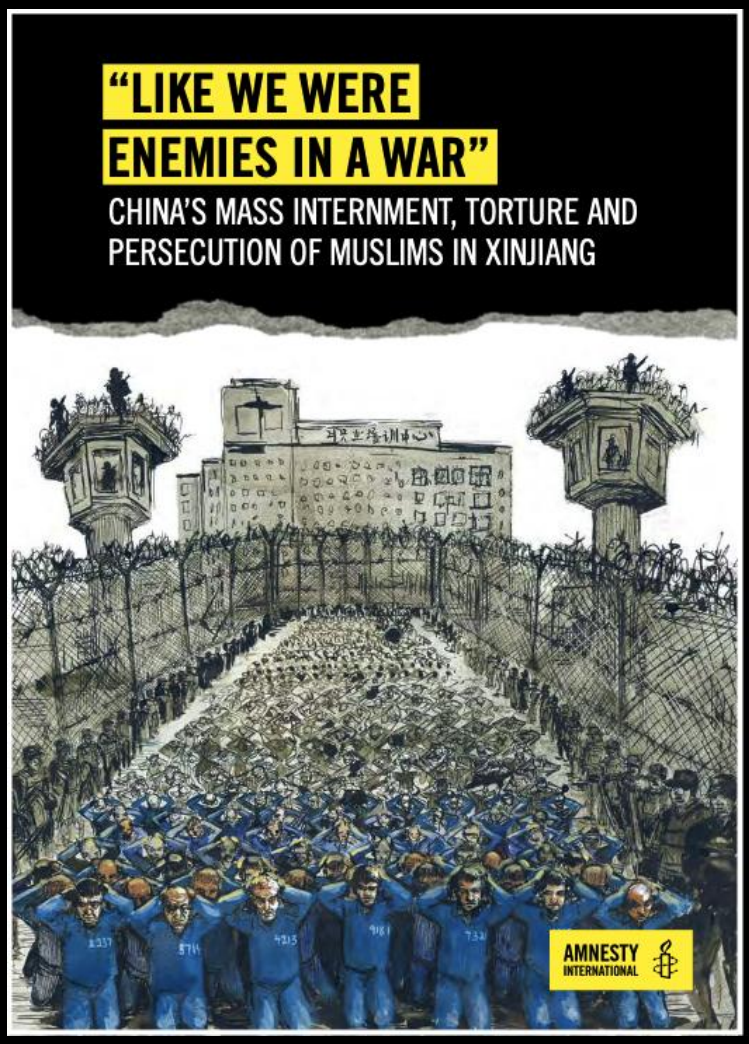
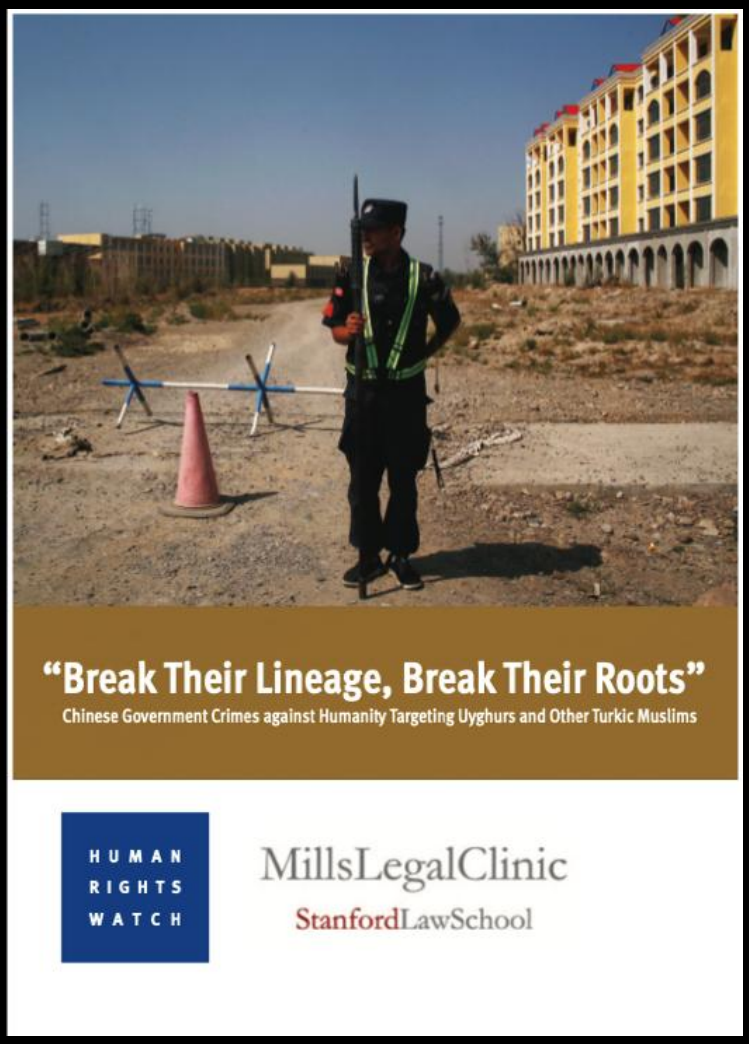
Amnesty International & Human Rights Watch's Forced Xinjiang Labour Claims:

Junk Research or Noble Cause Corruption?

Jaq James





GEO-LAW NARRATIVES

Working Paper 2/2022

ABOUT GEO-LAW NARRATIVES

Geo-Law Narratives is a platform for the exploration of competing rhetorical narratives between the Global North and Global South on matters involving international law and geo-politics.

ABOUT THE AUTHOR

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DISCLAIMER

This paper is published on the understanding that the author is not providing any form of legal advice.

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“Those who make you believe absurdities
can make you commit atrocities”

~ Voltaire

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1. EXECUTIVE SUMMARY

In February 2020, the Australian Strategic Policy Institute Limited (ASPI) (a defence and strategic policy think tank funded chiefly by the Australian Government and the United States' Government, as well as the armaments industry) made international headlines with its claim that it had uncovered a systematic forced Uyghur labour program taking place in factories across China, orchestrated by the Chinese government. In January 2022, the author of this paper published a working paper – titled *The Australian Strategic Policy Institute's 'Uyghurs for Sale' Report: Scholarly Analysis or Strategic Disinformation?* – which demonstrated that none of ASPI's forced Uyghur labour allegations were able to stand up to scrutiny from a legal, merit or evidentiary perspective. It was argued that ASPI's trumpeted allegations likely stemmed from an agenda to disseminate strategic disinformation propaganda in furtherance of the think tank's founding objectives.

Nevertheless, the 'cry of wolf' panicked one of Australia's most vocal independent federal politicians – Senator Rex Patrick. He introduced a private member's bill into the Australian Parliament to ban the import of Uyghur-made products into Australia. The bill was passed by the Senate in 2021 and put before the House of Representatives for consideration. When Senator Patrick was questioned by the author of this paper about whether his motion was a righteous or unrighteous one (in light of the findings in the first Geo-Law paper), Senator Patrick pointed to other human rights groups that had since joined his chorus. 'Might is right' was the implicit message of the day.

Those other human rights groups Senator Patrick was referring to were likely Amnesty International and Human Rights Watch – two 'powerhouse' institutions in the international human rights advocacy field. In 2021, both organisations published long-form reports which included claims that forced labour was being systematically committed in the Xinjiang Uyghur Autonomous Region by the Chinese government. This paper critically analyses those reports from an international law perspective. By the end, this paper finds that both Amnesty International and Human Rights Watch failed to present sound research methodologies, reliable evidence and sufficient legal analysis, thereby leaving the forced labour narrative (and any proposed legislation built on top of the narrative) open to even greater doubt.

This paper ultimately concludes that, at best, the work of Amnesty International and Human Rights Watch amounts to junk research and, at worst, their work may be the result of noble cause corruption or even ignoble cause corruption. Either way, the status quo must change – Amnesty International and Human Rights Watch should no longer enjoy the presumption of competency and dependability. Instead, both organisations must earn such repute on a report-by-report basis.

2. BACKGROUND

This is the second paper in a series by Geo-Law Narratives that critically examines widespread allegations by Western institutions that the Chinese government has been orchestrating a systematic forced labour program against its ethnic minority population from Xinjiang. The first paper in the series was a legal analysis of allegations made by the Australian Strategic Policy Institute Limited (ASPI) that the Chinese government had forcefully transferred more than 80,000 Uyghur workers from Xinjiang to other provinces across China between 2017 and 2019. ASPI's allegations were contained in its February 2020 report, titled *Uyghurs for sale: 'Re-education', forced labour and surveillance beyond Xinjiang* ('ASPI report').[1]

The first Geo-Law Narratives' paper, published in January 2022, was titled *The Australian Strategic Policy Institute's 'Uyghurs for Sale' Report: Scholarly Analysis or Strategic Disinformation?*. It established that none of ASPI's case studies of forced labour were able to survive close scrutiny. Amongst the problems with the ASPI report, it was found that ASPI had engaged in dubious and contradictory argumentation, had relied on poor-quality sources, had overplayed and misrepresented evidence, had exhibited questionable academic integrity standards, and had engaged in substandard legal analysis. It was submitted in the first Geo-Law Narratives' paper that the frequency of such problems was more likely due to ASPI deliberately producing a piece of strategic disinformation propaganda rather than being the result of scholarly incompetence.

The first Geo-Law Narratives' paper explained that there was foreseeable danger in passing off false and misleading allegations of forced Uyghur labour as factual: companies hiring Uyghurs would predictably seek to defensively mitigate reputational, financial and legal risks associated with the allegations. As the first Geo-Law Narratives' paper observed, defensive mitigation strategies manifested in companies terminating the employment of consensual Uyghur workers en masse, as well as introducing discriminatory no-hire policies for workers of Uyghur descent. As such, it was submitted in the first Geo-Law Narratives' paper that ASPI ultimately contributed to the violation of the Uyghurs' rights to work under article 6 of the *International Covenant on Economic, Social and Cultural Rights*, amongst other

[1] Vicky Xiuzhong Xu, Danielle Cave, Dr James Leibold, Kelsey Munro and Nathan Ruser, 'Uyghurs for sale: "Re-education", forced labour and surveillance beyond Xinjiang', *Australian Strategic Policy Institute*, Policy Brief Report No 26/2020, February 2020 <online>.

possible human rights violations. Consequently, it was argued that this meant ASPI (as a Commonwealth company) failed to comply with its responsibility to respect extra-territorial human rights under the United Nations' *Guiding Principles on Business and Human Rights.*

What potentially exacerbates the violation of the Uyghurs' rights to work is the push in some jurisdictions to enact discriminatory legislation and regulations relating to goods made by Xinjiang's ethnic minority workers. For example, in 2021, the United States signed into law the *Uyghur Forced Labor Prevention Act (H.R. 6256)*, which is predicated on an assumption that goods manufactured in Xinjiang are made with forced labour unless the Commissioner for US. Customs and Border Protection certifies that the goods in question have not been made with forced labour.[2] In law, this reversal of the onus of proof is known as a 'rebuttable presumption', and effectively declares companies that hire Xinjiang workers are guilty of using forced labour until proven innocent.

In Australia, Senator Rex Patrick pushed for similar legislation – the *Customs Amendment (Banning Goods Produced by Uyghur Forced Labour) Bill 2020* ('bill').[3] The bill was considered by the Senate *Foreign Affairs, Defence and Trade Legislation Committee* ('Senate Committee')[4] and was passed by the Senate in 2021. As of the publication date of this paper, the bill's status before the House of Representatives is "not proceeding".[5] This would be because the House of Representatives was dissolved for the 2022 election. It is unclear whether the bill will be picked up again in the new parliament, particularly since Senator Patrick lost his seat in the 2022 election.

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[2] It has been reported that the legislation will be enforced from 21 June 2022: 'U.S. is ready to implement ban on Xinjiang goods on June 21', *Reuters*, 2 June 2022 <online>.

