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Customs Amendment (Banning Goods Produced By Uyghur Forced Labour) Bill 2020

Submission to:
Senate Standing Committee on Foreign Affairs Defence and Trade
Legislation Committee
February 2021

From:
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A. PREFACE

On 4 February 2020 (Australian time) there were reports on BBC News of serious human rights abuses of Uyghur / Turkic peoples in China. These reports go well beyond the reports of forced labour and forced re-education that were expressed in the report of the Australian Strategic Policy Institute (ASPI) entitled 'Uyghurs for Sale'.¹

To address the BBC reports would require a commission of inquiry with international standing, such as the 2014 Kirby report on North Korea (DPRK)² or the 1998 ILO report on Myanmar³. Such inquiries rely upon an international consensus to apply particular norms. The BBC reports refer to alleged breaches of well understood international norms, but there is no sign at the time of writing that a relevant body (such as the Security Council) is prepared to establish a Commission at this time.

This Submission does not address the BBC reports aired on 4 February.

- It responds to the Customs Amendment (Banning Goods Produced by Uyghur Forced Labour) Bill 2020.
- It identifies two sets of norms that could provide grist for diplomatic initiatives to build consensus among Australia's trading partners regarding forced labour, servitude and slavery in the Indo-Asia-Pacific region.
- These norms are to be found in the *Abolition of Forced Labour Convention 1957* and the slavery conventions.

In responding to the Bill, Slavery Links Australia Inc. draws the Senate's attention to actions that could be taken within Australia to address forced labour, servitude and slavery, by activating existing laws, structures and policies; and encourages the Committee to ask the Attorney General to advise on these.

To this end, the Submission makes 8 recommendations for a principled approach to forced labour, servitude and slavery in the Indo-Asia-Pacific region (see the Text Box over the page).

¹ Vicky Xiuzhong Xu (2020) Uyghurs for sale. 'Re-education', forced labour and surveillance beyond Xinjiang. International Cyber Policy Centre. ASPI Policy Brief. Report No. 26/2020. With Danielle Cave, Dr James Leibold, Kelsey Munro, Nathan Ruser

² United Nations Human Rights Council (2014) Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea, Twenty-fifth session. Agenda item 4. Human rights situations that require the Council's attention. A.HRC.25.63

³ International Labour Organization (1998) Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29). International Labour Organization, Geneva, 2 July 1998 Go to: [https://www.ilo.org/public/libdoc/ilo/P/09604/09604\(1998-81-serie-B-special-suppl\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09604/09604(1998-81-serie-B-special-suppl).pdf)

B. INTRODUCTION

Slavery Links Australia Inc. thanks the Senate Standing Committee on Foreign Affairs, Defence and Trade for its invitation to make a submission in relation to the Customs Amendment (Banning Goods Produced by Uyghur Forced Labour) Bill 2020 (the Bill).⁴

Slavery Links asks to give evidence in person if the Committee can arrange that, preferably in Melbourne.

In summary: this Submission seeks a principled approach to forced labour, servitude and slavery in the Indo-Asia-Pacific region. We encourage the Senate to build on and utilise existing laws and international obligations and apply these to our trading partners, trade agreements and importers, equally, including:

- Make freedom from slavery eligible for Parliamentary scrutiny (by being a 'core' human right)
- Could the law on 'taint' recover 'proceeds of crime' from entities who profit from forced labour?
- Strengthen approvals processes and skills for prosecution of slavery offences in Australia
- Urge the appointment of an Anti-Slavery Commissioner under the *Modern Slavery Act 2018* (Cth)
- Encourage all trading partners to ratify the *Abolition of Forced Labour Convention 1957*
- Add a 'Chapter' re labour rights and obligations into all Free Trade Agreements
- Add slavery to the responsibilities of the Ambassador for People Smuggling and Human Trafficking
- Develop a framework for the Indo-Asia-Pacific region that will value human rights alongside other activities, with the Helsinki Accords / OSCE that brought benefit to Europe as one possible model.

These action points start at the most local – Parliamentary scrutiny – through actions that will utilise or strengthen existing legislation or processes ('taint', prosecutions, a Commissioner) and culminate in actions to strengthen relations with our trading partners and neighbours in the Indo-Asia-Pacific region.

We do not agree with singling out Communist China while letting other trading partners off the hook.

For example Malaysia and Singapore each ratified and then denounced the *Abolition of Forced Labour Convention 1957*. These democracies each made a deliberate and overt decision to allow the possibility of forced labour in their social and economic systems. The effect of these decisions would have been to depress wages, hide the costs of human rights breaches and make Malaysia and Singapore appear to be relatively more competitive. In Australia, by comparison, the costs and benefits of human rights are made explicit and brought to account in an obvious way. Australia needs a just and level playing field.

The charts over the page illustrate the consequences for Australia of trading partners not being compliant.

An important step in Australia's emerging anti-slavery story will be to develop a framework for the Indo-Asia-Pacific region that will encourage all countries to value human rights alongside other activities.

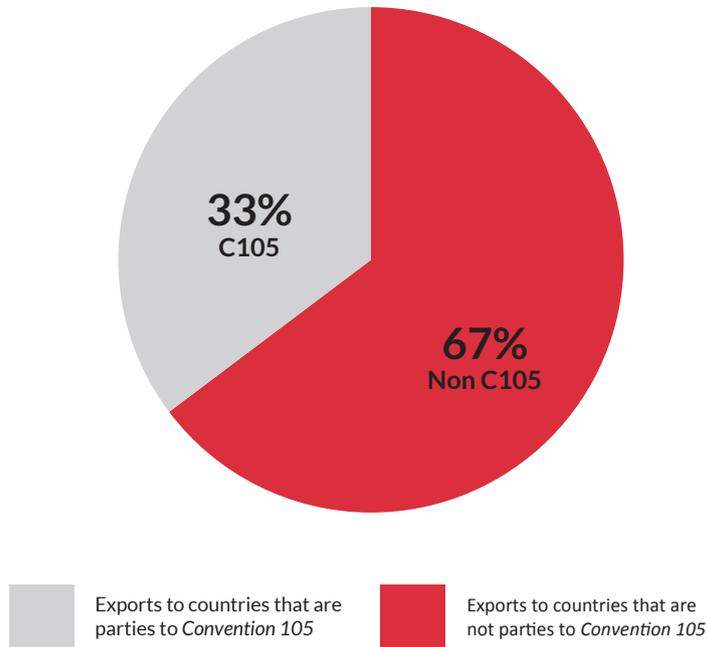
⁴ Refer to the PARLINFO page at:

