required to transport the nuclear weapons. Under the agreement between the Australian and UK governments, the area of testing was to be limited to 100 miles. This agreement (made by the Prime Minister at the time, Robert Menzies, without reference to cabinet) was not revealed to Parliament, the opposition or the people of Australia. Nor was it adhered to by the British, with the fallout extending

³⁹ The contention that Australia (including the Torres Strait Islands) was *terre nullius* (absent of occupiers) upon arrival of Captain Cook in 1770, then the First Fleet and Captain Philip in 1778, was scotched by the High Court of Australia in the *Mabo case* - *Mabo v Queensland* [1986] HCA 8; (1986) 64 ALR 1; (1986) 60 ALJR 255 (27 February 1986) (austlii.edu.au) (accessed 26 September 2023); *Mabo v Queensland* [1988] HCA 69; (1989) 166 CLR 186 (8 December 1988) (austlii.edu.au) (accessed 26 September 2023); *Mabo v Queensland (No 2)* (“*Mabo case*”) [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992) (austlii.edu.au) (accessed 26 September 2023).

⁴⁰ The Maralinga Tjarutja people who could be rounded up were removed from the land and similarly the Yulparitja people from Broome. Yet removal did not protect them from negative health consequences due to the spread of the land area impacted, and the disruption to their lives was never compensated for nor taken into account: Royal Commission into British Nuclear Tests in Australia (the McClelland Royal Commission), British nuclear tests at Maralinga | naa.gov.au (accessed 26 September 2023); Peter N Grabosky, *Wayward Governance: Illegality and its Control in the Public Sector*, Australian Studies in Law, Crime and Justice, AIC, Canberra, ACT, 1989; Maralinga: How British nuclear tests changed history forever - Creative Spirits (accessed 30 December 2023); Samantha Jonscher and Gary-Jon Lysaght, ‘Maralinga story ...’, *ABC News*, 30 June 2019, Maralinga story to be told through eyes of traditional owners affected by Britain’s atomic bomb testing - ABC News (accessed 30 December 2023).

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over the vast land mass of northern Australia, including Broome (in the northwest), Townsville (in the northeast) and south to Sydney and Adelaide.⁴¹

British nuclear testing took place over the period 1952/1953–1957, 1956–1963, with adverse consequences.⁴² The export of nuclear testing from the UK to Australia wrought human and land damage, with associated damage to animals and plants all impacting on the environment and biodiversity. Military and civilian personnel engaged in the project suffered harm to health, leading to death for many.⁴³ The consequences meant forgetting – at least by those impacted – was impossible. Political action resulted in a Royal Commission,⁴⁴ then fighting for compensation through the courts against the Australian and UK governments for years.⁴⁵ Indigenous Australians suffered health impacts, too – arguably far greater (if this were possible) for apart from forcing them from their country, no precautions

⁴¹ Royal Commission into British Nuclear Tests (n40).

⁴² The principal site Maralinga was finally ‘closed’ in 1967: A picture in time: Maralinga, the blinding flash that ushered in Australia’s atomic age | Australia news | The Guardian (accessed 30 December 2023).

⁴³ The Royal Commission held it was unable to determine whether deaths from cancer were directly related to the tests. In March 2012 the 1000 British military involved had their claim ruled out of time by the UK Supreme Court: Maralinga veterans shocked by ‘cruel’ ruling - ABC News (accessed 30 December 2023). The Australian Human Rights Commission rejected a claim by Australian service personnel on the basis that it had no jurisdiction under any human rights treaties or covenants: Maralinga Nuclear Tests Case Rejected By Human Rights Commission - Stacks Law Firm (stacklaw.com.au) (accessed 26 September 2023); Blow for nuclear veterans as Human Rights Commission rejects complaint | The Canberra Times | Canberra, ACT (accessed 1 October 2024). In 1993 the Keating government accepted more than AUS \$435 million from the UK government to settle Maralinga claims: Xenophon backs calls for Maralinga compo - ABC News (accessed 26 September 2023).

⁴⁴ Royal Commission into British Nuclear Tests (n40).

⁴⁵ Ruth Hudson, ‘State Refuses to Fund ...’, *Stacks Law Firm*, 29 July 2010, State Refuses To Fund Maralinga Court Battle - Stacks Law Firm (stacklaw.com.au) (accessed 26 September 2023); Tom Goudcamp, ‘Maralinga Veterans Seek Justice ...’, *Stacks Law Firm*, 21 February 2013, Maralinga Veterans Seek Justice At Last - Stacks Law Firm (stacklaw.com.au) Paul Farrell, Maralinga nuclear tests case ...’, *Guardian*, 10 December 2013, Maralinga nuclear tests case rejected by Human Rights Commission | Nuclear weapons | The Guardian (accessed 26 September 2023). The United Kingdom campaign continues: ‘Britain’s nuclear-test veterans want compensation’, *The Economist*, 19 September 2024, Britain’s nuclear-test veterans want compensation (accessed 19 September 2024); ‘Nuclear Testing and the Royal Navy’, *The National Museum*, 4 August 2023, Nuclear Testing and the Royal Navy - Unpacking the impact of High Explosive Research | National Museum of the Royal Navy (accessed 19 September 2024).

were taken in relation to them, nor warnings advanced to them, and the cultural impact upon them was profound.⁴⁶

The land was damaged, too. Although the British should have been wholly responsible for neutralising the entire area, reports indicate that in the 1960s their two attempts were ‘ineffectual’.⁴⁷ Hence, in the early 1980s the Pitjantjatjara land claim proceeded on the basis that the land required decontaminating, as did that of the Tjarutja people who regained their land in 1984, with AUS \$1.3 million in compensation from the Australian government.⁴⁸ In 1995 and 2000, a further, more thorough, effort at decontamination was undertaken ‘at the cost of more than AUS \$100 million’, with Australia contributing AUS \$75 million of that total.⁴⁹ Even then, despite this expenditure, parts of the area affected remain uninhabitable, and 400,000 cubic metres of soil contaminated by plutonium remain.⁵⁰

Nuclear waste impacts not only on land above ground. The sea and seabed, and the atmosphere, are at risk. Hence, on 20 December 1974 the International Court of Justice (ICJ) issued two judgments finding (by majority 9:6) in favour of Australia and Aotearoa New Zealand in their claim (Fiji intervening), made on 9 May 1973, ‘concerning tests of nuclear weapons which France proposed to carry out in the atmosphere in the South Pacific region’.⁵¹ Prior to 2 July 1966, the US

⁴⁶ Peter N Grabosky, *Wayward Governance: Illegality and its Control in the Public Sector*, Australian Studies in Law, Crime and Justice, AIC, Canberra, ACT, 1989; Royal Commission into British Nuclear Tests (n40).

⁴⁷ Mike Ladd, ‘The Lesser known history ...’, *ABC News*, 23 March 2020, The lesser known history of the Maralinga nuclear tests — and what it’s like to stand at ground zero - ABC News (accessed 25 September 2023); Maralinga: How British nuclear tests changed history (n40).

⁴⁸ Maralinga Tjarutja Land Rights Act 1984 (legislation.sa.gov.au) (accessed 30 December 2023); Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (legislation.sa.gov.au) (accessed 30 December 2023).

⁴⁹ Ladd (n47); Maralinga: How British nuclear tests changed history (n40).

⁵⁰ Nicolas Peterson, *Aboriginal Land Rights: A Handbook*, Australian Institute of Aboriginal Studies, Canberra, ACT, 1984; Nicolas Peterson and Marcia Langton, *Aborigines, Land and Land Rights*, Australian Institute of Aboriginal Studies, Canberra, ACT, 1984.