[3] 'Bill to Ban Goods Produced by Uyghur Forced Labour Introduced to Australian Parliament', *Rex Patrick*, 8 December 2020 <online>. The bill's title was later changed by removing the reference to 'Uyghur'. This change was due to Australia potentially being exposed to a legal challenge before the World Trade Organisation due to the bill targeting China and therefore having a discriminatory effect in breach of Australia's international trade obligations: see discussion in Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, *Customs Amendment (Banning Goods Produced by Uyghur Forced Labour) Bill 2020* (Report, June 2021) 28-29 <online>. However, it has been indicated that, in practice, the legislation would still be used to target China: see discussion in Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, *Customs Amendment (Banning Goods Produced by Uyghur Forced Labour) Bill 2020* (Report, June 2021) 53-54 <online>. Thus, if enacted, the legislation would arguably remain tainted by discriminatory intentions.

[4] In addition to Senator Patrick, the other participating members of the Senate Committee were Senator Eric Abetz, Senator Kimberly Kitching, Senator Janet Rice and Senator Tony Sheldon.

[5] See Parliament of Australia's Parliamentary Business, *Customs Amendment (Banning Goods Produced by Forced Labour) Bill 2021* <online>.

In order to prevent further harm to consensual Uyghur workers, it was recommended in the first Geo-Law Narratives' paper that the bill not be passed into law by the Australian Government if the foundational beliefs underlying the bill were based on the ASPI report. This proposition was put directly to Senator Patrick by the author of this paper in January 2022. It was rejected by Senator Patrick on the grounds that the Senate Committee "came to a unanimous conclusion that there is no doubt that the events that have purported to have taken place are true".[6] Senator Patrick qualified this statement by saying that the Senate Committee "didn't rely solely on the ASPI report for its inquiry, rather many other sources". Senator Patrick indicated that the findings of "**Human Rights Groups** and Parliaments around the world" was also in line with the Senate Committee's findings (emphasis added).[7] In other words, Senator Patrick took the position of 'might is right'.

Whilst the ASPI report may not have been the sole source behind the bill, it was undeniably a key source, based on the following observations:

- two of the three lead witnesses who gave oral testimony to the Senate Committee were authors of the ASPI report (Ms Vicky Xiuzhong Xu and Dr James Leibold);[8]
- thirty out of the sixty-one (49.1%) public submissions received by the Senate Committee referenced the ASPI report;[9] and
- Senator Patrick, himself, made the ASPI report his central reference point in his Second Reading Speech accompanying the bill.[10]

A further observation is that Senator Patrick did not deny that the ASPI report was an unreliable source, nor did he defend it; rather, he shifted the focus to "many other sources". This suggests that Senator Patrick perceived other sources as being more reliable than the ASPI report. If this is the case, then it is a marked change from his endorsement during the Senate Committee inquiry that ASPI's work was "fantastic".[11]

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[6] Email from Ms Kirsty Kubenk (Correspondence Officer, Office of Rex Patrick) to Jaq James, 20 January 2022.
[7] Ibid.
[8] See public hearing program, 'Customs Amendment (Banning Goods Produced By Uyghur Forced Labour) Bill 2020', *Foreign Affairs, Defence and Trade Legislation Committee*, 27 April 2021 <online>.
[9] See submissions, 'Customs Amendment (Banning Goods Produced By Uyghur Forced Labour) Bill 2020', *Foreign Affairs, Defence and Trade Legislation Committee* <online>.
[10] Commonwealth, *Parliamentary Debates*, Senate, 23 August 2021, 4892 (Senator Rex Patrick) <online>.
[11] Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 27 April 2021, 4 (Senator Rex Patrick) <online>.

Given that there was no evidence of critical engagement with the ASPI report by Senator Patrick or the other Senate Committee members, it can be assumed that there was also no critical engagement with the other sources relied upon by the Senate Committee. As such, in order to help determine whether Senator Patrick and the Senate Committee proposed legislation with a questionable foundation, it is necessary to know whether other sources alleging forced labour can be deemed reliable. This is not only necessary for the sake of respecting the Uyghurs' rights to work, it is also necessary in terms of accountability to Australian tax-payers. Consideration of legislation takes up 55% of the House of Representatives' time.[12] This means Senator Patrick's bill had the potential to waste valuable parliamentary time and resources at the expense of Australian tax-payer dollars, and at the opportunity cost of time and resources devoted to other bills.

Whilst Geo-Law Narratives would like to wholly fill the critical engagement void left by Senator Patrick and the Senate Committee, resources are unfortunately far too limited to undertake such a monumental task. Consequently, what this paper does instead is critically examine the reports of two organisations in the human rights advocacy space that enjoy the most credibility and influence (and therefore Senator Patrick would likely have had the two organisations in mind when he defended his bill). The first report is Amnesty International's *"Like We Were Enemies in A War": China's Mass Internment, Torture and Persecution of Muslims in Xinjiang* ('Amnesty International report'), published in 2021.[13] The second report is Human Rights Watch's *"Break Their Lineage, Break Their Roots": Chinese Government Crimes against Humanity Targeting Uyghurs and other Turkic Muslims* ('Human Rights Watch report'), also published in 2021.[14] The Human Rights Watch report was written in conjunction with the Mills Legal Clinic of the Stanford University Law School.

This paper analyses the forced Xinjiang labour claims made in both reports from an international law perspective.

[12] 'Bills – the parliamentary process' in *House of Representatives Practice* (Parliament of Australia: 2018: 7th ed) <online>.
[13] '"Like We Were Enemies in a War": China's Mass Internment, Torture and Persecution of Muslims in Xinjiang', *Amnesty International*, 2021 <online>.
[14] '"Break Their Lineage, Break Their Roots": Chinese Government Crimes against Humanity Targeting Uyghurs and other Turkic Muslims', *Human Rights Watch*, 2021 <online>.

3. THE LAW

Before delving into an analysis of the Amnesty International and Human Rights Watch reports, it is important to clearly articulate the international law on forced labour. The law-related concepts outlined in this section will be integrated into the discussions in the following sections of this paper when they bear relevance to issues raised in the two reports.

3.1. International Labour Law

In the context of international labour law, article 2(1) of the International Labour Organization's[15] *Forced Labour Convention 1930 (No 29)* ('ILO Convention')[16] defines 'forced labour' (or 'compulsory labour') as:
*"all **work or service** which is exacted from any person under the **menace of any penalty** and for which the said person has not offered himself **voluntarily**"* (emphasis added).

The key legal elements of this definition are: (i) "work or service"; (ii) "menace of any penalty"; and (iii) "voluntarily". Each element is extrapolated below.

With the first element, the International Labour Office[17] has explained that an obligation to undergo compulsory education is not "work or service" extracted under the menace of a penalty. Similarly, a compulsory vocational training scheme that delivers genuine vocational training – as opposed to extraction of work or service – does not usually constitute forced labour.[18]

Regarding the second element, the International Labour Office has explained that "menace of any penalty" should be construed broadly. It can take the form of

[15] The International Labour Organization is a United Nations agency established in 1919 for the purpose of setting international labour standards. It has a unique tripartite structure that encompasses governments, employers and workers. Its approach to setting labour standards is based on consent from its 187 member states. China is a founding member.
[16] China ratified the ILO Convention in 2022.
[17] The International Labour Office is the permanent secretariat of the International Labour Organization.
[18] *Forced Labour and Human Trafficking: Casebook of Court Decisions* (International Labour Office: 2009) 12 <online>.

physical threats or threats of loss of rights or privileges, in addition to penal sanctions. Psychological coercion also may amount to "menace of any penalty". However, work undertaken out of pure economic necessity does not fall within the ambit of a penalty.[19]

With respect to the third element, the International Labour Office has explained that voluntariness consists of two elements: (i) consent to work is freely given by the worker; and (ii) the ability to revoke that consent is retained by the worker.[20] The first element of voluntariness overlaps with the "menace of any penalty" element, as there can be no voluntary offer under a threat.

Of further relevance to this paper is article 2(2)(c) of the ILO Convention, which excludes any work or service exacted as a consequence of a conviction in a court of law from the categorisation of 'forced labour'. This is on the condition that the work or service carried out by the convicted person is under the supervision and control of a public authority, and the convicted person is not hired by private individuals, companies or associations. The International Labour Office has clarified that punitive work or service cannot be imposed on a person unless they have been found guilty of an offence as a result of the due process of law.[21]

According to the International Labour Organization, work by prisoners for private parties can still be compatible with the ILO Convention, as long as it "does not involve compulsory labour and is carried out with the informed, formal and freely given consent of the persons concerned".[22]

It is noted that consensual prison labour is viewed by the International Labour Organization in positive terms:
"The best method of maintaining a prisoner's working capacity is to employ him on useful work. The idea that work for prisoners is in all circumstances an evil is a survival from the days when the object of the sentence was to extirpate the criminal from society. Not until it is understood that work is a beneficial distraction for the

[19] Ibid.
[20] Ibid, 12-13.
[21] 'General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)', Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III, Part IB, *International Labour Office*, 2007, 26 <online>.
[22] Committee of Experts on the Application of Conventions and Recommendations, 'Direct Request (CEACR) – adopted 2011, published 101st ILC Session (2012)', *International Labour Organization* <online>.

prisoner will the right to work be recognized. The recognition of this right is an urgent social necessity".[23]

Similarly, it is also noted that rule 4 of *The United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)* stipulates a positive obligation on governments to assist prisoners with education, vocational training and work:

"The purposes of a sentence of imprisonment or similar measures deprivative of a person's liberty are primarily to protect society against crime and to reduce recidivism. Those purposes can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life. … To this end, prison administrations and other competent authorities should offer education, vocational training and work, as well as other forms of assistance that are appropriate and available, including those of a remedial, moral, spiritual, social and health- and sports-based nature. All such programmes, activities and services should be delivered in line with the individual treatment needs of prisoners."[24]

Returning to the general concept of 'forced labour', the International Labour Organization has also published a front-line practitioner's manual to help "identify persons who are **possibly** trapped in a forced labour situation" (emphasis added). Called the *ILO Indicators of Forced Labour 2012* ('ILO indicators'),[25] the manual contains eleven indicators that "represent the most common signs or 'clues' that point to the **possible** existence of a forced labour case" (emphasis added). In other words, the ILO indicators do not necessarily, of themselves, lead to a person being forced into labour; rather, they are simply red flags that warrant further investigation. This distinction is important to note, as some organisations (such as ASPI) effectively misrepresent the ILO indicators as a legal definition or legal checklist, thereby unilaterally broadening the definition of forced labour.[26]

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[23] 'ILO Memorandum on Prison Labour', *International Labour Review*, vol. XXV, 1932, 313-314, quoted in 'General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)', Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III, Part IB, *International Labour Office*, 2007, 25 <online>.

[24] *The United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules),* GA res 70/175 (17 December 2015) <online>.

[25] Special Action Programme to Combat Forced Labour, *ILO Indicators of Forced Labour*, International Labour Organization, 2012 <online>.

[26] See Jaq James, 'The Australian Strategic Policy Institute's "Uyghurs for Sale" Report: Scholarly Analysis or Strategic Disinformation?', *Geo-Law Narratives*, Working Paper 1/2022, 17.

The eleven ILO indicators of forced labour are worded as follows:

- First indicator - 'Abuse of vulnerability'
- Second indicator - 'Deception'
- Third indicator - 'Restriction of movement'
- Fourth indicator - 'Isolation'
- Fifth indicator - 'Physical and sexual violence'
- Sixth indicator - 'Intimidation and threats'
- Seventh indicator - 'Retention of identity documents'
- Eighth indicator - 'Withholding of wages'
- Ninth indicator - 'Debt bondage'
- Tenth indicator - 'Abusive working and living conditions'
- Eleventh indicator - 'Excessive overtime'.