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s1284

Australia's merchandise trade with countries that are / are not parties
to *Convention No 105 (Abolition of Forced Labour 1957)*

Merchandise Exports 2013-2014

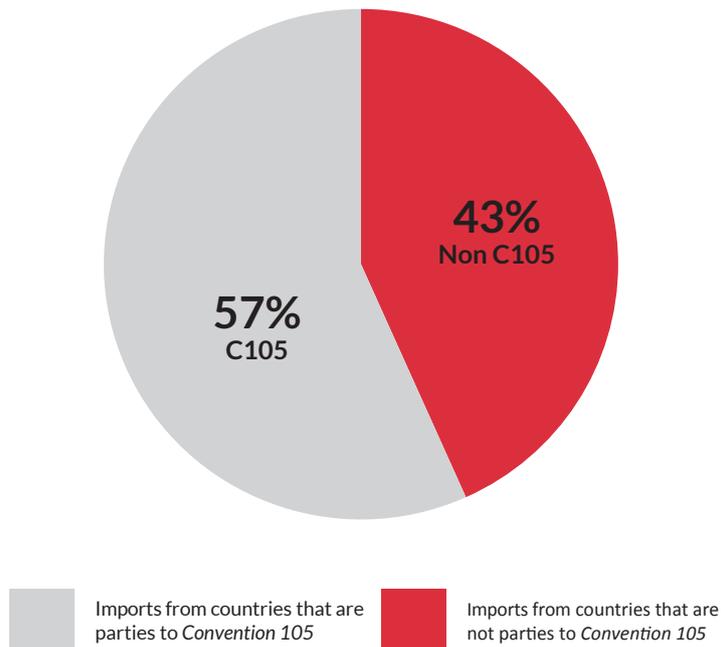
(\$272,877 million. Source ABS Table 5368014a)



Australia's merchandise trade with countries that are / are not parties
to *Convention No 105 (Abolition of Forced Labour 1957)*

Merchandise Imports 2013-2014

(\$251,604 million. Source ABS Table 5368014b)



C. WHO IS SLAVERY LINKS AUSTRALIA?

Slavery Links is a charity, incorporated in Victoria as a community association, whose members began work in 2005. Members and Directors work *pro bono* on slavery and slavery-like practices, which are strictly defined. We have been privileged to assist ten Parliamentary Inquiries.⁵ This Inquiry refers to a private Senator's Bill. Slavery Links was privileged to assist another private Senator's Bill, the Fair Trade (Workers' Rights) Bill 2013 which was also considered by the Senate Foreign Affairs, Defence and Trade Committee. We thank the Senate for its interest and engagement with slavery over a decade or more.⁶ We encourage the Senate to build on its past considerations of forced labour, servitude and slavery (see Note 6) when considering the present Bill. Slavery Links is prepared to assist, if asked.

D. FORCED LABOUR IN THE INDO-ASIA-PACIFIC REGION

In 2014 Slavery Links gave a public address in Adelaide which illustrated that Australia is exposed to forced labour, servitude and slavery through trade. An extract from the address is at Attachment 1.

There are two forced labour conventions, made by the International Labour Organisation (ILO, an arm of the United Nations). One, made in 1930, defined the problem. The second, made in 1957, re-defined the action to be taken. To summarise Attachment 1 (which refers to trade data and treaty as at 2013-14):

- Most countries have ratified the conventions – 177 and 174 countries respectively.
- There are gaps, however. Some of Australia's trading partners had not ratified one or other forced labour convention. In 2013-14, six had ratified neither of the forced labour conventions.⁷

Countries that have ratified the *Forced Labour Convention 1930* are subject to enforcement powers. Myanmar found this in 1998, when its forced labour practices were investigated.⁸ A former Australian Judge, the Hon Dr Robyn Layton AO QC, was an investigator and co-author. The report and possibility of enforcement action were influential in opening the minds of the Myanmar regime to possible change.⁹

⁵ Refer to the 'Resources' Tab at <https://www.slaverylinks.org>

⁶ In addition to the Fair Trade (Workers' Rights) Bill 2013, the Senate has engaged Slavery Links Australia Inc. through the Legal and Constitutional Affairs Legislation Committee Inquiry re the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012; the Legal and Constitutional Affairs References Committee in 2018 re the practice of dowry and the incidence of dowry abuse in Australia; and the Legal and Constitutional Affairs Legislation Committee Inquiry re the Modern Slavery Bill 2018. The Senate has also engaged Slavery Links through Joint Committees, such as 2015 Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry re the human rights issues confronting women and girls in the Indian Ocean-Asia Pacific region; and the Parliamentary Joint Committee on Law Enforcement's Inquiry into human trafficking, 2016.

⁷ In 2013-14, six countries had ratified neither forced labour convention: Brunei; China; Korea; Marshall Is; Palau; Tuvalu.

⁸ International Labour Organisation (1998) Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), Geneva, 2 July. Go to: <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm>

⁹ Understanding between the Government of the Union of Myanmar and the International Labour Office concerning the appointment of an ILO Liaison Officer in Myanmar (2002). Go to:

http://www.ilo.org/yangon/info/meetingdocs/WCMS_106130/lang--en/index.htm

Nationalist China was not a party to the *Forced Labour Convention 1930*. So its successor, Communist China, is not subject to investigation or enforcement action under the convention. Communist China has not ratified the *Abolition of Forced Labour Convention 1957*. Until it does ratify, it is not obliged to comply.