⁵¹ *Australia v France* [1974] ICJ 253; *Aotearoa New Zealand v France* [1974] ICJ 547. France declined to appear or file pleadings as it considered the ICJ ‘manifestly lacked jurisdiction’. The cases proceeded, therefore, in the absence of France and any submissions made on their behalf. The dissenting judges considered that Australia had no standing to bring the action in that it had not objected to US and UK testing in the Pacific prior to the French test regime.

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and UK had carried out nuclear testing in the Pacific.⁵² From that day forward, France conducted 163 tests, over the period 1966–1974 exploding 46 nuclear bombs into the atmosphere from Moruroa Atoll and Fangataufa Atoll, then detonating 117 nuclear charges beneath the Pacific Ocean. The latter approach – of no longer conducting explosions into the atmosphere – was a direct consequence of the Australian and Aotearoa New Zealand ICJ action. Yet contrary to the plaintiffs’ request for a declaration of illegality, namely that France’s conduct was in breach of international law, and an injunction to prevent further atmospheric testing by France, the ICJ by majority (five of the nine in favour of Australia and Aotearoa New Zealand’s claim) held that a press release ‘to the world’ by France stating it would undertake only submerged, not atmospheric, tests was sufficient ‘undertaking’ to the ICJ. This the five considered obviated the need for a substantive decision as to illegality and a consequent determination as to illegality.

Yet whether or not directed into the atmosphere, whether or not beneath the waves, nuclear testing resulted in serious and ongoing harm to humans, sea life, plant life and land above and below the sea. The *Mururoa Files* confirm that at least one of the bombs released into the atmosphere was ‘30 times more powerful than the atomic bomb released by the US over Hiroshima’⁵³ and that French testing affected the atmosphere, land and sea miles beyond Mururoa and Fangataufa. Action has been instituted in France by those affected,⁵⁴ and mirroring the UK and Australian history of Maralinga, the *Mururoa Files* reveal.⁵⁵

Poisoned Legacy

Leukemia, lymphoma, cancer of the thyroid, lung, breast, stomach ... In Polynesia, the experience of French nuclear tests is written in the flesh and

⁵² Benoît Pelopidas and Sébastien Philippe, ‘Unfit for purpose: reassessing the development and deployment of French nuclear weapons (1956–1974)’, *Cold War History*, 2021, vol 21, no 3, pp 243–260, <https://doi.org/10.1080/14682745.2020.1832472> (accessed 30 December 2023); and see also LL Herman, ‘Australia v France; Aotearoa New Zealand v France – 1974’, *Dalhousie Law Journal*, 1976, vol 3, issue 1, pp 288–294, art 25, “Nuclear Tests Case: Australia v. France; New Zealand v. France” by L. L. Herman (dal.ca) (accessed 26 September 2023).

⁵³ INTERPRT and Disclose with Sébastien Philippe, Member, Science and Security Programme, Princeton University, *Mururoa Files - Investigation into French Nuclear Tests in the Pacific*, Poisoned legacy (moruroa-files.org) (accessed 30 December 2023).

⁵⁴ Ashley Westerman, ‘New study on nuclear testing ...’, *The Atomic Age*, 21 September 2021, New study on nuclear testing in French Polynesia reveals France’s ‘censorship and secrecy’ via The World | The Atomic Age (uchicago.edu) (accessed 30 December 2023).

⁵⁵ Westerman (n54); see also Pelopidas and Philippe (n52).

blood of the inhabitants. Strontium has eaten into bones, cesium has eaten away at muscles and genitals, iodine has seeped into the thyroid.

... Disclose and Interpret, in collaboration with the Science & Global Security program at Princeton University (USA), investigated the consequences of atmospheric testing in French Polynesia for two years. With the help of thousands of declassified military documents, hundreds of hours of calculations and dozens of unpublished testimonies, this investigation demonstrates for the first time the extent of the radioactive fallout that struck the inhabitants of this vast territory ...

According to our calculations, based on a scientific reassessment of the doses received, approximately 110,000 people were infected, almost the entire Polynesian population at the time. Modelling toxic clouds to support, we unveil[ed] how the French authorities concealed the true impact of nuclear testing on the health of Polynesians for more than fifty years ...

Plant life appears to be more resilient but even if this is so (and the impact on biodiversity through the adaptation of plants to nuclear fallout nonetheless remains), this cannot avoid problems facing herbivores where plant production is stunted before regrowth, or plants are unsafe to eat.⁵⁶ Nuclear contamination of sea life is similarly problematic or more so – the impact on the living things themselves and on those (human and other land or sea animals) dependent upon the produce of the sea for survival cannot – or should not – be ignored. Equally, contamination of the earth cannot, as failed and repetitive ‘clean ups’ of Maralinga (and other examples of destruction to the land itself through nuclear testing) confirm, be overlooked. Hence Australia and Aotearoa New Zealand’s ‘success’ at the ICJ in 1974 did not stand in the way of continuing harm from the French tests.

This problematic outcome in the face of an apparent win was replicated in the mid-1980s when the US proposed exporting nuclear waste to Johnston Atoll in the Pacific.⁵⁷ Protest action in Australia directed toward the federal government and the US appeared to have halted this abuse of land, sea, and Pacific populations.

⁵⁶ Stuart Thompson, ‘Trees and other kinds of vegetation have proven to be remarkably resilient to the intense radiation around the nuclear disaster zone’, *The Conversation*, 2 July 2019, How plants reclaimed Chernobyl’s poisoned land - BBC Future (accessed 30 December 2023).

⁵⁷ Grace M Plummer and Barbara Johnson, ‘An Overview of USDOE Participation in the Pacific Atomic Testing Program’, *Johnston Atoll – The Dragon’s Tale*, The-Dragons-Tale-Stories-of-JA-Fall-2016-Journal.pdf (nationalatomictestingmuseum.org) (accessed 30 December 2023).

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However, even if restraint was placed on nuclear waste, chemical disposal (including Agent Orange used extensively during the Viet Nam war) went ahead.⁵⁸ This continued a pattern already established, with its own negative outcomes.⁵⁹ Furthermore, knowledge of nuclear waste impact and public protest, along with the institution of litigation by survivors, have not quelled a reliance on nuclear development and the consequent need for dealing with waste. This is demonstrated in the 2023 AUKUS Agreement between Australia, the UK and US for the supply of nuclear-powered submarines to Australia.⁶⁰ The Australian government acknowledges that this will result in a need to deal with two types of waste – what is described as ‘minor’ in terms of daily usage, plus ‘major’ being disposal of obsolete machines and machine parts.⁶¹ Furthermore, the agreement includes

⁵⁸ Bradley Hennings, ‘Agent Orange in Johnston Atoll ...’, *Chisholm Chisholm and Kirkpatrick Ltd*, 3 August 2022/updated 20 November 2023, Agent Orange in Johnston Atoll: VA Disability Benefits | CCK Law (cck-law.com) (accessed 30 December 2023); see also Jamie Reno, ‘Judge’s Surprise Ruling ...’, *IB Times*, 9 April 2013, Judge’s Surprise Ruling On Veteran’s Exposure to Toxic Chemicals On U.S. Military Base Called “Turning Point” | IBTimes (accessed 30 December 2023).

⁵⁹ EA Schreiber, Paul F Doherty, Jr, and Gary A Schenk, ‘Effects of a Chemical Weapons Incineration Plant on Red-Tailed Tropicbirds’, *The Journal of Wildlife Management*, 2001, vol 65, no 4, pp 685–695; Committee on Review and Evaluation of the Army Chemical Stockpile Disposal Program, *Closure and Johnston Atoll Chemical Agent Disposal System*, US National Research Council/National Academies Press, Washington DC, 2002, Download: Closure and Johnston Atoll Chemical Agent Disposal System | The National Academies Press (accessed 13 January 2024). The facility was decommissioned in 2002–2003 at the cost of US \$10 million: ‘Johnston Atoll Demolition and Disposal’, *Northwest Demolition and Dismantling*, JOHNSTON ATOLL CHEMICAL WEAPONS FACILITY DEMOLITION & REMOVAL - Northwest Demolition (nwdemolition.com) (accessed 30 December 2023).