Ultimately, when understanding what is forced labour, it is important to heed the warning of the International Labour Office, which has declared that "the very concept of forced labour … is still not well understood" in many quarters, and that "'forced labour' can be used rather loosely to refer to poor or insalubrious working conditions, including very low wages".[27]

3.2. International Human Rights Law

International human rights law reflects the international labour law position. Article 8(3)(a) of the *International Covenant on Civil and Political Rights 1966* ('ICCPR')[28] states that "[n]o one shall be required to perform forced or compulsory labour". Similar to the ILO Convention, an exception is made under article 8(3)(c)(i) for "[a]ny work or service … normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention". However, article 8(3)(b) makes it clear that any work or service imposed by a court order cannot amount to "hard labour". Presumably, this means that any labour as a consequence of a court order must comply with the

[27] *A Global Alliance Against Forced Labour: Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (International Labour Office: 2005) 5 <online>.
[28] China has signed the ICCPR (i.e., expressing only an intention to be bound), but has chosen not to ratify it (i.e., there is no legal obligation on China to implement the ICCPR in its domestic laws, policies and practices).

International Labour Organization’s conventions and recommendations on work standards.

4. THE AMNESTY INTERNATIONAL REPORT

In its report, Amnesty International declared it had gathered evidence demonstrating the Chinese government has carried out "massive and systematic abuses" against Muslims living in Xinjiang. It also declared such abuses amount to 'crimes against humanity' under article 7 of the *Rome Statute of the International Criminal Court,*[29] as well as other violations of international law, including laws against forced labour.[30] It is noted that only four pages of the 158-page-report are dedicated to a discussion of Amnesty International's evidence for its forced labour claims – pages 126 to 129.

Amnesty International's evidence of forced labour was primarily based on interviews it conducted with "11 former detainees".[31] Yet, excerpts from interviews with **only four interviewees** featured on pages 126 to 129. This is a curiously small number given that Amnesty International declared that "hundreds of thousands – perhaps 1 million or more" – "men and women from predominantly [Xinjiang] Muslim ethnic groups have been detained" in what Amnesty International calls "internment camps",[32] and that "there is a clear compulsory labour component to the system of detention".[33] In other words, Amnesty International seemed to be claiming that **maybe more than 1 million people in Xinjiang have been forced into labour**. Despite this extraordinarily high number, Amnesty International only featured testimony excerpts of around 0.0004% of the potential victim pool. This very small sample size is the first problem with the Amnesty International report.

[29] Article 7 of the *Rome Statute of the International Criminal Court* states that 'crimes against humanity' include the following acts: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; (h) persecution against an identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law; (i) enforced disappearance of persons; (j) the crime of apartheid; or (k) other inhumane acts of similar character intentionally causing great suffering or serious injury to body or to mental or physical health. These acts must be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" before they can be classed as 'crimes against humanity'.

[30] Page 7 of the Amnesty International report.

[31] Page 126 of the Amnesty International report.

[32] Page 7 of the Amnesty International report. It is noted that the *Collins Dictionary* defines 'internment camp' as "a camp for the accommodation of internees, especially during wartime". Given this wartime connotation, it is questionable whether 'internment camp' is an accurate description. Nevertheless, for the sake of consistency with the Amnesty International report, the word 'camp' has also been used throughout this paper.

[33] Page 126 of the Amnesty International report.

Additionally, there are numerous other problems with the Amnesty International report which are of greater consequence and of greater complexity. Such problems are discussed in the next three sections of this paper, namely:

(i) anonymous, unsworn and uncorroborated interviewee testimony;
(ii) opaque interview methodology; and
(iii) unclear application of the law.

4.1. Anonymous, Unsworn and Uncorroborated Testimony

Amnesty International stated that "many" of the interviews it carried out for its report "were arranged with the assistance of two human rights organizations based in Kazakhstan".[34] The names of the two organisations were not disclosed. Amnesty International specified that its interviewees were in Xinjiang after 2017, but all interviews were conducted between October 2019 and May 2021 with people who had since left Xinjiang.[35] It is noted that there was no indication from Amnesty International that the interviewees provided actual sworn testimony, such as an affidavit/statutory declaration that carries legal ramifications if false statements were made. This is the second problem with the Amnesty International report.

The third problem with the Amnesty International report is that the four main interviewees featured on pages 126 to 129 went by pseudonyms (**Anarbek, Arzu, Aldiyar and Ibrahim**) instead of their real names. According to Amnesty International, pseudonyms were used to protect the interviewees and their families from Chinese government reprisals.[36] Amnesty International also noted that it:
"took a very cautious approach to including any information that could be used for the purposes of identification. For example, the report does not mention the specific internment camp where any particular interviewee was detained, the specific village or town where that person lived, or the specific age of any of the interviewees".[37]

It is acknowledged that Amnesty International's desire to protect its interviewees and their families from reprisals (whether real or imagined) is understandable. However, it also must be acknowledged that de-identifying the statements of

[34] Page 14 of the Amnesty International report.
[35] Page 14 of the Amnesty International report.
[36] Page 14 of the Amnesty International report.
[37] Page 15 of the Amnesty International report.

interviewees means that readers of the Amnesty International report have nearly no information to work with if they wish to seek independent corroboration of the interviewees' claims. Readers also have to contend with the reality that anonymity can heighten interviewees' "sense of impregnability and increase the temptation to falsify or exaggerate".[38] Thus, the interviewees' assertions are left suspended in a reliability void, while at the same time placing an unfair expectation on Amnesty International's readers to accept the interviewees' assertions at face value. Amnesty International and the interviewees knowingly made this credibility trade-off, and, as such, have to accept any criticism that comes their way. In fact, it could be said that criticism is especially warranted against Amnesty International (as a human rights advocacy organisation) because the European Court of Human Rights has taken a stand against relying wholly, or to a decisive extent, on anonymous witnesses.[39]
The fourth problem with the Amnesty International report is that its methodology for corroboration of testimony is arguably inadequate. All that the readers are told by Amnesty International is that its testimonial evidence was "corroborated by other reliable sources", with those sources merely being: (i) "high-resolution satellite imagery to identify the facilities in which some former detainees reported being detained"; (ii) "leaked Chinese government documents"; and (iii) "other credible testimonial, photographic, and documentary evidence collected by journalists, scholars and investigators".[40] The shortcomings of these three corroboration methods are explained below.

Regarding the first corroboration method, it is noted that it only confirms an interviewee was able to accurately describe a facility, with one possible explanation being that such descriptive ability was due to the interviewee being previously assigned to that facility. However, such descriptive ability also could have stemmed from prior viewing of satellite imagery or from descriptions received from third

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[38] *S v Leepile and others* (5) 1986 4 SA 187, 189 (Ackermann J).
[39] *Doorson v Netherlands*, App no 20524/92 (ECtHR, 26 March 1996). After the *Doorson v Netherlands* case, the Committee of Experts on the Intimidation of Witnesses and the Rights of the Defence for the Council of Europe adopted the position that there are three dangers to accepting anonymous witness testimony: (i) "the anonymous witness could be unreliable for subjective reasons associated with his personal history, for instance former mental disorders, hallucinations, or simply former episodes of regular lying, which could not be brought to light without the defence knowing the identity and verifying his personal history"; (ii) "the anonymous witness might have had in the past some undisclosed relationship or contact or indirect connection with the defendant which … ought to be known and taken into consideration in order to verify whether it might be the source of a prejudiced attitude towards the defendant"; and (iii) "the anonymous witness could be plotting against the defendant": Explanatory Memorandum to Recommendation No R(97)13 prepared by the Committee of Experts on the Intimidation of Witnesses and the Rights of the Defence for the Council of Europe, 10 September 1997, cited in David Lusty, 'Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials', *Sydney Law Review*, 2002, vol. 24, 361-426, 413.
[40] Pages 13, 16 and 142 of the Amnesty International report.

parties. Moreover, this method does not, on its own, corroborate the claims of forced labour.

Regarding the second corroboration method, it is noted that a leaked Chinese government document (known as "the telegram") was referenced in the Amnesty International report as corroboration of forced labour. Amnesty International specifically paraphrased paragraph 18 of the telegram as corroborative evidence of forced labour:
*"if a **detainee** was designated ready for **release**, the group that did the final evaluation also determined whether the **detainee** would enter a **'skills improvement class'** for **'intensive training'** before being **released**"* (emphasis added).[41]

Yet, an actual reading of paragraph 18 in the telegram shows: (i) no mention of the word "detainee", only the word "student"; and (ii) no mention of the word "release", only the word "completion". What is notably mentioned repeatedly throughout the telegram is the phrase "vocational skills education and training". More relevantly, the word 'labour' is only mentioned twice and only in the following contexts:

(i) "[s]tudents are not allowed to participate in ***labor*** outside of class" (emphasis added); and

(ii) "[t]raining should be based on the students' employment aspirations and the needs of society, and ***labor*** skills training should be carried out in a targeted manner to enable them to achieve employment as soon as possible after training" (emphasis added).[42]

Thus, there is no indication, from a reading of the telegram, that the Chinese government has established a systematic program of forced labour. Rather, there is only an indication that it has established a systematic program of "vocational skills education and training".

Referring to the ILO Convention's definition of 'forced labour' (outlined in Part 3 of this paper), if Amnesty International believed that "skills improvement class" and "intensive training" was actually a ruse for extraction of "work or service", then Amnesty International needed to make that argument, not just unilaterally

[41] Page 126 of the Amnesty International report.
[42] Autonomous Region Party Political and Legal Affairs Commission, 'Autonomous Region State Organ Telegram: Opinions on further strengthening and standardizing vocational skills education and training centers work', *New Party Politics and Law*, 2017, No. 419, para 18 <online> (known as 'the telegram').

substitute the words “detainee” for “student” and “release” for “completion”.[43] Accordingly, as it stands, it is submitted that the telegram is not corroborative evidence of forced labour.

Regarding the third corroboration method used by Amnesty International, it is submitted that it is too vague to be of probative value, particularly since: (i) the evidence collected by journalists, scholars and investigators does not appear to be specifically about Amnesty International’s eleven interviewees alleging forced labour; and (ii) Amnesty International did not indicate that it critically engaged with the evidence collected by journalists, scholars and investigators. In fact, given that the ASPI report was cited in the Amnesty International report as a credible reference, it can be assumed that Amnesty International did not critically engage with any of its other sources either.

More importantly, on the pages that matter – pages 126 to 129 – there was no mention of the steps Amnesty International took to corroborate each interviewee’s specific claims of being forced into labour. Such steps could have included attempts at collecting copies of workplace contracts, copies of bank statements recording wage deposits, and letters/emails sent or received about labour arrangements.

Hence, at this stage of the analysis, a reader of the Amnesty International report is left with testimony from the interviewees that is: (i) a very small sample size; (ii) anonymous; (iii) unsworn; and (iv) uncorroborated.

4.2. Opaque Interview Methodology

The fifth problem with the Amnesty International report is its opaque interview methodology. From pages 14 to 17 of its report, Amnesty International recounted its overarching research methodology. Specifically relating to its interview methodology, Amnesty International only disclosed superficial aspects, such as: “[o]ral consent was obtained from each interviewee before the interview”; “[i]nterviews generally lasted between four and 12 hours and were often conducted over the course of multiple days”; and “[n]o incentives were provided to interviewees in exchange for their

[43] See also Section 4.3 of this paper for further discussion of legal issues that Amnesty International would need to consider.

accounts".[44] What was notably missing from the report was a transparent interview methodology encompassing the following important features:

- **leading questions and fact-feeding were avoided** in the course of asking examination-in-chief-type questions;
- attempts were made at **asking cross-examination-type questions** (not just examination-in-chief-type questions), while also attempting to ascertain whether interviewees had any intrinsic or extrinsic incentives for falsifying or exaggerating statements that were unable to be corroborated by Amnesty International;
- an indication that theoretically and empirically grounded **credibility assessment frameworks** were used to evaluate the reliability of interviewees' answers, such as 'Criteria-Based Content Analysis' (CBCA) within the 'Statement Validity Assessment' (SVA) framework; and
- **accredited translators** who comply with a professional code of ethics were used in the interview process.