1. International norms

These gaps are relevant to the Senate's consideration of the Bill. Building consensus and commitment to international norms would be useful. Scolding China is likely not useful, any more than it would be useful to scold the United States of America for its non-ratification of the *Forced Labour Convention 1930*.

Recommendation 1

Australia should develop a framework for the Indo-Asia-Pacific region that will value human rights alongside other activities, with the Helsinki Accords / OSCE that brought benefit to Europe as one possible model.

2. The *Abolition of Forced Labour Convention 1957*

Australia should also build regional consensus and commitment regarding norms of the International Labour Organisation, as reflected in the *Abolition of Forced Labour Convention 1957*. This particular convention is relevant to the present Inquiry: States that are parties to the *Abolition of Forced Labour Convention 1957* agreed not to make use of any form of forced or compulsory labour:

- (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
- (b) as a method of mobilising and using labour for purposes of economic development;
- (c) as a means of labour discipline;
- (d) as a punishment for having participated in strikes;
- (e) as a means of racial, social, national or religious discrimination (underlines added)

Recommendation 2

Australia should encourage trading partners to ratify the *Abolition of Forced Labour Convention 1957*.¹⁰

3. The DFAT Ambassador

The Department of Foreign Affairs and Trade has an important part to play in this. Yet, for reasons that are not understood, the role of the relevant Ambassador has been circumscribed, limited to 'People Smuggling and Human Trafficking'. The Ambassador should address slavery, not just border control issues.

Recommendation 3

The role of the Ambassador for People Smuggling and Human Trafficking should be expanded to address slavery and to prevent forced labour from developing into conditions analogous to slavery.¹¹

¹⁰ The Convention will enter into force for Viet Nam on 14 July 2021. Japan, Lao PDR, Marshall Islands, Myanmar, Palau, Republic of Korea, Timor-Leste, Tonga, Tuvalu have not ratified. Malaysia and Singapore have denounced.

¹¹ The words 'conditions analogous to slavery' appear in the Preface to the *Slavery Convention 1926*

Recommendation 3 (continued)

The Committee should encourage the Department of Foreign Affairs and Trade (DFAT) to produce time series data and reports on trade exposure to forced labour, including reports on Australia's merchandise trade with countries that are / are not parties to Convention No 105 (*Abolition of Forced Labour 1957*).

4. Free Trade Agreements

There should be a 'labour' Chapter in each Free Trade Agreement that Australia enters into. This is not a new idea. In 2013, a private Senator's Bill proposed that course of action. Slavery Links' Submission to this Committee's Inquiry into the Fair Trade (Workers' Rights) Bill 2013 (Submission 12, page 2) noted:

Slavery Links supports the Purpose of the Bill

The Bill requires the Commonwealth, through the minister, to ensure that an amended or new trade agreement with a country includes a binding agreement for minimum standards about workers' rights in the other country's domestic law. The minimum standards are to be derived from international agreements which are listed in the Bill. In Slavery Links' submission the Bill would have at least three positive effects:

- A. It would assist Australia to meet its obligations to implement international agreements to which Australia is a signatory
- B. It would encourage Australia's trading partners to provide their workers with access to minimum standards regarding workers' rights
- C. It would support standards in Australia, to the benefit of Australian workers and business

Slavery Links respectfully requests the Committee to take it that this past submission¹² re the Fair Trade (Workers' Rights) Bill 2013) is also taken as a Submission to the present Inquiry.

Recommendation 4

There should be a 'labour' Chapter in each Free Trade Agreement that Australia enters into.

It is possible for Australia to act within our own laws and territory, to take responsibility for our supply chains and to eschew profits that can be made by exploiting vulnerable people overseas.

PART E of this Submission respectfully suggests that the Explanatory memorandum for the present Bill could be strengthened. If the memorandum could be aligned more closely with the relevant Conventions, Australian law and jurisprudence, it would likely assist the Committee in considering how to proceed with the Bill itself.

Necessarily, **PART E** is to do with anti-slavery law and its reach within Australia and beyond our shores. Where forced labour in overseas countries is concerned, **PART E** indicates that such reach may be limited.

For that reason, **PART E** considers how existing Australian law can be applied where Australian entities seek to profit from circumstances where forced labour, servitude and slavery have been employed.

¹² Submission 12 to the Senate Standing Committee on Foreign Affairs Defence and Trade's Inquiry into the Fair Trade (Workers' Rights) Bill 2013), in particular page 2 and page 3

E. THE BILL AND EXPLANATORY MEMORANDUM

5. Slavery in the Explanatory memorandum

We urge the Committee to encourage Senator Patrick to re-frame the Explanatory memorandum, to align it more closely with the relevant Conventions, Australian law and jurisprudence. Why?

The Explanatory memorandum for the Bill refers to the ICCPR,¹³ wherein the terms 'slavery' and 'forced labour' are mentioned but not defined.

- The term 'slavery' in the ICCPR can only be understood with reference to the slavery conventions. The Explanatory memorandum does refer to the slavery conventions, where slavery is defined. The slavery conventions do refer to 'forced labour' but do not define it. A copy of the most recent anti-slavery convention (the Supplementary Convention 1956) is at Attachment 2.
- Item 2 of the Explanatory memorandum does refer to 'the use of forced labour within the meaning of the *Criminal Code*'. Yet that meaning of 'forced labour' has limited extra-territorial effect (see below) and would not appear to be of use in referring to another country.
- The term 'forced labour' in the Explanatory memorandum could usefully refer to the ILO's¹⁴ *Abolition of Forced Labour Convention 1957* (see below). This would perhaps provide context for encouraging Communist China to accede to the Convention and to adopt ILO standards at work.
- To refer in the Bill and the memorandum to the *Abolition of Forced Labour Convention* could be an important contribution; and may possibly assist statutory interpretation if the Bill is enacted.¹⁵

6. Eliminate ambiguity

To construe a Bill about *forced labour*, the Explanatory memorandum refers to the *slavery* conventions. Without offering any criticism, Slavery Links submits that this ambiguity should be cleared up.