⁶⁰ UK, US AND Australia launch new security partnership - GOV.UK (www.gov.uk) (accessed 23 September 2023); UK powers up partnership with US and Australia to strengthen security - GOV.UK (www.gov.uk) (accessed 23 September 2023); AUKUS Defense Ministers Meeting Joint Statement > U.S. Department of Defense > Release (accessed 23 September 2023); British-led design chosen for AUKUS submarine project - GOV.UK (www.gov.uk) (accessed 23 September 2023).

⁶¹ Nabil Al Nashar, ‘The AUKUS submarine deal ...’, *ABC News*, 14 March 2023, The AUKUS submarine deal requires Australia to dispose of the nuclear waste. Where will it be dumped and will it break any treaties? - ABC News (accessed 26 September 2023); Philip Coorey, ‘Australia saddled with high-level nuclear waste ...’, *Financial Review*, 14 March 2023, US nuclear submarines: Australia saddled with high-level nuclear waste under AUKUS pact (afr.com) (accessed 26 September 2023); Sarah Tomevska, ‘AUKUS means Australia will need a nuclear waste dump ...’, *SBS News*, 15 March 2023, AUKUS

provision for US nuclear waste export for disposal in Australia. The question is where will this waste go?

Again, it is most likely that the centre of Australia will be targeted, despite this being country for Indigenous Australians. It is not an empty wilderness, whatever those who are outside Indigenous, community and traditional links might think. Does this mean that environmental, human, animal and plant damage are inevitable? The Australian government approach appears to be that the ‘minor’ waste is manageable – where it will be deposited remains unidentified so far, and the ‘major’ waste is addressed as not being an issue until years in the future.⁶² The submarines are not due for delivery until some time in 2030 and will have a life expectation of three decades beyond that, with the estimate of the earliest time this significant waste level will be required to be addressed is said by the Defence Minister to be 2050,⁶³ meaning that obsolescence and therefore the need for major disposal will not lie with the current government. Is this good enough? One factor that appears to have been overlooked is the prospect of action taken under the UN Declaration of the Rights of Indigenous Peoples (UNDRIP). What avenues might be followed to prevent nuclear waste being deposited in the fragile lands of Australia’s centre may lie in UNDRIP which contains a provision that indigenous peoples do have a say in matters going to the storage of hazardous materials:⁶⁴

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that **no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.**
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

means Australia will need a nuclear waste dump. Why are we just hearing of this? | SBS News (accessed 26 September 2023).

⁶² Tomevska (n61).

⁶³ Tomevska (n61).

⁶⁴ UNDRIP_E_web.pdf (emphasis added) (accessed 26 September 2023); and see Scutt, ‘Climate Change as Threat to Indigenous People’s Rights ...’ (n10).

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This should be sufficient to ensure that storage of waste from nuclear submarines or the of the obsolete machines themselves will not be able to be done on the lands considered ‘remote’ by those who do not live there or whose customs and traditions are not linked with the lands. Indigenous Australians do not always live permanently on lands that are ‘country’ for them, but this does not mean that the lands are uninhabited or lacking Indigenous Australian connection. The spurious doctrine of *terre nullius* denying the very existence of Aboriginal people as inhabitants of the country was contradicted by genocidal policies from the time of colonisation or invasion that explicitly saw them in the landscape.⁶⁵ ‘Permanent’ is perceived differently, in any event: for Indigenous Australians their permanent place may be ‘deserted’ in Western eyes or seen as intermittently occupied when ‘business’ takes them to another locale. For Indigenous Australians, it remains their country, despite their hold being tenuous (in Western terms) sometimes, through denial of their connection with the land. As visual artist, activist, philosopher and poet Lilla Watson wrote in 1987:⁶⁶

It took me half my lifetime to realise I was entitled to my mother’s mother’s mother’s country, I was entitled to my mother’s mother’s mother’s language, my mother’s mother’s mother’s history, and the laws that belong to that country. The greatest sadness in my life is the realisation that I will never have any of those things. Those things are rightfully mine, I am entitled to them, but I will never have them. Both my father’s father’s father’s country and my mother’s mother’s mother’s country have some of the richest coalfields in the

⁶⁵ Australian Human Rights Commission (AHRC), *Bringing them Home – Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, AHRC, 1997, *Bringing them Home Report (1997)* | Australian Human Rights Commission (accessed 21 September 2023); Lyndal Ryan, *The Aboriginal Tasmanians* (University of Queensland Press, 1981); Henry Reynolds, *Why Weren’t We Told? A personal search for the truth about our history* (Viking, 1999); Timothy Bottoms, *Conspiracy of Silence Queensland’s frontier killing times* (Allen & Unwin, 2013); Stephen Gapps, *Gudyarra: The First Wiradjuri War of Resistance The Bathurst War, 1822–1824* (NewSouth, 2021); Chris Owen, *‘Every Mother’s Son is Guilty’ Policing the Kimberley Frontier of Western Australia 1882–1905* (UWA Press, 2016); Jacques Semelin, *Purify and Destroy: The Political Uses of Massacre and Genocide* (Hurst, 2007; Columbia University Press, 2009); Jocelynn A. Scutt, ‘The Stolen Generations -Stealing children, stealing culture, stealing lives’ in JA Scutt, *The Incredible Woman – Power and Sexual Politics*, vol 2, chapter 31, pp 215–230 (Artemis Publishing, 1997).

⁶⁶ Lilla Watson, ‘Sister, Black is the Colour of My Soul’ in JA Scutt, ed, *Different Lives – Reflections on the Women’s Movement and Visions of its Future*, Penguin, Sydney, 1987, pp 44–53 at pp 49.

world, and I know I will never have any title to that land. I or my brothers or sisters will never own (in white terms of reference) any of the land rightfully belonging to us.

Nevertheless, Land Rights have been asserted and to some extent gained by Indigenous Australians⁶⁷ and increasingly ‘First Nations’ is becoming the respected appellation for them, recognising their connection with the land and the permanency that goes with First Nations status and lived reality.⁶⁸

UNDRIP also provides for Indigenous Peoples’ rights where land is proposed for ‘military activities’. Subject to interpretation (which should favour Indigenous Peoples’ rights) this should be capable of applying to the decommissioning of military equipment and their storage.⁶⁹

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

⁶⁷ See for example Native Title Act 1993 (Cth); *Mabo v Queensland (no 1)* (1988) 166 CLR 186; *Mabo v Queensland* [1986] HCA 8 (n39); *Mabo v Queensland* [1988] HCA 69 (n39); *Mabo v Queensland (No 2)* (“Mabo case”) (n39); The Mabo Case | AIATSIS corporate website (accessed 23 September 2023).

⁶⁸ See for example Australia’s First Peoples | AIATSIS corporate website (accessed 21 September 2021); Indigenous Australians: Aboriginal and Torres Strait Islander people | AIATSIS corporate website (accessed 21 September 2021); Jackie Huggins, *Sister Girl: the writings of Aboriginal activist and historian Jackie Huggins* (UQP, 1998); Maureen Watson (1931–2009) - First Nations Australia Writers Network (fnawn.com.au) (accessed 21 September 2021).

⁶⁹ Although note the wording of this provision which appears to place ‘public interest’ above the ‘free agreement’ or ‘request’ by indigenous peoples concerned in its construction of ‘unless justified by a relevant public interest or otherwise freely agreed ...’. However, any such interpretation should be able to be overcome in the interpretation of ‘public interest’ which should be consistent with, and not oppositional to, UNDRIP in and of itself, as well as the ‘public interest’ surely weighted in favour of ‘health, etc’ rather than a militaristic interpretation that sees ‘security’ lying in military objectives rather than human rights including health, clean water, edible and sufficient food, etc.