The reasons why each of these four features should be considered important are set out in the following sub-sections.

4.2.1. Interview Methodology Features – Avoiding Leading Questions and Fact-Feeding

The first important feature to a bona fide investigation is ensuring improper leading questions and fact-feeding are avoided with interviewees. Leading interview questions are questions that prompt and encourage answers that an interviewer may want. They usually take the form of closed-ended questions, as opposed to open-ended questions. In a courtroom context, leading questions are usually objectionable in the examination-in-chief context, but rarely objectionable in the cross-examination context.[45]

[44] Page 14 of the Amnesty International report.

[45] Examination-in-chief involves a witness being questioned in court by the party that called them to appear to give testimony. It occurs before cross-examination, and establishes the foundation for either the prosecution or defence's case. Cross-examination involves a witness being questioned by the opposing party in order to challenge the witness's testimony.

Fact-feeding is when non-public investigative information is divulged to an interviewee, which can subsequently contaminate the interviewee's testimony. In a police investigation context, fact-feeding is usually disallowed in order to ensure that police retain the ability to validate the veracity of an interviewee's statement.

Given that Amnesty International is an advocacy organisation for victims of human rights abuses (not a disinterested fact-finding organisation), it could be said that it takes an adversarial (one-sided) approach to conducting its interviews, rather than an inquisitorial (all-sided) approach. Accordingly, in the absence of contrary evidence, it may be assumed that the questions put by Amnesty International to its interviewees were only examination-in-chief-type questions, not also cross-examination-type questions.

There is also the possibility that Amnesty International contaminated the interviewees' testimonies with fact-feeding if it was not vigilantly guarding against it. Without video, audio or transcript evidence of the interviews, it is impossible for Amnesty International to either confirm or deny this concern, since fact-feeding can occur inadvertently. Risk of contamination from fact-feeding is especially high with interviewees who are suggestible.[46]

Given these risks in an interview process, Amnesty International should have assured its readers that no improper leading questions or fact-feeding were put to any of its interviewees. Such assurances could have taken the form of an appendix containing the list of questions that were put to the interviewees, or, even better, transcripts of the interviews (with redactions, if Amnesty International wanted to keep the interviews de-identified). Since the principle of transparency is arguably enshrined in international human rights law (namely, the right to seek, receive and impart information under article 19 of the ICCPR), it is submitted that readers have a reasonable expectation of transparency from Amnesty International on its interview methodology. Without the methodology being made publicly available for scrutineering purposes, the reliability of the interviewees' testimonies remains contestable.

Accordingly, at this stage of the analysis, a reader of the Amnesty International report is left with testimony from the interviewees that is: (i) a very small sample size;

[46] See, e.g., David E Zulawski, Douglas E Wicklander and Shane G Sturman, *Practical Aspects of Interview and Interrogation* (CRC Press: 2001: 2nd ed).

(ii) anonymous; (iii) unsworn; (iv) uncorroborated; and (v) may have been influenced by improper leading questions and fact-feeding.

4.2.2. Interview Methodology Features – Cross-Examination-Type Questions

The second important feature of a bona fide investigation is ensuring that cross-examination-type questions are included in the process of interviewing witnesses. In the absence of a disinterested fact-finding organisation having access to Amnesty Internationals' interviewees to make its own credibility assessment, the next best alternative was Amnesty International, itself, subsuming a cross-examination-type role in addition to its examination-in-chief-type role when conducting its interviews. It is submitted that subsuming both roles is important when assessing allegations of human rights and labour rights abuses for the following two reasons (extrapolated in the next sub-sections):

(i) cross-examination matters in human rights law; and
(ii) cross-examination matters in avoiding tunnel vision.

4.2.2.1. Cross-Examination Matters in Human Rights Law

As the European Court of Human Rights has noted, "[e]xperience shows that the reliability of evidence, including evidence which appears cogent and convincing, may look very different when subjected to a searching examination".[47] Hence, witness evidence is regulated in various conventions and constitutions around the world to help safeguard against prejudices in the fact-finding process. Challenging and assessing a witness's testimony can help identify its flaws of "omission, embroidery, or implausibility".[48] Indeed, cross-examination has been described as "beyond any doubt the greatest legal

[47] *Al Khawaja and Tahery v United Kingdom*, App no 26766/05 and 22228/06 (ECtHR, 15 December 2011) para 142.
[48] H Richard Uviller, 'Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale', *Duke Law Journal* (1993) 42(4), 776-839, 782.

engine ever invented for the discovery of truth".[49] Accordingly, Amnesty International, as a human rights advocacy organisation, should be presenting and applying all relevant principles of human rights law, not selectively holding back some principles because they may complicate Amnesty International's narration of a linear story.

Some examples of cross-examination-type questions that should have been put to Amnesty International's main interviewees alleging forced labour include the following:[50]

Aldiyar

Aldiyar told Amnesty International that he was sent to a garment factory "after he was released from the camp". He claimed that the factory paid him a salary so low that it was "impossible to take care of [his] family with the salary", which, in the first month was said to be 200 RMB [31 USD].[51]

Aldiyar's claims beg the following sequence of inquiry:

(i) Was Aldiyar paid per hour or by piecework? What was the hourly or piecework rate? Can he support his response with documentary evidence (such as a work contract)? If not, why?

(ii) If Aldiyar was paid by piecework, what was his output each week? How did Aldiyar's output compare to the average worker? Can he support his response with documentary evidence (such as payslips) or witness testimony (from former workmates)? If not, why?

(iii) If Aldiyar was paid by the hour, how many hours did Aldiyar work each day? How many days did Aldiyar work each week? Can he support his response with documentary evidence (such as timeslips)? If not, why?

(iv) Was Aldiyar's first month of salary net or gross? If net, was the first month's salary lower than the second month because part of it was retained by the factory to cover items and services it purchased upfront for Aldiyar (such as relocation transportation, dormitory bedding, subsidised meal card, work clothes, advanced payment, etcetera)? Can

[49] J. Wigmore, Evidence § 1367, 32 (J Chadbourn rev. 1974), cited in *United States v Salerno* (91-872), 505 U.S. 317 (1992).
[50] Cross-examination-type questions were not included in this paper for Anarbek, as only one short sentence was included from his interview by Amnesty International: see page 127 of the Amnesty International report.
[51] Page 127 of the Amnesty International report.

he support his responses with documentary evidence (such as factory policy documents, payslips and tax statements)? If not, why?

(v) Did Aldiyar's net salary increase in the second month? If so, by how much? Was the second month's net salary enough to take care of his family? Can he support his responses with documentary evidence (such as factory policy documents, payslips, banks statements and tax statements)? If not, why?

(vi) Was Aldiyar or his family members eligible for the government's 'public subsistence allowance' (低保) as a salary supplement? If not, why?

(vii) When Aldiyar was in the "camp", was he given a monetary allowance or did he earn a salary? If he received a monetary allowance or a salary while in the "camp", was it less or more than the garment factory salary? Can he support his response with documentary evidence (such as bank statements or tax statements)? If not, why?

(viii) If the monetary allowance or salary Aldiyar received while in the "camp" was less than that of the garment factory, how did he manage to take care of his family while in the "camp"?

Depending on Aldiyar's answers, it may be that it was quite possible for him to take care of his family on a full-time garment factory salary. If this is the case, it would bring into question whether Aldiyar's other claims are misleading too.

Arzu

Arzu told Amnesty International that, while he was working for a factory, he was "allowed to call family and friends, but not people abroad".[52] Presumably Amnesty International chose to include this interview excerpt because it suggests that Arzu had no way of alerting the outside world to his situation.

Arzu's claim begs the following sequence of inquiry:

(i) Who was paying for the cost of Arzu's calls to his family and friends?

(ii) Who was Arzu wanting to call abroad?

(iii) Was Arzu told that: (a) he was "not allowed" to call people abroad; (b) the factory was "not willing" to meet the cost of international calls;

[52] Page 127 of the Amnesty International report.

or (c) the phone Arzu used was unable to make international calls? Was he "not allowed" to write letters and send emails abroad as well?

(iv) If Arzu was "not allowed" to call people abroad, was the reason for Arzu's time in a "camp" and factory linked to an association with a foreign group considered by China to be a national security risk, for example? If so, could it be that a condition of Arzu's rehabilitation was that he have no contact with that foreign group and its associates? If so, could it be that it was members of that group that Arzu was trying to call?

Depending on Arzu's answers, it may be that Arzu had to comply with a no-contact list as part of something akin to a consensual pre-trial diversion agreement, an intensive correction order, a probation order or a parole order.[53] It could also be that the cost of international calls simply was not covered by the factory or the phone was not attached to a plan that enabled international calls. If any of these scenarios are the real story, this would bring into question whether Arzu's other claims omit relevant information too.

Ibrahim

Of the four main interviewees, Ibrahim is referenced in the Amnesty International report for its most far-fetched and fanciful-sounding claims. For example, Ibrahim asserted that it is a crime in Xinjiang "not to drink and not to smoke", to be in possession of too much thick rope, to bring in "too much food at once to your house", and to visit "a mosque not in your hometown".[54] Without seeing corroborative evidence (such as legislative provisions or government proclamations), anyone accepting Ibrahim's assertions at face value has arguably failed to engage intellectually with them. As such, a reasonable person would be put on alert to the veracity of Ibrahim's other claims.

Regarding Ibrahim's forced labour story, it is a mixture of hearsay evidence (and thus unreliable) and a strange suggestion that he was released from

[53] It is noted that Amnesty International stated that none of its interviewees who were "former detainees" were provided with an arrest warrant and they were all arbitrarily detained: pages 48-49 of the Amnesty International report. Yet, Amnesty International did not make clear whether it tried to corroborate Arzu's claims.

[54] Page 89 of the Amnesty International report

forced labour in a garment factory after only two weeks because he said he "had been a businessman before".[55]

Ibrahim's claim of two weeks of forced labour begs the following sequence of inquiry:

(i) Does Ibrahim know if it is Chinese government policy that businessmen should not work in garment factories? What sort of businessman was Ibrahim? (These questions need to be asked because, if the Chinese government was really orchestrating a forced labour program, it is unclear if there was an exception category for someone like Ibrahim. It is acknowledged, however, that such policy information is unlikely to be known by Ibrahim, nor would he be the best source for it. Therefore, Amnesty International, itself, should have investigated the Chinese government's official position.)

(ii) What evidence was Ibrahim required to provide to the factory that proved he was previously a businessman? (This question needs to be asked because it is unlikely Ibrahim would have been taken at his word by the Chinese authorities.)

(iii) Does Ibrahim possess any documentary evidence to substantiate his claim, such as a letter of release from the factory? If not, why? (These questions need to be asked because, if documentary evidence exists, it could confirm or deny the reason why Ibrahim was released, if he even worked for the factory to begin with.)

Depending on Ibrahim's answers, more doubtful scenarios could be revealed, thereby impugning his credibility.

4.2.2.2. Cross-Examination Matters in Avoiding Tunnel Vision

In recent years, there has been an increasing amount of literature examining the contributing factors towards wrongful convictions of innocent persons in the criminal justice system. The problem of tunnel vision has been identified

[55] Page 128 of the Amnesty International report.

as a pervasive contributor in nearly every case of a wrongful conviction.[56] In the criminal justice context, 'tunnel vision' means the "compendium of common heuristics and logical fallacies" that lead actors to "focus on a suspect, select and filter the evidence that will 'build a case' for conviction, while ignoring or suppressing evidence that points away from guilt".[57] According to Findley (2010), this process leads actors to focus on:
"a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion. Through that filter, all information that supports the adopted conclusion is elevated in significance, viewed as consistent with the other evidence, and deemed relevant and probative. Evidence inconsistent with the chosen theory is easily overlooked or dismissed as irrelevant, incredible or unreliable."[58]

Tunnel vision encompasses confirmation bias, hindsight bias and outcome bias.[59] As such, if these biases are not recognised and counterbalanced, they can corrupt the fact-finding process: not just in the criminal justice system, but also in the human rights advocacy field.