¹³ The *International Covenant on Civil and Political Rights, 1966*, ICCPR, Art 8 refers to slavery, the slave trade and servitude. However it is only with reference to the slavery conventions that these terms can be understood. Indeed the definition of slavery in Div 270 of the Commonwealth *Criminal Code* comes from the *Supplementary Convention 1956*. Arguably, a grasp of Australian law requires an appreciation of the *Supplementary Convention*.

¹⁴ International Labour Organisation, an arm of the United Nations.

¹⁵ Maxwell, Chris (2005) "Human Rights: A View from the Bench", Address to the Annual General Meeting of the Administrative law and Human Rights Section of the law Institute of Victoria by The Honourable Justice Chris Maxwell, President, Victorian Court of Appeal. Go to: http://assets.justice.vic.gov.au//supreme/resources/09d0bb49-97ce-4348-b912-733927e20314/speech05_humanrightsviewfrombench.pdf

'First, the provisions of international treaties are relevant to statutory interpretation. In the absence of a clear statement of intention to the contrary, a statute (Commonwealth or State) should be interpreted and applied, as far as its language permits, so that it conforms with Australia's obligations under a relevant treaty. Secondly, the provisions of an international convention to which Australia is a party – especially one which declares universal fundamental rights – may be used by the courts as a legitimate guide in developing the common law, that is, the law as it develops through decisions of the courts, as distinct from the law enacted by Parliament.'

The leading judgment in Tang's Case distinguished between slavery and other forms of exploitation. The High Court transcript notes (*R v Wei Tang* (2008) 237 CLR 1, Para 32) a need for care and precision:

'It is important not to debase the currency of language, or to banalise crimes against humanity, by giving slavery a meaning that extends beyond the limits set by the text, context, and purpose of the 1926 Slavery Convention. In particular it is important to recognise that harsh and exploitative conditions of labour do not of themselves amount to slavery. The term "slave" is sometimes used in a metaphorical sense to describe victims of such conditions, but that sense is not of present relevance.'

The definitions of slavery and forced labour are different. They are defined in different international conventions and (relevantly) different actions are possible under Australian law (see below).

7. Slavery law and jurisprudence

In Australian law, slavery is defined in Division 270 of the *Criminal Code Act 1995* (Cth). Australian jurisprudence re slavery can be found in Tang's Case, where the High Court affirmed the relevance of the two slavery conventions.¹⁶

- The essential conventions for work on slavery are the League of Nations' *Slavery Convention 1926* and the United Nations' *Supplementary Convention 1956*. The *Criminal Code's* definition of slavery refers to the *Supplementary Convention*.
- Other legislation (such as the *Modern Slavery Act 2018* and the Victorian *Charter of Human Rights and Responsibilities Act 2006*) also rests on the strict definition of slavery from these Conventions.

This point is fundamental. As noted in Point 3, the Explanatory memorandum does not refer to the *Abolition of Forced Labour Convention 1957* (but usefully could do so). As indicated above, the memorandum uses the term 'forced labour', while it refers to the *slavery* conventions. This would likely be taken as indicating the Bill should be construed in terms of the phenomenon of slavery.

8. Obligations *jus cogens* and *erga omnes*

Slavery involves a fundamental change of state, from free to unfree. That is why freedom from slavery is a non-negotiable legal norm (*jus cogens*) and an obligation owed to everyone by all (*erga omnes*).¹⁷

¹⁶ As to the Criminal Code, the leading Judgment in *R v Wei Tang* (2008) 237 CLR 1 at Para 21 remarks that:

The word "slave" in s 270.3(1)(a) is not defined. It takes its meaning from the definition of "slavery" in s 270.1. That definition, in turn, derives from, although it is not identical to, the definition of "slavery" in Art 1 of the International Convention to Suppress the Slave Trade and Slavery (1926) (the 1926 Slavery Convention). That definition was taken up in Art 7 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery (1956) (the 1956 Supplementary Convention), which dealt with institutions and practices similar to slavery "where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the [1926] Slavery Convention" (Art 1).

¹⁷ *Jus cogens; erga omnes*:

- Bales, Kevin and Robbins Peter T., (2001) "'No one shall be held in slavery or servitude": A critical analysis of international slavery agreements and concepts of slavery', *Human Rights Review*, 1 January 2001
- Bassiouni, M. Cherif (1997) *International Crimes: Jus Cogens And Obligatio Erga Omnes*, in *Law and Contemporary Problems*, Vol. 59: No. 4

In the sense that freedom from slavery is rooted in a fundamental and not negotiable legal norm (what the Romans might have called 'natural law'),¹⁸ the absolute right to freedom from slavery exists whether or not a country has ratified a slavery convention. Not every country has ratified the conventions of the International Labour Organisation on labour rights; but every country is obliged to suppress slavery.

9. Extra-territoriality: slavery

However, approaching forced labour through the lens of the slavery conventions is not appropriate.

- Slavery is a serious international crime and in some contexts a crime against humanity.¹⁹ Forced labour is a serious crime but does not meet the stringent tests that slavery satisfies.
- The *Criminal Code* grants Australia extended geographical (i.e. extra-territorial) jurisdiction (Category D) over a slavery offence.²⁰ This means that a slavery offence applies:
 - (a) whether or not the *conduct* constituting the alleged offence occurs in Australia; and
 - (b) whether or not a *result* of the conduct constituting the alleged offence occurs in Australia.

Slavery has this sort of extended geographical jurisdiction, forced labour does not (see Point 10 below).

10. Extra-territoriality: forced labour

The Explanatory memorandum for the Bill characterises the situation of Uyghurs in China as 'forced labour'.

- Whereas slavery offences have a broad extended geographical jurisdiction, forced labour does not.
- For slavery-like offences,²¹ such as forced labour, a more limited form of extended geographical jurisdiction (Category B) applies.²²
- Compared with a slavery offence, this 'B' jurisdiction requires a more direct connection with Australia for the offence and or its result.