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In light of health risks and risks to land, flora and fauna, it is difficult to see that ‘public interest’ could be skewed toward storage of deadly material. Notably, there is no ‘public interest’ reference in Article 29 – although the rationale for this provision, namely protection of health, environment and productive capacity, is surely based in public interest in itself.⁷⁰ In February 2023 the CSIRO (Commonwealth Scientific and Industrial Research Organisation) announced it had found a ‘safe’ method of nuclear waste storage involving packing it in minerals ‘for long-term storage’. Yet what happens at the end of the ‘long-term’, where will the ‘safe storage’ place be, and however ‘safe’ why is there nuclear waste for disposal and storage and an apparent acceptance that somewhere will be found for it. Furthermore, if this is ‘safe’ then why does it remain certain that the storage place found will be in areas of significance to people less powerful – the Australian outback or the Pacific, or under the ocean away from ‘first world’ countries?⁷¹

Various ‘nuclear test’ or ‘nuclear weapons’ ‘bans’ treaties have been proposed and entered into over the years, the most recent being 2017 which came into force in January 2021.⁷² It is said ‘to matter’⁷³ yet, despite being entered into, nuclear powered submarines continue to be manufactured and nuclear weapons do not disappear. Even if they did, ‘peaceful’ uses of nuclear power (despite, for example,

⁷⁰ Reference might also be had to the Preamble as a whole and particularly to paras 10, 11 and 12:

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world, ...

⁷¹ Grant Douglas, ‘Radioactive waste isn’t going away ...’, *CSIRO – Australia’s National Science Agency*, 21 February 2023, Radioactive waste isn’t going away. We’ve found a new way to trap it in minerals for long-term storage - CSIRO (accessed 26 September 2023).

⁷² N1720973.pdf (un.org) (accessed 26 September 2023); TPNW-Fact-Sheet-Jan2022.pdf (un-arm.org) (accessed 26 September 2023); Treaty on the Prohibition of Nuclear Weapons - House of Commons Library (parliament.uk) (accessed 30 December 2023).

⁷³ Why does the Nuclear Ban Treaty matter? | ICRC (accessed 30 December 2023).

Germany divesting itself of this form of power generation)⁷⁴ produce waste as well as the danger of errors leading to serious human, flora, fauna and environmental damage.⁷⁵

PART 3 – FASHIONING AND IMPLEMENTING MEASURES TO ADDRESS ‘FIRST WORLD’ IMPOSITIONS ON DEVELOPING COUNTRIES

Although the export of manufacturing, production and sourcing are focused on ‘developing countries’ and the export of nuclear testing and waste is less stark, Part 1 Exporting Carbon Emissions and Creating Human Rights Abuses via Outsourcing Production, Manufacture and Supply, and Part 2 - Exporting Waste to Export Environmental Degradation, Human, Animal and Plant Risk, and Biodiversity Damage are not unrelated. Developing countries such as China and India are involved in nuclear development and hence in waste disposal and its impact, and nuclear testing has taken place in ‘first world’ countries – the US (Nevada) and Australia (Maralinga, Emu Field and Montebello Islands). Yet the US and Australia ensured that the testing was carried out as far from highly populated areas – that is, populated by non-indigenous peoples - as possible. Nevada (where most tests were conducted underground) has a comparative low non-indigenous population and significant number of Native American reservations⁷⁶ with the site being on Shoshone land and said to be ‘a violation’ of the 1863 Treaty of Peace and Friendship ‘signed by the Western Shoshone and the federal government’.⁷⁷ The

⁷⁴ Federal Office for the Safety of Nuclear Waste Management, ‘The nuclear phase-out ...’, BASE - Nuclear phase-out (bund.de) (accessed 26 September 2023); Kerstine Appunn, ‘Fact Sheet – The history behind Germany’s nuclear phase-out ...’, *Clean Energy Wire*, 9 March 2021, The history behind Germany’s nuclear phase-out | Clean Energy Wire (accessed 30 December 2023).

⁷⁵ For example, Three Mile Island, US, 1975: Backgrounder On The Three Mile Island Accident | NRC.gov (accessed 30 December 2023); Three Mile Island - Accident, Nuclear & Meltdown | HISTORY (accessed 30 December 2023); Chernobyl, Soviet Union, 1986: The 1986 Chornobyl nuclear power plant accident | IAEA (accessed 30 December 2023); Chernobyl disaster | Causes, Effects, Deaths, Videos, Location, & Facts | Britannica (accessed 30 December 2023); Fukushima, Japan, 2011: Fukushima Daiichi Accident - World Nuclear Association (world-nuclear.org) (accessed 30 December 2023); Fukushima accident | Summary, Date, Effects, & Facts | Britannica (accessed 30 December 2023).

⁷⁶ Native American Reservations of Nevada, nevada native american tribes map - Search Images (bing.com) (accessed 30 December 2023).

⁷⁷ Carly Sauvageau, ‘Complicated legacy of nuclear testing in Nevada ...’, *The Nevada Independent*, 17 September 2023, Complicated legacy of nuclear testing in Nevada lives

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Australian sites were located on Indigenous Australian land. This, then, together with the targeting of the Pacific for nuclear testing follows the manufacturing, production and sourcing pattern.

What then is to be done? First, employment, industrial and human rights abuses. If manufacturing, production and sourcing are not to be returned to ‘first world countries’ so that labour laws including health and safety, sexual and sexist harassment, race- and sex-based discrimination are at least available for potential legal action and enforcement,⁷⁸ then these standards need to be applied where manufacturing, production and sourcing are located. Two aspects are relevant here: adherence to labour laws through enforcing standards required of UK companies in the UK by civil action, and action directed at conduct breaching criminal laws. The proposition that UK nationals committing crimes in other countries should be prosecuted in the UK is not novel. Laws presently exist to do this in relation to, for example:⁷⁹

- Economic crimes committee overseas, including (but not limited to) bribery: Bribery Act 2010;
- Money laundering: Proceeds of Crime Act 2002;
- Tax evasion and other financial crimes: Criminal Finances Act 2017;
- Various crimes against the person including child sexual abuse and rape.⁸⁰

The Istanbul Convention, a Council of Europe Convention on preventing and combatting violence against women and domestic violence⁸¹ signed and ratified by

on in bodies, politics - The Nevada Independent (accessed 30 December 2023); Treaty with the Western Shoshoni, 1863 - Treaty with the Western Shoshoni, 1863 (talmaz.net) (accessed 30 December 2023); Treaty with the Western Shoshoni 1863, <https://talmaz.net/ruby-valley-treaty-of-peace-and-friendship> (accessed 30 December 2023).

⁷⁸ Although enforcement of labour laws including minimum wage provisions in ‘first world’ countries is reportedly inadequate: Fixing fashion: clothing consumption and sustainability - Report Summary - Environmental Audit Committee (parliament.uk) (accessed 26 September 2023); and see for example Chris Newlands, ‘HMRC investigates exploitation claims in Leicester ...’, *Independent*, 13 September 2020, HMRC investigates exploitation claims in Leicester as clothing chain Boohoo accused of low pay and poor conditions (inews.co.uk) (accessed 30 December 2023).

⁷⁹ CPS, Extraterritoriality: The UK Perspective - Global Investigations Review (accessed 30 December 2023); CPS, Jurisdiction | The Crown Prosecution Service (cps.gov.uk) (accessed 30 December 2023).

⁸⁰ See below re Istanbul Convention.