Relating the phenomenon of tunnel vision to the Amnesty International report, it is noted that Amnesty International seemed to accept many claims from its interviewees on face value (when they clearly required corroboration), and it ostensibly chose not to critically engage with its secondary sources (such as the ASPI report). This mirrors what Amnesty International has done before when it became embroiled in the now infamous scandal of the 'Kuwaiti Incubator Story'.

The 'Kuwaiti Incubator Story' involved a fifteen-year-old Kuwaiti girl called Nayirah who gave damning testimony in 1990 before the United States' Congressional Human Rights Caucus about the cruelty of Iraqi soldiers she witnessed in Kuwait. Darda (2017) succinctly summarises her testimony, as follows:
"Before the caucus and a television audience, Nayirah recalled how, in the second week after the invasion, she had been volunteering at the al-Addan

[56] Keith A Findley, 'Tunnel Vision' in Brian L Cutler (ed), *Conviction of the Innocent: Lessons From Psychological Research* (APA Press: 2010) 303.
[57] Dianne L Martin, 'Lessons about justice from the "laboratory" of wrongful convictions: Tunnel vision, the construction of guilt and informer evidence', *University of Missouri-Kansas City Law Review,* 70, 847-864, 848.
[58] Keith A Findley, 'Tunnel Vision' in Brian L Cutler (ed), *Conviction of the Innocent: Lessons From Psychological Research* (APA Press: 2010) 304.
[59] Ibid, 306.

hospital in Hadiya when it was ransacked by Iraqi soldiers. 'I saw the Iraqi soldiers come into the hospital with guns,' she testified, struggling to hold back tears. 'They took the babies out of the incubators, took the incubators, and left the children to die on the cold floor.' She went on to describe how the Iraqis had tortured her friend and burned entire neighborhoods, but the story of babies being removed from incubators was the one that everyone remembered, defining for Americans the brutality of the Iraqi Army."[60]

Darda (2017) explains that Nayirah's testimony gave the then United States president, George HW Bush, the moral high road to a war with Iraq:
"Though invented, her resonant account of Iraqi brutality was crucial in authorizing the [United States'] own story of a humanitarian crusade in the Middle East."[61]

Like Anarbek, Arzu, Aldiyar and Ibrahim, Nayirah was allowed not to reveal her identity, claiming fear of retaliation against her family. Yet, Nayirah's anonymity was a pretext for something far more sinister. As Darda (2017) reveals:
"Only after the war did Americans learn that Nayirah's testimony was fabricated. … [J]ournalist John MacArthur revealed in a New York Times *editorial that Nayirah was not your average Kuwaiti teenager. She was the daughter of the country's ambassador to the United States, Saud Nasir al-Sabah, who had been sitting four seats down from her, unacknowledged, at the caucus hearing. Nayirah never volunteered at the al-Addan hospital. She had visited only once and, during that visit, had not witnessed babies being taken from incubators by looting soldiers, because such an incident had never occurred. The incubator story was a myth that had been circulating among Kuwaitis in Britain and the United States since the late summer and treated as fact by the* Daily Telegraph (London) *and the* Los Angeles Times*. Nayirah's decision to assume the story as her own was a result of coaching by the public-relations firm Hill and Knowlton for its client Citizens for a Free Kuwait (CFK), a US-based organization bankrolled by the Kuwaiti government to advocate for the United States to militarily intervene on behalf of Kuwait. Acting under*

[60] Joseph Darda, 'Kicking the Vietnam Syndrome Narrative: Human Rights, the Nayirah Testimony, and the Gulf War', *American Quarterly*, 2017, vol 69(1), 71-92, 80.
[61] Ibid, 74.

CFK's direction, Hill and Knowlton chose and advised the witnesses who testified during the Human Rights Caucus hearing."[62]

The false incubator story was then fed by Hill and Knowlton to Amnesty International.[63] As Oddo (2018) sees it:
"To its great discredit, Amnesty confirmed the incubator charge, yielding even more media coverage. A human rights giant was effectively transformed into an (unwitting) propaganda tool."[64]

MacArthur (1992) notes that another human rights organisation – Middle East Watch – refused to give oxygen to the falsified story, suspecting it was a public relations ploy.[65] While Middle East Watch took the real moral high road, Amnesty International took the shameful moral low road. It arguably aided President Bush in transforming human rights into an instrument of war and recasting an aggressor as a virtuous defender of human rights.[66] It is submitted that the utter bastardisation and propagandisation of the international human rights framework may have been avoided if Amnesty International sought to avoid tunnel vision.[67]

One way to avoid tunnel vision is to have the discipline of adopting a cross-examination-type mindset in addition to possessing an examination-in-chief-type mindset, thereby increasing the likelihood of arriving at the truth. As such, in adopting a cross-examination-type mindset when approaching its research on Xinjiang, Amnesty International should have considered that its interviewees may have been motivated to make false or exaggerated statements just like Nayirah. In the case of the Xinjiang interviewees, it has to be considered that their testimony may have been driven by a separatist agenda or separatist sympathies, in which case, greater scepticism and corroboration needed to be pursued by Amnesty International.

[62] Ibid, 80-81.
[63] Jarol B Manheim, 'Strategic Public Diplomacy: Managing Kuwait's Image during the Gulf Conflict' in W Lance Bennett and David L Paletz, *Taken by Storm: The Media, Public Opinion, and US Foreign Policy in the Gulf War* (University of Chicago Press: 1994) 131-48, 140.
[64] John Oddo, *The Discourse of Propaganda: Case Studies from the Persian Gulf War and the War on Terror* (Pennsylvania State University Press: 2018) 92.
[65] John R MacArthur, *Second Front: Censorship and Propaganda in the 1991 Gulf War* (University of California Press: 1992) 61-62.
[66] See, e.g., President Bush's references to Amnesty International in a news conference: 'The President's News Conference', *The American Presidency Project*, 9 October 1990 <online>.
[67] For a deeper analysis of how Amnesty International endorsed the 'Kuwaiti Incubator Story', see John Oddo, *The Discourse of Propaganda: Case Studies from the Persian Gulf War and the War on Terror* (Pennsylvania State University Press: 2018) 92-97.

To further explain, the situation in Xinjiang is not a clear-cut case involving human rights advocacy that is untainted by politics and ideology. Rather, the Xinjiang situation is set against a backdrop of exiles and activists who want Xinjiang to become a separate state (or Islamic state) called East Turkistan. There are various exile and activist groups set up for separatist lobbying purposes, including the *East Turkistan Government-In-Exile* and the *East Turkistan National Awakening Movement*, headquartered in Washington DC. There is also the *East Turkistan Islamic Movement* (renamed the *Turkistan Islamic Party*), declared a terrorist organisation by the United Nations Security Council since 2002.[68] In their separatist pursuits, these organisations would undoubtedly want to mobilise international support behind them, and could therefore be conceivably mimicking Hill and Knowlton's tactics.

The sympathies and backing of an international audience are always more easily garnered when the 'enemy' is portrayed as a rogue state brutalising an innocent group of people. This is because of the "psychological tendency to empathize with weaker actors and to equate weakness with moral superiority".[69] In light of the international law principle of 'Responsibility to Protect' and international actors' greater willingness to use military intervention on humanitarian grounds, it cannot be ruled out that Xinjiang separatists may be hoping to trigger off the 'Responsibility to Protect' principle in their pursuit of establishing East Turkistan.[70] As such, there could be an incentive to disseminate politically useful propaganda containing falsified or exaggerated claims of human rights abuses carried out by the Chinese government. Accordingly, it is submitted that Amnesty International should have investigated this route and drawn attention to any interviewees' uncovered biases, prejudices, agendas or beliefs. With care and sensitivity, such an investigation could have been designed in a way to prevent re-victimisation where Amnesty International's interviewees were real victims of human rights and labour rights abuses.

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[68] 'East Turkistan Islamic Movement', *United Nations Security Council* (2011) <online>.

[69] Or Hong and Ariel Reichard, 'Evidence-Fabricating in Asymmetric Conflicts: How Weak Actors Prove False Propaganda Narratives', *Studies in Conflict & Terrorism*, 2018, 41(4), 297-318, 298.

[70] The principle of 'Responsibility to Protect' was endorsed by all member states of the United Nations at the 2005 World Summit in order to address and prevent genocide, war crimes, ethnic cleansing and crimes against humanity: *2005 World Summit Outcome*, GA Res 60/1, UN Doc A/Res/60/1 (24 October 2005) paras 138 and 139 <online>. For a discussion of the 'Responsibility to Protect' principle in the context of military intervention, see Christopher C Joyner, 'The Responsibility to Protect: Humanitarian Concern and the Lawfulness of Armed Conflict', *Virginia Journal of International Law,* 2007, 47, 693-723, 700.

Thus, at this stage of the analysis, a reader of the Amnesty International report is left with testimony from the interviewees that is: (i) a very small sample size; (ii) anonymous; (iii) unsworn; (iv) uncorroborated; (v) may have been influenced by improper leading questions and fact-feeding; and (vi) may not have been challenged by cross-examination-type questions.

4.2.3. Interview Methodology Features – Credibility Assessment Framework

The third important feature of a bona fide investigation is utilising a credibility assessment framework when interviewing witnesses. The benefits of utilising structured credibility assessments (over unstructured assessments) for courtroom testimony are covered widely in the literature. Such assessments are designed for the purpose of systematically distinguishing between truthful and fabricated testimonies. As such, credibility assessment frameworks that help detect deception could be adapted (and improved) for the human rights field.

It is noted that Amnesty International made no reference to any credibility assessment frameworks in its report. Thus, it can be assumed that Amnesty International did not assess the credibility of its interviewees' testimonies within an existing structured framework adapted to the human rights field or within its own theoretically and empirically grounded framework (if it believes the existing frameworks are inadequate or unsuitable).[71]

One type of existing assessment framework is the 'Criteria-Based Content Analysis' framework (CBCA), which is situated within the 'Statement Validity Assessment' framework (SVA). CBCA and SVA are briefly outlined over the following pages, but it is noted that it is difficult to apply these assessment tools to the interview excerpts provided by Amnesty International because the excerpts are severely decontextualised and de-identified. Only Amnesty International is in possession of all the relevant content; therefore, only Amnesty International has the ability to

[71] Given that Amnesty International has been in operation for over 60 years, it would be expected that it already has its own theoretically and empirically grounded credibility assessment framework. If it does not have its own framework, the obvious question to ask is: why? If it does have its own framework, the obvious question to ask is: why is it not publicly available?

determine whether its interviewees would have passed a structured credibility assessment.

CBCA was proposed by Max Steller and Günter Köhnken in 1989. As Volbert and Stellar (2014) succinctly describe it, the rationale of CBCA is that:
"a true statement differs in content quality from a fabricated account because: (a) a truth teller can draw on an episodic autobiographical representation containing a multitude of details, whereas a liar has to relate to scripts containing only general details of an event; and (b) a liar is busier with strategic self-presentation than a truth teller."[72]

The contents of a testimony that should be considered in this framework are briefly listed as follows:

(i) general characteristics of the testimony (that is, logical consistency, unstructured production and quantity of details);
(ii) specific details of the testimony (that is, contextual bedding, descriptions of interactions, reproduction of conversations and unexpected complications during the event);
(iii) peculiarities of the testimony (that is, unusual details, superfluous details, accurately reported details not comprehended, related external associations, accounts of subjective mental state and attribution of perpetrator's mental state);
(iv) motivation-related aspects of the testimony (that is, spontaneous corrections, admitting lack of memory, raising doubts about one's own testimony, self-deprecation, pardoning the perpetrator); and
(v) offence-specific elements (that is, details characteristic of the offence).[73]

Volbert and Steller (2014) proposed that CBCA should be situated within the SVA framework, which takes the above factors into account within the context of the factors set out below:

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[72] Renate Volbert and Max Steller, 'Is This Testimony Truthful, Fabricated, or Based on False Memory?: Credibility Assessment 25 years After Steller and Köhnken (1989)', *European Psychologist*, 2014, 19(3), 207-220, 207.
[73] Max Steller and Günter Köhnken, 'Criteria-Based Statement Analysis' in David C Raskin (ed), *Psychological Methods in Criminal Investigation and Evidence* (Springer Publishing Company: 1989) 217-245. For a summary of the limitations of CBCA, see Renate Volbert and Max Steller, 'Is This Testimony Truthful, Fabricated, or Based on False Memory?: Credibility Assessment 25 years After Steller and Köhnken (1989)', *European Psychologist*, 2014, 19(3), 207-220. Volbert and Steller proposed that CBCA be contextualised within the SVA framework to address the limitations of CBCA.