Point 13 following considers how a more direct connection could be realised. Point 12 below considers a different sort of slavery-like offence – servitude – that seems to fit the alleged situation of Uyghurs.

¹⁸ Ernst Levy 'Natural Law In The Roman Period' in Nat Law Inst Proc Vol 2 (1) 1949, p 43-72:

'In fact, justice does not exist at all, if it does not come from nature or right reason. Consequently, that law is above space and time. It is alike at Rome and at Athens, a *ius gentium*, as he says, it rules the whole universe by its wisdom in command and prohibition. It is eternal and everlasting, hence unchangeable, so that neither senate nor people can relieve us from its obligations'. Levy, p 45-46. (where 'Nature is here the order inherent in conditions of life as the Romans saw it.', Levy, p 53)

¹⁹ Crimes against humanity: *R v Wei Tang* (2008) 237 CLR 1, Para 3, Para 24, Para 28

²⁰ Slavery offences are referred to in s 270.3 of the *Criminal Code*. Section 270.3A of the *Criminal Code* provides: Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against section 270.3.

²¹ Slavery-like: workplace offences (debt bondage, deceptive recruiting, forced labour and servitude) as well as forced marriage.

²² s 270.9 of the *Criminal Code* provides: Section 15.2 (extended geographical jurisdiction—category B) applies to a slavery-like offence Put loosely: the offence or the result of the conduct occurs (in effect) wholly or partly in Australia or on board an Australian aircraft or an Australian ship; or the offender is a citizen, a resident or an Australian body corporate.

11. The ASPI report

According to the Australian Strategic Policy Institute (ASPI), Uyghurs and other Turkic minorities in China have been subjected to an oppressive regime. Allegedly, entities that do business in Australia have been dealing with the factories to which Turkic people have been sent. The report ('Uyghurs for sale'²³) described forced labour in factories, but with some features in addition to forced labour, including:

- detention and forced re-education
- forced trans-shipment from home territory to factories elsewhere in China, and
- supervised living such as residence in a barracks.

12. Extra-territoriality: servitude

If proven, these extra features would meet the test for servitude (which is less serious than slavery but more serious than forced labour). The definition of servitude in the *Criminal Code* (s 270.4) is similar to forced labour but, in addition:

- (1)(b) the victim is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services.

Being subject to forced re-education, forced trans-shipment and supervised living would seem to meet the test for servitude.²⁴ However servitude is a slavery-like offence in the *Criminal Code*, and (as with forced labour) a limited form of extended geographical jurisdiction (Category B) would apply.

13. 'Taint' and 'proceeds of crime'

It remains to be seen whether the Committee will find that Uyghurs in China are subject to forced labour or servitude. Yet there are other examples of forced labour in the Indo-Asia-Pacific region (for example Myanmar in 1998) and these are good reasons for the Committee to ask the Attorney General to think through the general case of how 'taint' and 'proceeds of crime' could be applied to Australian entities that make a profit from forced labour, servitude or other slavery-like offences overseas.

Remember that 'slavery-like' offences fall into the 'B' category of extended jurisdiction.²⁵ Compared with slavery, the 'B' category requires a more direct connection with Australia for the offence and or its result.

²³ Vicky Xiuzhong Xu (2020) Uyghurs for sale. 'Re-education', forced labour and surveillance beyond Xinjiang. International Cyber Policy Centre. ASPI Policy Brief. Report No. 26/2020. With Danielle Cave, Dr James Leibold, Kelsey Munro, Nathan Ruser

²⁴ However there is a complication. Servitude in the *Criminal Code* is defined differently from the *Supplementary Convention 1956*, where Article 7 (b) provides: (b) "A person of servile status" means a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention. The practices in Article 1 are child trading, debt bondage, forced marriage and serfdom.

²⁵ To paraphrase s. 270.3: it is an offence, with intent, to reduce a person to slavery ... through a financial transaction. The Code is quite clear regarding financial transactions that engage with slavery or the slave trade. This is not so for forced labour.

There is ambiguity in the Explanatory memorandum and apparent uncertainty regarding the law.

Slavery Links submits it would be useful for the Committee to seek expert advice from the Attorney General regarding Australian law re 'taint' and 'proceeds of crime' and how this could be applied to forced labour or servitude that occurs overseas. The Committee would need advice which includes:

- How 'taint' and 'proceeds of crime' could be applied to Companies owned and registered in Australia as well as overseas entities such as those named in the ASPI report 'Uyghurs for Sale'.
- How to calculate 'proceeds' when the cost of the goods manufactured overseas under forced labour, servitude or other slavery-like conditions (compared to goods manufactured under appropriate conditions in other jurisdictions) may not readily be available or may not even exist.

Recommendation 5

Investigate how the law on 'taint' could be used to recover 'proceeds of crime' from entities who profit from forced labour or servitude that occurs overseas.

14. Parliamentary scrutiny

The Explanatory memorandum for the Bill included a:

'Statement of Compatibility with Human Rights, Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011' (the Scrutiny Act).

The Scrutiny Act lists so-called 'core' human rights treaties, but the slavery convention is not one of them. In 2016 Slavery Links developed a case²⁶ for adding slavery to the list of 'core' human rights treaties that are eligible for the process of Parliamentary Scrutiny.²⁷ The booklet identified benefits for:

- Informing Parliamentarians about how obscure forms of slavery can persist in a free society
- Strengthening the role of the Australian Human Rights Commission with respect to development of curricula and other roles (such as Intervener)
- Signaling to legal academics and researchers that slavery should be on the curriculum.

Slavery Links' booklet formed part of its submission to the Joint Standing Committee's²⁸ 2017 Inquiry into a Possible Modern Slavery Bill for Australia. The Joint Inquiry took up the case in favour of scrutiny. It recommended that slavery be made eligible for the process of Parliamentary scrutiny.