⁸¹ EM_MS_3.2022_Council_of_Europe_Convention_on_Preventing_and_Combating_Violence_Against_Women_and_Domestic_Violence.odt (live.com) (accessed 30 December 2023).

the UK on 8 June 2012 and 21 July 2022 respectively⁸² amongst other matters commits the UK to taking prosecutorial action where nationals commit these offences when abroad.⁸³ Regarding the various offences contained in the

⁸² Ratification of the Council of Europe Convention on Combating Violence Against Women and Girls and Domestic Violence (Istanbul Convention) – 2018 Report on Progress (publishing.service.gov.uk) (accessed 30 December 2023); The United Kingdom ratifies the Istanbul Convention - Istanbul Convention Action against violence against women and domestic violence (coe.int) (accessed 30 December 2023).

⁸³ Though the UK has lodged reservations in relation to Article 44, relating to prosecution of conduct committed in another country which constitutes an offence in the UK but not in that other country; and Article 59 which relates to offences committed against migrant women. The House of Lords Explanatory Memorandum sets out the rationale for the reservations as expressed by the then Secretary for Home Affairs:

Article 44 of the convention relates to extraterritorial jurisdiction and dual criminality. The explanatory memorandum sets this out as follows:

Article 44(1) requires the UK to take the ability to prosecute UK nationals and people who live in the UK but are not UK nationals, for certain crimes which they commit overseas. This is often referred to as ‘extraterritorial jurisdiction’. The UK is compliant with article 44(1). In UK law extraterritorial jurisdiction usually applies only when the offending behaviour is a criminal offence in the country where it happened as well as in the UK. This is known as ‘dual criminality’. Article 44(3) states that we may not apply a dual criminality requirement for offences encompassed by articles 36 (sexual violence, including rape), 37 (forced marriage), 38 (female genital mutilation [FGM]) and 39 (forced abortion and forced sterilisation). Dual criminality is the norm in UK law when dealing with extraterritorial jurisdiction, because it is not generally right to prosecute someone for doing something in another country for which they could not be prosecuted in that country.

There are sometimes good reasons to depart from the dual criminality rule, if there is an offence which is not a crime in a number of countries. That is true for forced marriage and FGM, and so we do not have dual criminality for those crimes in UK law. We can therefore prosecute a UK national or resident for carrying them out in a country where they are not crimes. This means that we are compliant with Article 44(3) to the extent that it relates to offences covered by Articles 37 and 38.

The UK would use the reservation on article 44(3) to preserve dual criminality for some offences. The reservation would apply to crimes encompassed by article 36 (sexual violence, including rape), when committed by UK residents who are not UK nationals, and crimes encompassed by article 39 (forced abortion and forced sterilisation). The explanatory memorandum states that 12 other countries had made such a reservation, including France and Sweden. Paragraphs 9.4 to 9.9 of the explanatory memorandum go into further detail on this reservation.

Article 59 of the convention relates to residence status. The article states that parties should provide victims with an autonomous residence permit where their

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Convention, the UK observes that it already has legislative provision to implement prosecution of many of these crimes:⁸⁴

The UK courts already have extraterritorial jurisdiction over the following offences required by the Istanbul Convention: murder and manslaughter in most (but not all) circumstances (Article 35); sexual offences (including those required by the Convention) where the victim of the crime is under 18 (Article 36) ...

residence status depends upon their spouse or partner: Parties shall take the necessary legislative or other measures to ensure that victims whose residence status depends on that of the spouse or partner as recognised by internal law, in the event of the dissolution of the marriage or the relationship, are granted in the event of particularly difficult circumstances, upon application, an autonomous residence permit irrespective of the duration of the marriage or the relationship. The conditions relating to the granting and duration of the autonomous residence permit are established by internal law.

The government has said that its position on article 59 is under review “pending the results and evaluation of the support for migrant victims scheme”. The scheme has “provided accommodation and wrap around support for migrant victims of domestic abuse with no recourse to public funds, as well as providing the data required to inform subsequent policy decisions”. The scheme was launched on 1 April 2021. The government stated that it would conclude before summer 2022. The government has said that “in order to enable swift ratification”, it has decided to apply a reservation to the whole of article 59. It said this decision would be reviewed:

This decision is without prejudice to the substantive decisions which the government will make on the matters relating to article 59, in the light of the results and evaluation of the support for migrant victims scheme. As part of that process ministers will revisit the reservation on article 59, with the option of withdrawing it under article 78(4: Istanbul Convention: Preventing and combating violence against women and domestic violence - House of Lords Library (parliament.uk) (accessed 30 December 2023).

⁸⁴ See Home Office, *Policy Paper – Extraterritorial fact sheet*, 3 January 2024 (update), Extraterritorial jurisdiction factsheet - GOV.UK (www.gov.uk) (accessed 3 January 2024); but see also David Malone, Chapter 14, ‘Offences Committed Outside the UK ...’ in Susan Edwards, David Mallone and Gillian Jones, KC, eds, *Blackstone’s Guide ...*, OUP, 2023, Offences Committed Outside the UK (Sections 72–74) | Blackstone’s Guide to the Domestic Abuse Act 2021 | Oxford Academic (oup.com) (accessed 30 December 2023).

The Domestic Abuse Act 2021 has further implemented the Istanbul Convention including extraterritorial jurisdiction.⁸⁵

Additionally, powers lie to apply financial sanctions against individuals and corporations engaging in human rights violations and financial crimes: for example, the Global Human Rights Sanctions Regulations 2022; Sanctions and Anti-Money Laundering Act 2018; Global Anti-Corruption Sanctions Regulations 2021; Economic Crime (Transparency and Enforcement) Act 2022; Policing and Crime Act 2017.⁸⁶

Considering the allegations of conduct occurring within the garment industry in factories run under the auspice of UK companies or under contract to manufacture, produce and supply to UK companies, recourse to existing extraterritorial provisions requires investigation. Ensuring the Corporate Manslaughter Act 2007 provides for extraterritorial jurisdiction to cover potential complicity of UK companies in deaths caused, for example, by the collapse or fire damage of buildings housing factories manufacturing, producing or sourcing UK products is one avenue.⁸⁷ If legislation does not cover potential offences occurring in the industry abroad, then firm consideration should be given to expanding the categories of extraterritorial prosecution to encompass them. Similarly for the US, Canada and other ‘first world’ countries whose clothing (and other) industry corporations use labour and factories abroad to supply products that are sold with the profit motive generating this offshore industry. Proof of complicity in crimes including corporate manslaughter, for example, where these can be sheeted home to ‘first world’ corporations should be pursued. This is essential where local authorities are unable or reluctant to act because developing countries’ governments are in turn reluctant to deter international investment in or development of industry.⁸⁸

⁸⁵ See Edwards, Mallone and Jones, *Blackstone’s Guide* (n84).

⁸⁶ CPS, Extraterritoriality: The UK Perspective - Global Investigations Review (accessed 30 December 2023).

⁸⁷ Although there are criticisms of the complexity or application of the Corporate Manslaughter Act in circumstances that might be replicated in overseas countries. See for example Victoria Roper, ‘The Corporate Manslaughter and Corporate Homicide Act 2007—A 10-Year Review’, *Journal of Criminal Law*, vol 82, no 1, pp 48–75, 153535601.pdf (core.ac.uk) (accessed 30 December 2023); Sharon Hartles, ‘Unmasking Ineffectiveness ...’, *BSC – The BSC Blog*, 17 March 2020, Unmasking Ineffectiveness: The UK’s Corporate Manslaughter and Corporate Homicide Act 2007 – The BSC Blog (wordpress.com) (accessed 30 December 2023).

⁸⁸ The Bhopal disaster where a toxic gas leak during production of pesticide in India by the American company Union Carbide reportedly killed 3,800 people immediately (Union Carbide’s figure, although local estimates were far higher), with ‘many thousands more’ suffering ‘significant morbidity and premature death’ is a lesson in corporate responsibility.