(i) the age of the interviewee (children are less likely to provide detailed testimony than adults);
(ii) the interviewee's general tendency to narrate autobiographical experiences (to compare with their recount of the events in question);
(iii) whether the interviewee has relevant prior experiences or familiarity with the events in question that could facilitate the task of constructing a fabricated statement;
(iv) personality characteristics of the interviewee (such as whether the interviewee is a 'high fantasy-prone' individual);
(v) the interviewee's abilities to deceive;
(vi) the interviewee's willingness to testify (unwillingness can result in poor testimonial content quality, even when testimony is based on actual experience);
(vii) the complexity of the event in question (the more complex the event, the more detail would be expected);
(viii) the time interval between the event in question and the interview (a long space in between can affect memory recall);
(ix) one-off versus multiple similar events (in cases of multiple similar events, there is a tendency to form generic memory representations); and
(x) interview technique that makes free and long narrative possible (namely, open-ended questions).[74]

Without Amnesty International declaring it had attempted to use a suitable credibility assessment framework to evaluate interviewee testimony, it is submitted that Amnesty International leaves its forced labour allegations open to doubt.

As such, at this stage of the analysis, a reader of the Amnesty International report is left with testimony from the interviewees that is: (i) a very small sample size; (ii) anonymous; (iii) unsworn; (iv) uncorroborated; (v) may be influenced by improper leading questions and fact-feeding; (vi) may not be challenged by cross-examination-type questions; and (vii) may not have been subject to a suitable credibility assessment.

[74] Renate Volbert and Max Steller, 'Is This Testimony Truthful, Fabricated, or Based on False Memory?: Credibility Assessment 25 years After Steller and Köhnken (1989)', *European Psychologist*, 2014, 19(3), 207-220, 213.

4.2.4. Interview Methodology Features – Using Accredited Translators

When dealing with matters as serious as victim testimony of human rights abuse allegations, it is important that any translators involved are professionally accredited and comply with a professional code of ethics. Such codes may oblige translators to:

- maintain professional integrity standards, which include independence, detachment, impartiality and objectivity (and where personal beliefs or other circumstances impair these standards, the translation assignment should be declined by the translator);
- ensure accurate translation that preserves the complete content of the testimony without any omission or distortion; and
- maintain clear role boundaries, so that translators do not engage in advocacy, guidance or advice.[75]

In fact, as an added layer of quality assurance, Amnesty International should have published in its appendix transcripts of its full interviews in the source language and the English translations (with redactions, if Amnesty International wanted to keep the interviews de-identified). Such transparency could help ensure that no bad-faith translations nor translation omissions/distortions occurred.[76]

It is noted that Amnesty International made no mention that accredited translators, who comply with a professional code of ethics, were used for its interviews. Amnesty International only stated that "[t]he vast majority of interviews were conducted using translators fluent in Mandarin Chinese, Uyghur, Kazakh or Kyrgyz".[77] If the translators used by Amnesty International did not possess the relevant accreditations and did not comply with a professional code of ethics, then the reliability of the testimonial excerpts provided by Amnesty International is questionable. If at any point the translators engaged in conduct that contravened ethical standards, then the relevant testimonies published by Amnesty International must be set aside, as there is unlikely any way to 'unscramble the egg'. Amnesty International should have been transparent on this issue (even retrospectively).

[75] See, e.g., 'AUSIT Code of Ethics and Conduct', *Australian Institute of Interpreters and Translators (AUSIT),* 2012 <online>

[76] For examples of how bad faith translations and translation omissions/distortions can be made by unaccredited translators not complying with a professional code of ethics, see the discussions relating to ASPI's Chinese-to-English translations in Jaq James, 'The Australian Strategic Policy Institute's "Uyghurs for Sale" Report: Scholarly Analysis or Strategic Disinformation?', *Geo-Law Narratives*, Working Paper 1/2022.

[77] Page 14 of the Amnesty International report.

As such, at this stage of the analysis, a reader of the Amnesty International report is left with testimony from the interviewees that is: (i) a very small sample size; (ii) anonymous; (iii) unsworn; (iv) uncorroborated; (v) may be influenced by improper leading questions and fact-feeding; (vi) may not be challenged by cross-examination-type questions; (vii) may not have been subject to a suitable credibility assessment; and (viii) may not have been translated by an accredited professional in compliance with a code of ethics.

4.3. Unclear Application of the Law

The sixth problem with the Amnesty International report is also one of the same problems with the ASPI report, namely: whilst both reports alleged a systematic forced labour program run by the Chinese government in breach of international law, both reports did not draw substantial connection between the asserted facts and the law on forced labour. However, unlike the ASPI report, the Amnesty International report **did** include the legal definition of forced labour in the body of its report (not tucked away in an endnote), and it **did not** wrongly imply that the ILO indicators are a substitute legal definition or legal checklist for forced labour. Yet, a notable omission from the Amnesty International report was the exclusion article 2(2)(c) of the ILO Convention and article 8(3)(c)(i) of the ICCPR with respect to work or service as a consequence of lawful convictions or conditional releases (as outlined in Part 3 of this paper).

In terms of connecting the testimony of its interviewees to the law of forced labour, it is noted that Amnesty International only stated the following:
"Based on the evidence presented in the report, Amnesty believes the treatment of some former detainees in Xinjiang is characterised by elements of forced labour which meet the definition of the ILO Convention 29. There is a lack of voluntariness accompanied by a threat of detention for non-compliance."[78]

Such a sparse legal comment makes any third-party attempt at a thorough legal analysis of the Amnesty International report very challenging. As such, any third-party legal analysis requires second-guessing of Amnesty International's legal reasoning. Accordingly, the parts of Arzu, Aldiyar, Ibrahim and Anarbek's testimony

[78] Page 128 of the Amnesty International report.

set out in bold font in the following sections have been presumed, in this paper, to be evidence of forced labour in the eyes of Amnesty International. The next sections also seek to reconcile the disconnect between the presumed evidence and what international law says about forced labour.

However, before delving into the testimonial evidence, an important issue needs to be explored that is relevant to a legal analysis of the interviewees' testimonies.

In a different section of the Amnesty International report, a statement was made that the "internment camp detention process appears to be operating outside the scope of the Chinese criminal justice system or other domestic law".[79] Without being explicit, what this statement effectively does is eliminate any possible application of the exclusion article 2(2)(c) of the ILO Convention and article 8(3)(c)(i) of the ICCPR. In other words, if labour assigned to the interviewees fell outside the criminal justice system or other relevant domestic law because it was not the consequence of convictions in a court of law, then the exclusion articles cannot apply, and thus any assigned labour could amount to forced labour. However, it is noted that Amnesty International's statement seemingly contradicts another statement made in its report, that is, "De-extremification Regulations provided the 'legal' cover for the government to expand its then-nascent internment camp in southern Xinjiang to the rest of the region" from March 2017.[80] Putting aside the cynical tone, this statement appears to indicate that Amnesty International acknowledged that the "internment camp detention process" does technically operate inside the scope of China's domestic law.

This latter point is confirmed by the Chinese government's 2019 white paper – *Vocational Education and Training in Xinjiang.*[81] It states that "vocational education and training centers" (which Amnesty International calls "internment camps")[82] have been established in accordance with the "Counter-Terrorism Law of the People's Republic of China", the "Regulations of the Xinjiang Uygur autonomous region on Deradicalization", and "other laws and regulations". Thus, the white paper also contradicts Amnesty International's earlier statement that the "centers"/"camps" operate outside the scope of domestic law.

[79] Page 49 of the Amnesty International report.
[80] Page 23 of the Amnesty International report.
[81] The State Council, The People's Republic of China, 'Vocational Education and Training in Xinjiang' (White Paper), 17 August 2019 <online>.
[82] Page 7 of the Amnesty International report.

The white paper goes on to list three categories that the "trainees" of the "centers"/"camps" fall within. The third category is the most serious category. It is for those who have been "convicted and received a prison sentence for terrorist or extremist crimes and, after serving their sentences, have been assessed as still posing a potential threat to society, and who have been ordered by people's courts in accordance with [articles 29 and 30 of the Counter-Terrorism Law] to receive education at the centers". Thus, this third category contradicts Amnesty International's claim that the "centers"/"camps" operate outside the criminal justice system.

In fact, China's system for dealing with high-risk terrorists is not dissimilar to what occurs in Australia. For example, the *Terrorism (High Risk Offenders) Act 2017* (NSW) provides for "the extended supervision and continuing detention of certain offenders posing an unacceptable risk of committing serious terrorism offences so as to ensure the safety and protection of the community". At the federal level, the *Counter-Terrorism Legislation Amendment (High Risk Offenders) Bill 2021* (Cth) was introduced into Parliament due to the recognition that some convicted terrorist offenders "are typically highly radicalised and do not change their extremist views while in prison, despite deradicalisation efforts".[83] The bill proposes that:
"Under an extended supervision order, a State or Territory Supreme Court may impose conditions on a terrorist offender at the end of their sentence that are proportionate to the risk they pose to the community. Conditions may include restrictions to movement and access to devices, requirements to not associate with particular individuals, and ***to participate in specified rehabilitation and treatment programs****"* (emphasis added).[84]

Returning to the white paper, the first category of the three categories of "trainees" is a less serious category. It is for "[p]eople who were incited, coerced or induced into participating in terrorist or extremist activities, or people who participated in terrorist or extremist activities in circumstances that were not serious enough to constitute a crime". The white paper also notes that this first category of "trainees" receive education at the "centers"/"camps" under "articles 29 and 30 of the Counter-Terrorism Law".

[83] Senator the Hon Michaelia Cash (Attorney-General), 'Keeping Australia safe from high risk terrorist offenders' (Media Release, 22 November 2021) <online>.
[84] Ibid.

To clarify, the white paper makes a distinction between "unlawful acts" and "criminal acts". This distinction could be analogised to "misdemeanours" and "felonies" in the United States criminal justice system. The distinction also appears to be in line with the *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)*, which encourages the use of non-custodial measures as part of the movement towards decriminalisation.[85]

What is unclear from the white paper is which body determines whether a person has committed an "unlawful act" and should attend a "center"/"camp". In one part of the white paper, it states that:
"Chinese law distinguishes between unlawful and criminal acts, and prescribes different ***law enforcement and judicial bodies*** *and different processes for handling the two kinds of acts. Depending on the specific circumstances, some offenders or criminals are subjected to* ***punishment by administrative organs, including public security organs, in accordance with the law****"* (emphasis added).

In another part of the white paper, it states that:
"The specific procedures for carrying out education and training in Xinjiang require the relevant authorities … to deal with the … categories in accordance with the laws and regulations, ***such as the Criminal Law, Criminal Procedure Law, and Counter-Terrorism Law.*** *The first category should* ***first be handled by public security organs****, and then given assistance and education by vocational education and training centers"* (emphasis added).