Recommendation 33 of the Joint Standing Committee's report noted as follows:

7.168 The Committee recommends that the Australian Government add the *1956 Supplementary Convention on the Abolition of Slavery* and other related international

²⁶ Roscoe Howell (2015) 'Adding slavery to the list of treaties to be considered by the Parliamentary Joint Committee on Human Rights', Briefing Papers on Slavery (Slavery Links Australia Inc.)

²⁷ The action to be taken is simple and straightforward: to amend Section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, by adding to the list of treaties:

(h) *The Supplementary Convention, 1956* [ATS No. 3]

²⁸ Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT)

instruments addressing modern slavery to the list of core human rights treaties considered by the Parliamentary Joint Committee on Human Rights, by amending the Human Rights (Parliamentary Scrutiny) Act 2011.²⁹

Slavery Links encourages the Senate Foreign Affairs, Defence and Trade Committee to continue the work of the Joint Standing Committee in 2017, and to recommend that the *Supplementary Convention 1956* be made eligible for Parliamentary Scrutiny. A copy of the Supplementary Convention is at Appendix 1.

Recommendation 6

Make freedom from slavery eligible for Parliamentary scrutiny (by being a 'core' human right). Amend Section 3 of the Human Rights (Parliamentary Scrutiny) Act to add:

(h) the *Supplementary Convention 1956*

15. The hierarchy of slavery offences

Australian criminal law recognises that vulnerable people can be trapped and sucked into ever-more-serious forms of over-control. Division 270 of the *Criminal Code* creates a hierarchy of slavery offences, from debt bondage and deceptive recruiting at the lower end, through forced labour to the more serious offences of servitude and slavery. Slavery Links' chart illustrating the hierarchy of slavery offences was used by the 2017 Inquiry into a Possible Modern Slavery Act for Australia.³⁰ It can be found on Slavery Links web site (www.slaverylinks.org), together with a summary of Australian jurisprudence.

The Chart may be of assistance to the present Committee and in considering whether and how to strengthen the Explanatory memorandum, or the law. A 'creative commons' copy of the chart will be offered to the present Inquiry.

16. An Anti-Slavery Commissioner

In the 2017 Inquiry, the need for information about slavery and the law was recognised and a solution offered – an independent statutory officer, known as an Anti-Slavery Commissioner. The Joint Standing Committee Inquiry into a Possible Modern Slavery Act for Australia proposed:

' Recommendation of the Joint Standing Committee Inquiry

4.59 The Committee recommends that the Australian Government establish an Independent Anti-Slavery Commissioner under the proposed Modern Slavery Act with powers and resources to undertake the following functions ...'

The Commissioner, as recommended by the Joint Standing Committee, would be a statutory officer,

²⁹ Parliament of the Commonwealth of Australia (2017) Hidden in Plain Sight. An inquiry into establishing a Modern Slavery Act in Australia, by the Foreign Aid Sub-Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT), December 2017, page xiv

³⁰ Parliament of the Commonwealth of Australia (2017) Hidden in Plain Sight. An inquiry into establishing a Modern Slavery Act in Australia, by the Foreign Aid Sub-Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT), December 2017. Figure 3.1: The hierarchy of slavery offences in the Criminal Code, page 39

responsible for education, guidance and awareness training; improving coordination between criminal justice agencies in identifying and prosecuting modern slavery cases; providing independent oversight of the response to combat modern slavery across all sectors, and identifying gaps and solutions.³¹

The Senate Legal and Constitutional Affairs Legislation Committee recommended likewise:

3.99 The committee recommends that an independent statutory officer be appointed to support the operation of the Modern Slavery Act and be charged with the duties detailed in recommendation 6 of the Joint Standing Committee on Foreign Affairs Defence and Trade..³²

Recommendation 7

Strengthen approvals processes and skills for prosecution of slavery and slavery-like offences in Australia.

Recommendation 8

We respectfully request the Committee to recommend that an Anti-Slavery Commissioner be appointed.

F. CONCLUDING SUMMARY

Slavery Links asks to give evidence in person if the Committee can arrange that, preferably in Melbourne.

In summary: this Submission seeks a principled approach to forced labour, servitude and slavery in the Indo-Asia-Pacific region. We encourage the Senate to build on and utilise existing laws and international obligations and apply these to our trading partners, trade agreements and importers, equally, including:

- Make freedom from slavery eligible for Parliamentary scrutiny (by being a 'core' human right)
- Could the law on 'taint' recover 'proceeds of crime' from entities who profit from forced labour?
- Strengthen approvals processes and skills for prosecution of slavery offences in Australia
- Urge the appointment of an Anti-Slavery Commissioner under the *Modern Slavery Act 2018* (Cth)
- Encourage all trading partners to ratify the *Abolition of Forced Labour Convention 1957*
- Add a 'Chapter' re labour rights and obligations into all Free Trade Agreements
- Add slavery to the responsibilities of the Ambassador for People Smuggling and Human Trafficking
- Develop a framework for the Indo-Asia-Pacific region that will value human rights alongside other activities, with the Helsinki Accords / OSCE that brought benefit to Europe as one possible model.

These action points start at the most local – Parliamentary scrutiny – through actions that will utilise or strengthen existing legislation or processes ('taint', prosecutions, a Commissioner) and culminate in actions to strengthen relations with our trading partners and neighbours in the Indo-Asia-Pacific region.

An important step in Australia's emerging anti-slavery story will be to develop a framework for the Indo-Asia-Pacific region that will encourage all countries to value human rights alongside other activities.