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The 2013 collapse of Rana Plaza in Bangladesh saw more than 1,100 worker deaths and 2,000 workers injured, some with a diagnosis of permanent disability. In May 2015, criminal charges (murder) were brought against the building's owner and 37 other defendants, with the owner also charged with and convicted of corruption, and three other defendants charged with lesser offences. All charges related to 'procedural irregularities and illegalities' in the building's construction and by April 2022 there had been a delay of some five years in proceeding with the murder charges.⁸⁹ The disaster confirms direct involvement of 'first world' companies in production, manufacture and sourcing under conditions dangerous to workers' health and safety, and an accompanying reluctance to take responsibility. The Clean Clothes Campaign reports that labels were found in the rubble and order forms located in factories working in the Rana Plaza building, showing 'at least 29 global brands' having 'recent or current orders with at least one of the five garment factories' in the building, Benetton (Italy), Bonmarche

The case was settled through the Indian Supreme Court with a US \$470 million payout by Union Carbide as compensation, said to be significantly below the damage and suffering caused: Edward Broughton, 'The Bhopal disaster and its aftermath', *Environmental Health*, vol 4, no 6, 2005, The Bhopal disaster and its aftermath: a review - PMC (nih.gov) (accessed 30 December 2023). As for criminal prosecution, convictions were recorded in June 2010 of seven employees and the chairman of UCIL, the local company. The crime of 'causing death by negligence' with which each was charged brought for each of them the maximum penalty under Indian law, being fines of some US \$2000 and two years' imprisonment. As for Union Carbide, in 1991, Warren Anderson, chairman and chief executive of the company at the time, was charged with 'culpable homicide not amounting to murder', a crime under Indian law carrying a maximum penalty of 10 years' imprisonment. An extradition request was made to US authorities but 'languished ... for three and a half years' with no official response. Anderson died in 2014 without ever standing trial, the failure to follow through potentially attributed to the economic imperative. Union Carbide was taken over by Dow Chemical and the site has never been cleaned up, despite being acknowledged as permeated with toxic chemicals: Judah Passow and Tim Edwards, 'The long, dark shadow of Bhopal ...', *Guardian*, 14 June 2023, The long, dark shadow of Bhopal: still waiting for justice, four decades on | Global development | The Guardian (accessed 30 December 2023).

⁸⁹ 'Bangladesh: Rana Plaza survivors 'extremely frustrated ...', *Business and Human Rights Resource Centre*, 24 April 2022, Bangladesh: Rana Plaza survivors 'extremely frustrated' as just one out of 594 witnesses testifies in murder case over collapse - Business & Human Rights Resource Centre (business-humanrights.org) (accessed 30 December 2023); Motoko Aizawa and Salil Tripathi, 'Beyond Rana Plaza ...' *Business and Human Rights Journal*, vol 1, issue 1, 2016, pp 145–151, Beyond Rana Plaza: Next Steps for the Global Garment Industry and Bangladeshi Manufacturers | Business and Human Rights Journal | Cambridge Core (accessed 30 December 2023).

(UK), Cato Fashions (US), The Children’s Place (US), El Corte Ingles (Spain), Joe Fresh (Loblaws, Canada), Kik (Germany), Mango (Spain), Matalan (UK), Primark (UK/Ireland) and Texman (Denmark) amongst them.⁹⁰ Contending that each ‘was a complicit participant in the creation of an environment ultimately leading to deaths and maiming of thousands of individuals’, the Clean Clothes Campaign cites International Labour Organisation (ILO) Convention 121 ‘showing that families of those affected by the Rana Plaza collapse are owed US \$30 million in compensation’. It took ‘hard campaigning’ for more than two years ‘to make brands take their responsibility’ by paying into a trust fund established for Rana victims or ‘increasing their contribution if their first payment was insufficient’.⁹¹

The non-criminal route of ‘self-regulation’ was adopted, European companies setting up the Bangladesh Accord and Pakistan Accord to establish and maintain production, manufacturing and supply standards consistent with workers’ human and industrial rights, some 113 brands signing on, 92 to the Pakistan Accord, 99 to the Bangladesh Accord.⁹² North America corporations took another approach, the Alliance for Bangladesh Workers Safety with a five year sunset clause expiring in 2018.⁹³ On the expiration date of 14 December the Alliance announced a new approach of ‘engaging a local company to monitor safety in the factories’ from which the companies ‘procure their products’, and advised that over its five years from 2013 the Alliance had seen ‘93 per cent of faults identified in [its affiliated] factories were corrected, while 428 factories completed 100 per cent remediation works’. In addition, 178 factories had been ‘terminated’ from the ‘compliant factory list’ through ‘their lack of progress in ensuring a safe working condition ...’⁹⁴

Self-regulation is ever subject to critique on the basis that the interests of (in this case) the companies establishing overview bodies will skew their operations

⁹⁰ ‘Rana Plaza’, *Clean Clothes Campaign*, Rana Plaza — Clean Clothes Campaign (accessed 30 December 2023).

⁹¹ ‘Rana Plaza’ (n90).

⁹² ‘Join brands promoting safe workplaces within their supply chains’, *International Accord for Health and Safety in the Textile and Garment Industry*, Signatories - International Accord (accessed 30 December 2023); ‘The International Safety Accord, *Clean Clothes Campaign*, Which brands have signed the safety Accord? — Clean Clothes Campaign (accessed 30 December 2023).

⁹³ ‘Alliance announces the end of its tenure’, *Business & Human Rights Resource Centre*, 14 December 2018, Bangladesh: Alliance for Bangladesh Workers Safety announces end of its tenure - Business & Human Rights Resource Centre (business-humanrights.org) (accessed 30 December 2023).

⁹⁴ ‘Alliance announces the end ...’ (n93).

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and outcomes toward self-interest. Critics of these post Rana Plaza initiatives class the Bangladesh and Pakistan Accords as the more effective, having involved unions in their operation.⁹⁵ Advocates for improvements in the sector emphasise that boycotts are not the way to address the problem. Confirming the issue alluded to earlier, of the need developing countries have for foreign business and investment, Motoko Aizawa and Salil Tripathi of the Business and Human Rights Resource Centre confirm that garment exports ‘will remain a critically important sector for Bangladesh for many more years’. Hence:⁹⁶

Any damage to the sector—through sanctions or consumer boycotts—will have catastrophic impact on some of the most vulnerable and poor workers in global supply chains. Bangladeshi union leaders have stressed that they are against boycotts. They want the international community to demand change from Bangladeshi businesses and government to improve local standards, and for international consumers to apply pressure to the brands. Access to finance—to increase factory capitalisation so necessary investments can be made—is of critical importance.

They propose alternative steps including:⁹⁷

- Developing new finance mechanisms through terms of trade that provide the industry with resources to overhaul, upgrade and rebuild factories;
- New rules governing international companies’ contracts to ensure that clothing and garment prices reflect the true cost;
- Continuing and expanding International Finance Corporation (IFC) (a member of the World Bank Group) financing arrangements of a full corporate guarantee for up to \$10 million lending to contract suppliers, including lifting the US \$10 million ceiling;
- G7 countries following through on the Zero Vision Fund, in collaboration with the ILO, to ensure sustainable supply chains, consistent with UN Guiding Principles on Business and Human Rights;
- Improved supervision of the garment sector, including all its parts as some 2,500–3,000 factories manufacturing primarily for the domestic market are not covered by any current initiatives;

⁹⁵ Aizawa and Tripathi (n89).

⁹⁶ Aizawa and Tripathi (n89).

⁹⁷ Aizawa and Tripathi (n89).