From these excerpts, it appears that a non-judicial body handles the first category of offences. It is noted that non-judicial bodies handling violations of the law is not necessarily unusual, as this also occurs in Australia, such as police officers issuing criminal infringement notices. However, criminal infringement notices still incorporate a judicial backstop mechanism (when a person rejects a notice as an alternative to a court proceeding) and a judicial review mechanism (when a person wishes to challenge the legality of a notice). This is in line with *The Tokyo Rules.*[86] What would need to be investigated is whether China's "Criminal Law, Criminal Procedure Law, and Counter-Terrorism Law" provide for such mechanisms for the first category. If they do, then they may help ensure that the first category is not in breach of article 9(4) of the ICCPR (if people in the first category are not allowed to

[85] *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)*, GA Res 45/110 (14 December 1990) principle 2.7 <online>.
[86] Ibid, principles 3.3 and 3.5.

come and go from the "centers"/"camps" of their own free will). Article 9(4) of the ICCPR states that "anyone who is subject to detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful". It does not appear that Amnesty International pursued this line of investigation and reasoning.

What is also unclear is whether the first category can still satisfy the International Labour Organization's position that punitive work or service cannot be imposed on a person unless they have been found guilty of an offence as a result of the due process of law (as noted in Part 3 of this paper). Three consecutive questions arise from this:

(i) Is the provision of vocational education and training genuine education and training, or is it a guise for work or service? If the latter, then:

(ii) Does China's "Criminal Law, Criminal Procedure Law, and Counter-Terrorism Law" provide a judicial backstop mechanism or judicial review mechanism for non-judicial decisions made for first category "trainees"? If so, then:

(iii) Would such mechanisms be acceptable to the International Labour Organization?

If the third question is answered in the negative, then any work or service carried out in the "centers"/"camps", and any forcefully assigned work or service to a "trainee" after leaving the "centers"/"camps", would not satisfy the exclusion article 2(2)(c) of the ILO Convention and article 8(3)(c)(i) of the ICCPR, and would therefore amount to unlawful forced labour. It is noted that Amnesty International also did not appear to pursue this line of inquiry and reasoning.

Moving on to the second category listed in the white paper, it is for:
"People who were incited, coerced or induced into participating in terrorist or extremist activities, or people who participated in terrorist or extremist activities that posed a real danger but did not cause actual harm, whose subjective culpability was not deep, who acknowledged their offences and were contrite about their past actions and thus do not need to be sentenced to or can be exempted from punishment, and who have ***demonstrated the willingness to receive training***"
(emphasis added).

The white paper also contains the following information:
"With regard to people in the second category, a small number of them should be punished severely, while the majority should be rehabilitated in accordance with the policy of balancing compassion and severity. Confession, repentance, and ***willingness to receive training*** *are preconditions for leniency, and these people will receive education to help reform their ways after they have been exempted from prosecution* ***in accordance with the law****"* (emphasis added).

The white paper also states:
"The second category should first be investigated by public security organs, and ***if the procuratorial organs, after reviewing the cases, have made the decision not to institute legal proceedings,*** *they should then be given assistance and education by education and training centers"* (emphasis added).

Regarding the last excerpt, the process appears to comply with the principle laid out in *The Tokyo Rules* that "resort to formal proceedings or trial by a court" should be avoided as far as possible.[87]

Regarding the other two excerpts, it is noted that they make no reference to "articles 29 and 30 of the Counter-Terrorism Law". Thus, it is unclear which sections of which law are applicable in determining the commission of offences in the second category. It is submitted that the white paper should have provided this specific information, instead of a vague reference to "the law". Nevertheless, Amnesty International would have had the resources to research the legal framework to identify the relevant legislation and the relevant sections of the legislation.

Regarding the reference to a "willingness to receive training", it appears to indicate that the second category is akin to a consensual pre-trial diversion agreement (which would need to be confirmed in China's "Criminal Law, Criminal Procedure Law, [or] Counter-Terrorism Law"). Pre-trial diversion agreements are also a feature in Australia's criminal justice system. They enable offenders to have their cases handled outside the court system in order to avoid a criminal record and sentencing. However, for such pre-trial diversion agreements to comply with *The Tokyo Rules*, they must be "subject to review by a judicial or other competent independent authority, upon application by the offender".[88] Judicial review mechanisms may also ensure that such pre-trial diversion agreements are not in breach of article 9(4) of

[87] Ibid, principle 2.5.
[88] Ibid, principle 3.5.

the ICCPR (if people in the second category are not allowed to come and go from the "centers"/"camps" of their own free will). Thus, China's "Criminal Law, Criminal Procedure Law, and Counter-Terrorism Law" would need to be examined in order to determine if these laws stipulate such oversight mechanisms for the second category. Again, it does not appear that Amnesty International pursued this line of examination and reasoning.

It is unclear why Amnesty International did not undertake the type of legal analysis laid out in this section. As such, it follows that it is unclear which of the three legal categories in the white paper Arzu, Aldiyar, Ibrahim and Anarbek fell within. As will be seen in the next sections, this has made a legal analysis of the interviewees' forced labour claims even more difficult, as only a speculative legal analysis can be undertaken.

4.3.1. Arzu's Testimony

The following quote from Arzu was provided by Amnesty International as evidence of forced labour:
"During the day [at the second camp] we would sit on a plastic chair. ***A teacher taught language and how to make clothes.*** *During the 21 days [we spent in the second camp]* ***we went to class two or three times****, otherwise we were just in the cell... The teachers from the screen were in [a different] class.* ***They just showed us how to make clothes on the TV.*** *Some guys were there [in this camp] for two years and never touched a machine... Then a list came out for people to transfer to a factory. Kazakhs, Kyrgyz, and Uzbeks, not Uyghurs...* ***Then I was sent to a factory for five months, to make government uniforms at first. Then we started making dresses. I worked for eight hours a day. I had one hour of exercise in the yard****... I was allowed to call family and friends, but not people abroad... There was no physical inspection, but we were given phones and asked to install a police app...* ***We worked five days a week.*** *The salary was 1,620 RMB [253 USD] a month... We were really ineffective. We didn't know how to do it. They had some Chinese woman come in for one week to try to teach us"* (emphasis added).[89]

[89] Page 127 of the Amnesty International report.

The first issue to note is that it appears Arzu's references to clothes-making classes have been interpreted by Amnesty International as amounting to forced labour. If this understanding is correct, it is submitted that Arzu has not provided enough information for Amnesty International to draw this legal conclusion. As noted in Part 3 of this paper, vocational training is not "work or service" under the ILO Convention if that training delivers genuine vocational training, as opposed to extraction of work or service.[90] To determine if work or service was extracted from Arzu under the guise of vocational training, such evidence needed to be provided (for example, if Arzu was expected to achieve a commercial-level output of garments and the garments were sold for profit, then this could amount to work or service).

Second, it appears that Amnesty International viewed Arzu's claim of being sent to a factory to make government uniforms and dresses amounted to forced labour. Yet, it is noted that nowhere in the testimonial excerpt is there a reference to a threat of penalty (which is one of the three elements that make up the legal definition of 'forced labour' under article 2(1) of the ILO Convention, as outlined in Part 3 of this paper). Amnesty International only made a vague comment at the start of its section on forced labour that "**some** detainees who spoke to Amnesty described arrangements that left them … under threat of further punishment" (emphasis added).[91] This begs the question: does "some detainees" include Arzu? If so, what was the threat?

Third, given that Arzu was making "government uniforms", it suggests that Arzu was working in a factory that was supervised and controlled by the government, as opposed to being a private entity. If this was the case, then this may have formed part of something akin to a consensual and lawful pre-trial diversion agreement (relevant to the second category in the white paper) or may fall within the exclusion article 2(2)(c) of the ILO Convention and article 8(3)(c)(i) of the ICCPR with respect to consequences of lawful convictions (relevant to the third category, and possibly the first category, in the white paper). Indeed, *The Tokyo Rules* allow for work releases as part of post-sentencing dispositions (as long as they are subject to review mechanisms by a "judicial or other competent independent authority").[92] If it is a case of the latter, Arzu's sentence had to have been passed in a court of law that was competent, independent and impartial, and followed due process, as required under

[90] *Forced Labour and Human Trafficking: Casebook of Court Decisions* (International Labour Office: 2009) 12 <online>.
[91] Page 126 of the Amnesty International report.
[92] *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)*, GA Res 45/110 (14 December 1990) principles 9.2 and 9.3 <online>.

article 14 of the ICCPR.[93] If article 14 was satisfied, Arzu's work may not have amounted to forced labour under international law.

Amnesty International may argue that, in any case, article 2(2)(c) of the ILO Convention and article 8(3)(c)(i) of the ICCPR do not apply because any offence committed by Arzu was not serious enough to justify restrictions on his liberty. Indeed, Amnesty International stated in its report that all of the "55 people [it interviewed] who had been detained in internment camps and later released" had been "arbitrarily detained for what appears to be … entirely lawful conduct; that is, without having committed any internationally recognized criminal offence."[94]

Two comments can be made about Amnesty International's statement. First, Amnesty International did not provide an authority for what amounts to an "internationally recognized criminal offence". In fact, it is noted that *The Tokyo Rules* recognise that, in cases of implementing non-custodial measures as alternatives to imprisonment, "the political, economic, social and cultural conditions of each country and the aims and objectives of its criminal justice system" should be taken into account.[95] Whilst not explicitly stated, this United Nations instrument arguably infers that determining what should or should not be a criminal offence would be dependent on the realities within each country. Additionally, it is noted that the appropriate measuring stick for delimiting what should and should not be a criminal offence is international human rights law instruments, not a 'majority rules' posture.

A second comment regarding Amnesty International's statement is that, to make the claim that Arzu had engaged in lawful conduct, Amnesty International should have specifically explained to its readers what conduct was attributed to Arzu and, ideally provide corroborative evidence, such as police or court records. To not do so places an unfair expectation on Amnesty International's readers to accept at face value Arzu's implied claim that he was punished for lawful conduct.

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[93] Amnesty International acknowledged its uncertainty as to whether the relevant courts met the requirements of international law: page 134 of the Amnesty International report. Amnesty International also claimed that "none of the former detainees … experienced anything resembling a genuine judicial … process": page 132 of the Amnesty International report. It is noted that this latter claim would need to be corroborated before the applicability of article 2(2)(c) of the ILO Convention and article 8(3)(c)(i) of the ICCPR can be ruled out.

[94] Page 8 of the Amnesty International report.

[95] *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)*, GA Res 45/110 (14 December 1990) principle 1.3 <online>.

Returning to the legal issues with Arzu's testimonial excerpts, the fourth issue relates to Arzu working eight hours a day (with a one-hour break) for five days a week. It is noted that this working arrangement is in line with the principle of the forty-hour work week under article 1 of the International Labour Organization's *Forty-Hour Week Convention 1935 (No 47)*. To be clear, this means that Arzu was not subjected to "hard labour" (which is unlawful under article 8(3)(b) of the ICCPR, as mentioned in Part 3 of this paper).

To conclude on Arzu's testimony, without more information from Amnesty International, it is submitted that it cannot be definitively declared that Arzu was forced into labour in breach of international law.

4.3.2. Aldiyar's Testimony

The following quotes from Aldiyar were provided by Amnesty International as evidence of forced labour:
"[After I was released from the camp] they ordered me not to leave my house for 10 days... After a week they called me back and they registered me and made a list of people who had been in the camp. Then they gathered all the people on the list, and we went to a garment factory. ***We didn't have a choice but to go there... The salary was low. It was impossible to take care of my family with the salary.*** *The first month [we were paid] 200 RMB [31 USD]... The factory was on the outskirts of [redacted] county seat. Only ethnic minorities were working in the factory – Uyghurs, Kazakhs, and Hui. The [only] Han were the heads of the factory... The factory made clothes, gloves, and bags"* (emphasis added).
"I was at the factory for three months. ***After three months, I asked if I could do my old profession. They said, 'Okay, but you need to get a letter from your work saying that they are taking responsibility for you and to give the address of the head of your workplace'****... I got the paper [signed] and went back to [the place I used to work] after I finished [high] school"* (emphasis added).