³¹ Hidden in Plain Sight report Op. Cit., pp xxxi-xxxii

³² Parliament of the Commonwealth of Australia (2018) Modern Slavery Bill 2018 [Provisions]. inquiry by the Senate Legal and Constitutional Affairs Legislation Committee

**Attachments to Slavery Links' Submission to the Senate Inquiry into the
Customs Amendment (Banning Goods Produced By Uyghur Forced Labour) Bill 2020**

Attachment 1

Extract from:

Are you wearing a slave? The International Day for the Abolition of Slavery

Roscoe Howell. Address delivered at the Bradley Forum, University of South Australia 3 December 2014

Attachment 2

The Supplementary Convention 1956

Attachment 1

Extract from:

Are you wearing a slave? The International Day for the Abolition of Slavery

Roscoe Howell. Address delivered at the Bradley Forum, University of South Australia 3 December 2014

15. Forced Labour in International Law

I will now talk about forced labour in international law. In 1930 the members of the International Labour Organisation made a Convention regarding compulsory or forced labour (see Note 10). Put simply, forced labour comprised work or service that was performed involuntarily or exacted under the menace of a penalty (for example, a punishment or through the loss of rights and privileges). Forced labour did not stop in 1930. To the contrary it persisted and new forms emerged in World War II. To counter these new forms members of the ILO agreed on further actions to be taken, in the 'Abolition of Forced Labour Convention, 1957' (see Note 11).

So, there are two forced labour conventions. One, made in 1930, defined the problem and the second, made in 1957, re-defined the action to be taken. Most countries have signed on to the conventions – 177 and 174 countries respectively. There are gaps, however. Some of Australia's trading partners have not signed one or other forced labour convention (see Chart 4 and Chart 5).

177 Members of the ILO have ratified the Forced Labour Convention, 1930 (No. 29). However eight have not. These eight countries have been listed in Chart 4:

Chart 4.

Eight Countries have not ratified Convention No. 29

Afghanistan
Brunei Darussalam
China
Korea, Republic of
Marshall Islands
Palau
Tuvalu
United States

Source:

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P113_10_INSTRUMENT_ID:312174:NO

Attachment 1

In 1957 the Forced Labour Convention was updated. (The nature of the update has been discussed below) 174 members of the ILO ratified the Abolition of Forced Labour Convention, 1957 (No. 105). However Thirteen Countries are not parties. These countries have been listed in Chart 5.

Chart 5

Thirteen Countries are not parties to Convention No. 105

Brunei Darussalam

China

Japan

Korea, Republic of

Lao People's Democratic Republic

Marshall Islands

Myanmar

Palau

Timor-Leste

Tuvalu

Viet Nam

Malaysia: Signed 13 Oct 1958. Denounced on 10 Jan 1990

Singapore: Signed 25 Oct 1965. Denounced on 19 Apr 1979

Source:

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTUMENT_ID:312250:NO

16. How have Australia's trading partners considered forced labour?

China and Korea have signed neither Forced Labour Convention. China and Korea are two among Australia's trading partners.

Japan and Vietnam – also Australia's trading partners – signed the 1930 convention but have not signed the 1957 Convention. Malaysia and Singapore did sign the 1957 Convention but later withdrew – the formal term is they denounced it.

That leaves workers potentially exposed in China, Japan, Korea, Malaysia, Singapore Vietnam and the other countries listed in Chart 5. It means that imports from those countries are potentially contaminated by forcing.

Attachment 1

17. What specific protections have workers missed out on?

What sort of protection would the workers have if their countries had signed the 1957 Convention? States who sign the Convention undertake not to use forced or compulsory labour as a means of political coercion, for labour discipline, to punish workers who strike, or as a means of racial, religious or other discrimination (Chart 6).

In other words, the 1957 convention offers protection to the very groups who are vulnerable to being harvested as slaves – outcastes, or people from the wrong tribe or the wrong religion or the wrong skin colour women or people with a disability – the Convention calls it ‘social discrimination’.

Chart 6

Extract from the Abolition of Forced Labour Convention, 1957 (No. 105)

Article 1

Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour--

- (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
- (b) as a method of mobilising and using labour for purposes of economic development;
- (c) as a means of labour discipline;
- (d) as a punishment for having participated in strikes;
- (e) as a means of racial, social, national or religious discrimination.

Source:

http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105

Attachment 1

18. How significant is Australia's trade with non-ratifying countries?

Chart 5 indicated that thirteen countries have not signed the Abolition of Forced Labour Convention 1957 (No 105). These countries include China, Japan and Korea, which are among Australia's major trading partners, in terms of the value of merchandise imports and exports (see Table 1 in the Appendix and the summary illustration in Chart 7).

Let us ask therefore, where does Australia do most of its business: with countries that have signed the 1957 Convention or with countries that have not signed? Chart 7 illustrates this.

- Sixty seven point five per cent of Australia's exports are to countries that are not parties to Convention 105. This exposes Australian businesses to risk of supplying firms that engage in forced labour.
- Forty three per cent of Australia's imports come from countries that are not parties to Convention 105, countries that do not protect workers from forced labour. This exposes Australia's supply chains to risk of contamination (taint)

Attachment 2

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956

Entry into force: 30 April 1957, in accordance with article 13

Preamble

The States Parties to the present Convention ,

Considering that freedom is the birthright of every human being,

Mindful that the peoples of the United Nations reaffirmed in the Charter their faith in the dignity and worth of the human person,

Considering that the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations as a common standard of achievement for all peoples and all nations, states that no one shall be held in slavery or servitude and that slavery and the slave trade shall be prohibited in all their forms,

Recognizing that, since the conclusion of the Slavery Convention signed at Geneva on 25 September 1926, which was designed to secure the abolition of slavery and of the slave trade, further progress has been made towards this end,

Having regard to the Forced Labour Convention of 1930 and to subsequent action by the International Labour Organisation in regard to forced or compulsory labour,

Being aware , however, that slavery, the slave trade and institutions and practices similar to slavery have not yet been eliminated in all parts of the world,

Having decided , therefore, that the Convention of 1926, which remains operative, should now be augmented by the conclusion of a supplementary convention designed to intensify national as well as international efforts towards the abolition of slavery, the slave trade and institutions and practices similar to slavery,

Have agreed as follows:

Section I. - Institutions and practices similar to slavery

Article 1

Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926:

(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

Attachment 2

(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

Article 2

With a view to bringing to an end the institutions and practices mentioned in article 1 (c) of this Convention, the States Parties undertake to prescribe, where appropriate, suitable minimum ages of marriage, to encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages.