- Sufficient numbers of properly paid government inspectors to monitor all factories consistently and regularly so that amongst other matters more attention can be directed at supervisors overlooking infractions, ‘partly due to bribery’;
- Address the conflict of interest lying in close links between government and business that influence policies to the benefit of business;⁹⁸
- Initiatives such as the Accord and Alliance must incorporate local ownership and genuine local participation, ensuring ‘a more equitable relationship’ with local industry, rather than ‘being perceived as paternalistic foreign intrusions’;
- Recognise that garment industry problems go beyond factory safety and wages to include general health and safety standards, hours of work, sexual harassment, violence against unions, and so on;
- Reorientate unions to remove the ‘patron–client’ relationship between union leaders and ruling elite, and ensuring workers’ rights to union membership and organisation;
- Introduce multiple funding mechanisms, public and private, to ‘generate resources to overhaul the Bangladeshi garment sector’, ensuring ‘due diligence on financing structure, risk allocation, and identity of financial intermediaries’;
- Consideration of innovative solutions, including Mohammed Yunus’ proposed ‘T-shirt tax’ being a 50c charge on every piece of garment exported from Bangladesh, creating a welfare trust for workers.

‘First world’ governments need to address labour law breaches where ‘first world’ corporations are complicit, through extraterritorial prosecution or pursuit under civil law remedies applied extraterritorially. EU, UK, US and other ‘first world’ corporations taking advantage of the failure of factories manufacturing or producing their goods to adhere to health and safety, minimum pay and other effective industrial conditions should be subject to financial or other penalties under existing provisions or legislation specifically directed at sanctioning this conduct. Already the UK Parliament has extended some consideration to this, the Environmental Audit Committee reporting on the national clothing industry.

⁹⁸ The authors cite a report confirming ‘more than thirty of Bangladesh’s parliamentarians from major parties directly own garment factories’ and one estimate is that the number of parliamentarians ‘linked with the industry may be 50 per cent’: John Chalmers, ‘Special Report: How Textile Kings Weave a Hold ...’, *Reuters*, 3 May 2013, Special Report: How textile kings weave a hold on Bangladesh | Reuters (accessed 30 December 2023).

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The 19 February 2019 Report *Fixing Fashion: Clothing Consumption and Sustainability*.⁹⁹

The Report places emphasis on the negative environmental impact of fast fashion, with recommendations principally directed towards measures incorporating incentives aimed at ending the consumerism driving the industry. Amongst others, the Committee recommended making fashion retailers ‘take responsibility for the waste they create and reward companies [taking] positive action to reduce waste’, a proposal being a one penny charge per garment on producers which would ‘raise £35 million to invest in better clothing collection and sorting in the UK’. This did not, however, go further to address responsibility for waste created by sourcing, producing and manufacturing abroad. Nevertheless, in concluding that self-regulation through ‘voluntary corporate social responsibility initiatives’ has ‘failed significantly to improve pay and working conditions or reduce waste’, the Committee recommended that the government should ‘change the law to require companies to perform due diligence checks across their supply chains’.¹⁰⁰

In addition, the Modern Slavery Act 2015 and Companies Act 2006 provide some focus for an approach incorporating both ‘at home and abroad’ measures. Penalties are called upon for those companies who fail to comply with a proposed government requirement that retailers ‘release a modern slavery statement’, with the Companies Act being ‘updated’ to include ‘explicit reference to “modern slavery” and “supply chains”’ with annual reports required to include a statement of their ‘approach to human rights in [their] supply chain’. The Corporate Governance Code of the Financial Reporting Council (FRC) and the UK Stewardship Code, together with the listing rules of the Financial Conduct Authority (FCA) are proposed to be amended to ‘require modern slavery disclosures on a comply or explain basis by 2022’ and, if this is ‘not possible’ then a law consistent with the French Corporate Duty of Vigilance Law 2017 ‘should be considered’.¹⁰¹

⁹⁹ House of Commons Environmental Audit Committee, *Fixing Fashion: Clothing Consumption and Sustainability – Fashion: it shouldn’t cost the earth*, 19 February 2019, HC 1952, Sustainability of the fashion industry (parliament.uk) (accessed 30 December 2023); ‘Executive Summary’, Sustainability of the fashion industry (parliament.uk) (accessed 30 December 2023).

¹⁰⁰ ‘Executive Summary’, pp 3 (n99).

¹⁰¹ ‘The environmental cost of our clothes’, *Sustainable Fashion – Report Launch*, Fixing fashion: clothing consumption and sustainability - Report Summary - Environmental Audit Committee (parliament.uk) (accessed 30 December 2023).

The French law requires large French companies (more than 5000 employees ‘in the company’s direct or indirect French-based subsidiaries and with more than 10,000 employees if including direct and indirect subsidiaries globally) to publish an annual ‘vigilance plan’. The vigilance plan ‘must establish effective measures to identify risks and prevent severe impacts on human rights and the environment resulting from the company’s own activities’ and those of companies it controls ‘directly or indirectly’ and its ‘subcontractors and suppliers with which the company has an established commercial relationship, when the activities are linked to this relationship’. A court can impose penalties for non-compliance with an order to comply with vigilance obligations which may include ‘risk mapping, tailored actions to mitigate risks or prevent severe impacts, an alert mechanism’ and a monitoring system to gauge effectiveness of the measures implemented. Non-government organisations (NGOs) have a role in the process in that since the law’s adoption in 2017 NGOs have filed lawsuits and sent formal notices to companies alleged to be in breach.¹⁰²

The Committee’s approach might be regarded as somewhat timid and less decisive than it might be if effective action is to be taken with the urgency global warming and climate change required. Still, some comprehension of the need for intervention is an improvement. What of the export of environmentally damaging nuclear and chemical waste? The optimal position in all the circumstances would surely be cessation of this waste – which would require not only cessation of all and any nuclear and chemical use and testing, including (for example) cessation of nuclear-powered equipment including submarines and the making and marketing of chemical weapons.¹⁰³ At least those countries which have created and caused the environmental damage including toxicity of soil and sea should be obliged by international law to undertake effective clean ups, however many are required to reinstate the previous natural order or as near as humanly possible. Yet reparations for loss and damage has been the most thorny aspect of COP negotiations so it is difficult to see that ‘first world’ countries will take their responsibilities as seriously as they should, with concrete action, with regard to this aspect of environmental and biodiversity damage.

¹⁰² ‘France’s Corporate Duty of Vigilance Law’, *Business and Human Rights Resource Centre*, France’s Duty of Vigilance Law - Business & Human Rights Resource Centre (business-humanrights.org) (accessed 30 December 2023); ‘Frequently Asked Questions - French Corporate Duty of Vigilance Law’, *ECCJ European Coalition for Corporate Justice* french-corporate-duty-of-vigilance-law-faq.pdf (respect.international) (accessed 30 December 2023).

¹⁰³ AUKUS will be a feast for US venture capitalists (crikey.com.au) (accessed 18 January 2024).

CONCLUSION

The responsibility ‘first world’ nations have toward ‘developing’ countries in the current biodiversity, environment, climate change and global warming emergency is readily apparent. Exporting the damage today exists as a mirror image of the past extraction of wealth from developing countries through colonisation and enslavement, practices advantaging ‘first world’ to the detriment of the developing world. Ironically, this is leading to a situation where ‘first world’ countries now confront a growing pattern of displacement from the developing world, with the refugee crisis increasing through loss of land, food, clean water and the space to live. As Jake Bittle observes in *The Great Displacement – Climate Change and the Next American Migration*, climate victims and survivors, vulnerable to trafficking and of necessity being forced to move, are demanding a place of safety:¹⁰⁴

With every passing year, indeed with every new season, climate change forces more people out of their homes ... The levees are already breaking, the rivers are already running dry, the fire is already snaking through the forest. The world is already being remade, but its future shape is far from set in stone ...

The first world is reaping the consequences of exploitative practices imposed upon the developing world. Export of manufacturing and production, generating human rights abuses alongside the global climate effects, is compounded by the military industrial complex.¹⁰⁵ Defence and the munitions industry are leading contributors to global warming, climate change, and environmental degradation. The defence industry is more than a ££billion or \$\$trillion profit-earning business. Arms manufacture, then shipping arms and munitions abroad, contributes not only to the biodiversity and climate emergencies in and of themselves, but generates major destruction and displacement of populations – human, flora and

¹⁰⁴ Jake Bittle, *The Great Displacement – Climate Change and the Next American Migration* (Simon & Schuster, 2023), pp 285; see also Jocelyne A Scutt, ‘Displacement by Loss of Home and Country – Global Warming, Climate Change and Environmental Degradation as Drivers of Trafficking’, unpublished paper delivered to the Displacement and Victimization online seminar series, University of Western Sydney, CES – Centro de Estudos Sociais – UC, 1 October 2024.

¹⁰⁵ The term coined by then US President Dwight D Eisenhower, William D Hartung and Benjamin Freeman, ‘The Military Industrial Complex is More Powerful than Ever – The current war machine isn’t your grandfather’s MIC, not by a country mile’, *The Nation*, 9 May 2023, *The Military Industrial Complex Is More Powerful Than Ever | The Nation* (accessed 1 October 2024).

fauna. The waste left behind by war and devastation promoted by production devoted to defence and munitions is mirrored by waste from ‘peaceful’ use of nuclear power, with budgets devoted in terms that some describe as obscene, taking pre-eminence over the provision of even minimally comfortable lives for their populations.¹⁰⁶

Yet matters are not standing still. The legal system, domestic and international, is being employed to ensure redress is possible or at least that the powerful countries driving climate change and global warming are reminded that they must live up to existing obligations and take action to combat their contribution. One of the most recent cases in the international arena concluded that even existing obligations are insufficient. In 2023, under the Convention on the Law of the Sea, Niue, Palau, St Lucia, Vanuatu, Saint Vincent and the Grenadines, Saint Kitts and Nevis, and The Bahamas brought a claim in the UN International Tribunal for the Law of the Sea (ITLOS). The dispute lay in the pollution of the ocean promoting rising sea levels drowning the islands, cutting into landmass and despoiling remaining land, and most importantly damaging or destroying sea and sea-life through emissions, pollution, environmental degradation, the narrowing of biodiversity and industrialisation generating climate change and global warming, and interfering with oceans and oceanic life.

On 21 May 2024 under CLOS, ITLOS delivered its advisory opinion that nation states are obligated to ‘protect the marine environment from climate change impacts and ocean acidification’, observing:¹⁰⁷

- greenhouse gas emissions are a ‘form of marine pollution’;
- the Paris Agreement is inadequate to advance island nation states’ rights;
- ‘first world’ countries must institute better action to remedy the wrong and to prevent further degradation of sea and land;
- ‘first world’ countries have a duty to institute mitigation measures; and
- ‘first world’ countries have a duty to address transboundary pollution ...

¹⁰⁶ Hartung and Freeman (n105).

¹⁰⁷ International Tribunal for the Law of the Sea (ITLOS), Year 2024, 21 May 2024, REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE COMMISSION OF SMALL ISLAND STATES ON CLIMATE CHANGE AND INTERNATIONAL LAW (List of Cases No 31), Advisory Opinion, C31_Adv_Op_21.05.2024_orig.pdf (accessed 1 October 2024).

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Domestically, governments are learning that health damage and risk is an issue not only for youth,¹⁰⁸ but for the elderly, too. Hence on 9 April 2024 the European Court of Human Rights (ECtHR) upheld a claim by older women from Switzerland that their country was in breach of Article 6 (§ 1) and Article 8 of the European Convention on Human Rights (ECHR). The ECtHR determined that Article 8 ‘encompasses a right to effective protection by the State authorities from the serious adverse effects of climate change on lives, health, well-being and quality of life’. Switzerland had ‘failed to meet its past GHG emission reduction targets’¹⁰⁹ and was in breach of its ‘positive obligations’ under the ECHR:¹¹⁰

... concerning climate change, with critical gaps in establishing a relevant domestic regulatory framework, including through a carbon budget or national GHG emissions limitations.

Bittle concludes that the next century ‘may usher us into a brutal and unpredictable world, a world in which only the wealthiest and most privileged can protect themselves from dispossession’. So far, regrettably, privilege and wealth remain in prime position – though legal action is providing some hope. This is consistent with the second string to Bittle’s conclusion, when he adds, ‘it may usher us into a fairer world – a world where one’s home may not be impregnable, but where one’s right to shelter is guaranteed’.¹¹¹ Assuredly, this will not simply ‘just happen’. People are committed to acting. Street activism is prominent in the fight to gain climate equilibrium, and popular action by environmental organisations and litigants who see themselves as ‘ordinary’, ‘everyday’ individuals

¹⁰⁸ Australia - Minister for the Environment v Sharma [2022] FCAFC 35 (fedcourt.gov.au) (accessed 25 September 2024); US - Juliana v United States - Climate Change Litigation (climatecasechart.com) (accessed 25 September 2024); Held v State - Climate Change Litigation (climatecasechart.com) (accessed 25 September 2024)(Montana); The Netherlands - Urgenda Foundation v State of the Netherlands - Climate Change Litigation (climatecasechart.com) (accessed 25 September 2024).

¹⁰⁹ GHG emissions targets = Greenhouse Gas emissions targets: Corporate Value Chain (Scope 3) Standard | GHG Protocol (accessed 25 September 2024).

¹¹⁰ *Klima Seniorinnen v Switzerland (ECtHR)*, <https://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/> (accessed 25 September 2024); *KlimaSeniorinnen v Switzerland (ECtHR)* - Climate Change Litigation (climatecasechart.com) (accessed 25 September 2024); *Verein KlimaSeniorinnen Schweiz and Others v Switzerland (relinquishment)* (accessed 25 September 2024):

¹¹¹ Bittle (n104), pp 285.

seeking a healthier and better Earth, building on the activism of the 1970s,¹¹² is becoming more and more visible. With this visibility comes repressive action by governments¹¹³ and, ironically, by courts effecting harsh gaol sentences on demonstrators or would-be demonstrators (by way of conspiracy charges).¹¹⁴ This confirms that the voice of the people is having an impact, yet alone may not effect the changes necessary.

Bittle's final words – that 'both worlds are possible' and there remains time 'to choose between them'¹¹⁵ – will result in the fairer world only if 'first world' countries accept their responsibility for historical and present exploitation of their advantaged position in a world replete with inequality and inequity.

¹¹² See for example Meredith Burgmann, Verity Burgmann, 'The Green Bans Movement', *State Library of New South Wales | The Dictionary of Sydney*, 2011, Green Bans movement | The Dictionary of Sydney (accessed 1 September 2024); First green bans | National Museum of Australia (accessed 1 September 2024); The History of Earth Day - Earth Day (accessed 1 September 2024); Earth Day, the Largest Environmental Movement in History • Florida Wildlife Federation (accessed 1 September 2024); How the largest environmental movement in history was born - BBC Future (accessed 1 September 2024); Murder in the Pacific: the sinking of the Rainbow Warrior and what happened next - Greenpeace UK (accessed 1 September 2024); and see Helen Pringle, 'The voice of the trees in the law of armed conflict', this volume.

¹¹³ See for example amendments to the Public Order Act 1986 (UK), Public Order Act 1986 (accessed 25 September 2024); Public Order Act 2023 (accessed 25 September 2024); Public Order Act 2023 publications - Parliamentary Bills - UK Parliament (accessed 25 September 2024); Public Order Bill: factsheet - GOV.UK (accessed 25 September 2024).

¹¹⁴ UK climate activists jailed for at least four years over road blocks (accessed 25 September 2024); Five UK climate protesters jailed for conspiracy to block major road | Reuters (accessed 25 September 2024); In the UK, a dangerous escalation in the criminalization of climate protests - Bulletin of the Atomic Scientists (accessed 25 September 2024); European governments are using 'harsh, overly broad' laws to silence climate protesters (accessed 25 September 2024).

¹¹⁵ Bittle (n104), pp 285.