Section II. - The slave trade

Article 3

1. The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to very severe penalties.

2. (a) The States Parties shall take all effective measures to prevent ships and aircraft authorized to fly their flags from conveying slaves and to punish persons guilty of such acts or of using national flags for that purpose.

(b) The States Parties shall take all effective measures to ensure that their ports, airfields and coasts are not used for the conveyance of slaves.

3. The States Parties to this Convention shall exchange information in order to ensure the practical co-ordination of the measures taken by them in combating the slave trade and shall inform each other of every case of the slave trade, and of every attempt to commit this criminal offence, which comes to their notice.

Article 4

Any slave who takes refuge on board any vessel of a State Party to this Convention shall ipso facto be free.

Section III. - Slavery and institutions and practices similar to slavery

Article 5

In a country where the abolition or abandonment of slavery, or of the institutions or practices mentioned in article 1 of this Convention, is not yet complete, the act of mutilating, branding or otherwise marking a slave or a person of servile status in order to indicate his status, or as a punishment, or for any other reason, or of being accessory thereto, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to punishment.

Article 6

1. The act of enslaving another person or of inducing another person to give himself or a person dependent upon him into slavery, or of attempting these acts, or being accessory thereto, or being a party to a conspiracy to accomplish any such acts, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to punishment.

2. Subject to the provisions of the introductory paragraph of article 1 of this Convention, the provisions of paragraph 1 of the present article shall also apply to the act of inducing another person to place himself or a person dependent upon him into the servile status resulting from any of the institutions or practices mentioned in article 1, to any attempt to perform such acts, to being accessory thereto, and to being a party to a conspiracy to accomplish any such acts.

Section IV. - Definitions

Article 7

For the purposes of the present Convention:

Attachment 2

(a) "Slavery" means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and "slave" means a person in such condition or status;

(b) "A person of servile status" means a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention;

(c) "Slave trade" means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves by whatever means of conveyance.

Section V. - Cooperation between States Parties and communication of information

Article 8

1. The States Parties to this Convention undertake to co-operate with each other and with the United Nations to give effect to the foregoing provisions.

2. The Parties undertake to communicate to the Secretary-General of the United Nations copies of any laws, regulations and administrative measures enacted or put into effect to implement the provisions of this Convention.

3. The Secretary-General shall communicate the information received under paragraph 2 of this article to the other Parties and to the Economic and Social Council as part of the documentation for any discussion which the Council might undertake with a view to making further recommendations for the abolition of slavery, the slave trade or the institutions and practices which are the subject of this Convention.

Section VI. - Final clauses

Article 9

No reservations may be made to this Convention.

Article 10

Any dispute between States Parties to this Convention relating to its interpretation or application, which is not settled by negotiation, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute, unless the parties concerned agree on another mode of settlement.

Article 11

1. This Convention shall be open until 1 July 1957 for signature by any State Member of the United Nations or of a specialized agency. It shall be subject to ratification by the signatory States, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations, who shall inform each signatory and acceding State.

2. After 1 July 1957 this Convention shall be open for accession by any State Member of the United Nations or of a specialized agency, or by any other State to which an invitation to accede has been addressed by the General Assembly of the United Nations. Accession shall be effected by the deposit of a formal instrument with the Secretary-General of the United Nations, who shall inform each signatory and acceding State.

Article 12

1. This Convention shall apply to all non-self-governing trust, colonial and other non-metropolitan territories for the international relations of which any State Party is responsible; the Party concerned shall, subject to the provisions of paragraph 2 of this article, at the time of signature, ratification or accession declare the non-metropolitan territory or territories to which the Convention shall apply ipso facto as a result of such signature, ratification or accession.

2. In any case in which the previous consent of a non-metropolitan territory is required by the constitutional laws or practices of the Party or of the non-metropolitan territory, the Party concerned shall endeavour to secure the needed consent of the non-metropolitan territory within the period of twelve months from the date of signature of the Convention by the metropolitan State, and when such consent has been obtained the Party shall notify the Secretary-General. This Convention shall apply to the territory or territories named in such notification from the date of its receipt by the Secretary-General.

Attachment 2

3. After the expiry of the twelve-month period mentioned in the preceding paragraph, the States Parties concerned shall inform the Secretary-General of the results of the consultations with those non-metropolitan territories for whose international relations they are responsible and whose consent to the application of this Convention may have been withheld.

Article 13

1. This Convention shall enter into force on the date on which two States have become Parties thereto.
2. It shall thereafter enter into force with respect to each State and territory on the date of deposit of the instrument of ratification or accession of that State or notification of application to that territory.

Article 14

1. The application of this Convention shall be divided into successive periods of three years, of which the first shall begin on the date of entry into force of the Convention in accordance with paragraph 1 of article 13.
2. Any State Party may denounce this Convention by a notice addressed by that State to the Secretary-General not less than six months before the expiration of the current three-year period. The Secretary-General shall notify all other Parties of each such notice and the date of the receipt thereof.
3. Denunciations shall take effect at the expiration of the current three-year period.
4. In cases where, in accordance with the provisions of article 12, this Convention has become applicable to a non-metropolitan territory of a Party, that Party may at any time thereafter, with the consent of the territory concerned, give notice to the Secretary-General of the United Nations denouncing this Convention separately in respect of that territory. The denunciation shall take effect one year after the date of the receipt of such notice by the Secretary-General, who shall notify all other Parties of such notice and the date of the receipt thereof.

Article 15

This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations Secretariat. The Secretary-General shall prepare a certified copy thereof for communication to States Parties to this Convention, as well as to all other States Members of the United Nations and of the specialized agencies.

In witness whereof the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention on the date appearing opposite their respective signatures.

Done at the European Office of the United Nations at Geneva, this seventh day of September one thousand nine hundred and fifty-six.