Amnesty International also noted that:
"every week Aldiyar ***had to submit a written report of what he did [to the village administration]"*** (emphasis added).[96]

[96] Page 127 of the Amnesty International report.

Regarding the first excerpt, it is noted that Aldiyar indicated his work for the garment factory was involuntary. However, it would need to be clarified if such involuntariness was the result of an unlawful threat of penalty (which is one of the three legal elements of forced labour under article 2(1) of the ILO Convention) or the result of having no other employer-option being offered to him. If the latter, Aldiyar may still have retained the right to refuse to work altogether, in which case his work for the garment factory could have been consensual under the ILO Convention.

As with Arzu, another pertinent issue is determining whether Aldiyar's work fell outside the ambit of forced labour because it formed part of something akin to a consensual and lawful pre-trial diversion agreement (relevant to the second category in the white paper) or was a consequence of a lawful conviction in a court of law that was competent, independent and impartial, and followed due process (relevant to the third category, and possibly the first category, in the white paper). If the latter, it would need to be determined whether the garment factory was under the supervision and control of the Chinese government (not a private entity), in which case Aldiyar's work could be precluded from the realm of forced labour.

However, it is noted that Aldiyar claimed he was detained merely for working in Kazakhstan.[97] On the face of it, this claim sounds far-fetched and fanciful. Therefore, it would need to be ascertained whether Aldiyar was in Kazakhstan for unlawful purposes (for example, national security offences or drug offences) or whether he was subject to a travel ban as a bail condition or non-custodial condition linked to a domestic offence. Aldiyar's claim should also be corroborated by relevant legislation or government proclamation and police or court documents. If Aldiyar was indeed detained and assigned factory work merely for working in Kazakhstan, then such detention would be unlawful under international law, as it breaches article 12(2) of the ICCPR, which states that "[e]veryone shall be free to leave any country, including his own". As such, Aldiyar's work for the factory could amount to forced labour as there would have been no lawful justification to restrict Aldiyar's liberty in the first place.

Regarding the second excerpt, it is noted that Aldiyar claimed he could only cease work at the garment factory if his new workplace would take "responsibility" for him. Amnesty International did not explain what the word "responsibility" entailed and what type of work Aldiyar moved on to. If Aldiyar's work for the garment factory formed part of something akin to a consensual and lawful pre-trial diversion

[97] Page 88 of the Amnesty International report.

agreement or lawful court order, then did taking "responsibility" mean that the next workplace needed to comply with the conditions of the agreement or order as well? If so, was the next workplace under the supervision and control of the government? Such facts would need to be ascertained before a conclusion could be reached that Aldiyar was forced into labour in breach of international law.

Regarding the third excerpt, if it was the case that Aldiyar's work at the garment factory was in line with international law, it would need to be determined if Aldiyar had to submit written reports to the village administration as a consequence of something akin to a consensual and lawful pre-trial diversion agreement, intensive correction order, probation order or parole order.

Returning to the first excerpt, it is noted that Amnesty International included Aldiyar's complaint that he was paid a low salary and therefore unable to take care of his family. Determining the truthfulness of this claim has already been dealt with in Section 4.2.2.1 of this paper. Regarding its relevance to international law, it could be that Amnesty International was under the mistaken belief that a very low wage amounts to forced labour. Yet, as was noted in Part 3 of this paper, the International Labour Office has warned against the term 'forced labour' being used "loosely to refer to poor or insalubrious working conditions, including very low wages".[98]

4.3.3. Ibrahim's Testimony

The following quote from Ibrahim was provided by Amnesty International as evidence of forced labour:
*"**They took us [to the factory]**... There were many buildings and many people... I had to go to the third floor... **They taught us how to sew clothes.** And while we were having lunch I spoke with women and girls [who worked there] and learned that those women's husbands or girls' fathers were in a camp. That was why they were taken there**. I learned that if one family [member] was in a camp you had to work so the father or husband can get out quickly**... I worked there for [some] days.... **I had been a businessman before. I explained that and they let me go**... The name of*

[98] *A Global Alliance Against Forced Labour: Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (International Labour Office: 2005) 5 <online>.

the factory was [redacted]... it was in the county seat... it was a linen factory... we produced clothes" (emphasis added).[99]

There are a number of issues with Ibrahim's testimony. First, the reference to workers being forced into labour to get their family members out of detention amounts to hearsay evidence. Unless Amnesty International received first-hand testimony of such a claim, it cannot be relied upon as evidence of forced labour. Even if such a claim was first-hand testimony, it sounds far-fetched and fanciful, and would therefore need to be reliably corroborated.

Second, it is noted that nowhere in the excerpt does Ibrahim make a reference to a threat of penalty if he refused to work; nor is it clear that Ibrahim was one of "some detainees … under threat of punishment" to which Amnesty International generically referred.[100] Thus, one of the three legal elements of 'forced labour' under the ILO Convention is, on the face of it, missing.

Third, it appears, from the first sentence of the excerpt, that Ibrahim was implicitly claiming he was sent to the factory involuntarily. Yet, as with Aldiyar and Arzu, it needs to be determined whether Ibrahim's work fell within the exclusion article 2(2)(c) of the ILO Convention and article 8(3)(c)(i) of the ICCPR (relevant to the third category, and possibly the first category, in the white paper).

On this point, similar to Aldiyar, Ibrahim claimed he was detained merely for travelling to Kazakhstan.[101] Due to this claim sounding far-fetched and fanciful, as was noted with Aldiyar, the claim would need to be further investigated and corroborated. If Ibrahim was indeed detained for merely travelling to Kazakhstan (and this was not due to a travel ban as a bail condition or non-custodial condition linked to a domestic offence), then his two weeks of work would have been the result of an unlawful restriction of his liberty, as Ibrahim had the right to travel to Kazakhstan under article 12(2) of the ICCPR. As such, his two weeks of work could have amounted to forced labour in breach of international law.

Finally, the reference to Ibrahim only being given a qualified exit route from the factory (that is, his previous work as a businessman afforded him an exit) suggests he did not have the ability to fully revoke any consent to work (which is an element of

[99] Page 128 of the Amnesty International report.
[100] Page 126 of the Amnesty International report.
[101] Page 72 of the Amnesty International report.

determining voluntariness under article 2(1) of the ILO Convention, as discussed in Part 3 of this paper). The need to further investigate and corroborate this claim has already been covered in Section 4.2.2.1. Even if corroborated, it would be a moot point if Ibrahim did not freely enter the two weeks of work and his work did not fall within the exclusion article 2(2)(c) of the ILO Convention and article 8(3)(c)(i) of the ICCPR.

4.3.4. Anarbek's Testimony

The only quote from Anarbek provided by Amnesty International was: "They told me I could be free if I worked as a security guard at a camp".[102] The problems with passing off this statement alone as evidence of forced labour are obvious. There is no way for a reader of the Amnesty International report to rule out that Anarbek's work was part of a consensual and lawful pre-trial diversion agreement, a lawful consequence of a conviction in a court of law, or some other lawful post-sentencing order. If Anarbek committed an "unlawful act" or "criminal act", it would also have to be reliably determined if there was even a government policy that allowed such persons to be security guards in a "center"/"camp" (as it seems like a security risk).

4.3.5. Non-Attributed Claims of Forced Labour

Pages 126 to 129 of the Amnesty International report also recorded some non-attributed claims relating to forced labour. These included:

(i) "A few [former detainees] were sent to work in village administration offices, police stations, or other government buildings where they often perform menial tasks."[103]

(ii) "One [former detainee] was sent to work on a state-owned farm and one was made to do chores for a Han Chinese man in the village."[104]

[102] Page 127 of the Amnesty International report.
[103] Pages 126-127 of the Amnesty International report.
[104] Page 127 of the Amnesty International report.

(iii) "Other former detainees provided second-hand accounts of people from their camps being sent to work in factories."[105]

Regarding the first quote and the reference to "state-owned farm" in the second quote, the same legal issues relating to Arzu, Aldiyar, Ibrahim and Anarbek are applicable here, given that village administration offices, police stations and government buildings would be under the supervision and control of a public authority. It is noted that Amnesty International's reference to "menial tasks" is inconsequential to determining whether the legal elements of forced labour have been met.

Regarding the reference to doing "chores for a Han Chinese" in the second quote, it is difficult to make a legal comment, as there is not enough information to second-guess Amnesty International's intentions behind referencing the ethnicity of the person, and whether the word "chores" was an unfavourable re-wording of "assisted-living support work" for a government-run program, for example.

Regarding the third quote, it amounts to hearsay evidence and is therefore unreliable.

4.4. Summary

It is surprising that Amnesty International was of the position that the information it provided on pages 126 to 129 of its report would be sufficient to convince its readers that a clear case had been made of the Chinese government orchestrating a systematic forced labour program in Xinjiang (potentially encompassing one million people or more). And yet, even more surprisingly, Amnesty International did indeed persuade some people, which may have included Senator Patrick. No doubt, convincing impressionable people with political clout would matter far more to Amnesty International than convincing ordinary people with an analytical mind. As such, from Amnesty International's viewpoint, it would be a case of 'mission accomplished'.

[105] Page 128 of the Amnesty International report.

To restate the matter, in the end, all that a reader of the Amnesty International report is left with is testimony from interviewees that is: (i) a very small sample size; (ii) anonymous; (iii) unsworn; (iv) uncorroborated; (v) may have been influenced by improper leading questions and fact-feeding; (vi) may not have been challenged by cross-examination-type questions; (vii) may not have been subject to a suitable credibility assessment; (viii) may not have been translated by an accredited professional in compliance with a code of ethics; and (ix) not sufficiently connected to international law.

It may be that Amnesty International is ultimately right – that eleven of its interviewees were indeed unlawfully forced into labour. However, its report, as it currently stands, does not provide sufficient information to safely draw this conclusion, especially a conclusion that there was a larger and systematic forced labour program.[106] Amnesty International should have given its analytical readers the ability to look 'under the hood' to satisfy themselves that Amnesty International strove for a best practice standard in the course of its research. Instead, Amnesty International's readers were merely given an unspoken message of "trust us, we are human rights advocates".

If Amnesty International turns out to be wrong – that is, the Chinese government is actually complying with international law in all respects – then Amnesty International has effectively undermined the United Nations and the International Labour Organization's position that work is a beneficial distraction for offenders, and that work and training opportunities is a praiseworthy measure for reducing recidivism and ensuring societal integration.

It is noted that Amnesty International was given the assumptive benefit in Section 4.2.2.2 of this paper that its substandard report could have been the result of tunnel vision. But this explanation does not elucidate why its legal analysis was also substandard. Therefore, at this juncture, an important question arises: was the Amnesty International report just a piece of junk research or was there also something more sinister afoot? This question will be explored in Part 6 of this paper.

[106] The United Nations High Commissioner for Human Rights' anticipated 2022 report on Xinjiang may help shed light on the veracity of Amnesty International's claims.

5. THE HUMAN RIGHTS WATCH REPORT

Like Amnesty International, Human Rights Watch also declared in its report that it had gathered evidence demonstrating the Chinese government's actions in Xinjiang amount to 'crimes against humanity' under article 7 of the *Rome Statute of the International Criminal Court* ('Rome Statute'). However, unlike Amnesty International, Human Rights Watch went as far as categorising its forced labour allegation as a 'crime against humanity'. This more severe legal categorisation matters greatly because of the evolving international law principle of '*aut dedere aut judicare'* (Latin for "either extradite or prosecute") that obligates countries to prosecute or extradite persons who have committed the gravest violations in international law (which includes crimes against humanity).[107] The categorisation also matters because the 'Responsibility to Protect' principle in international law may be invoked when crimes against humanity are being committed, which, in a worst case scenario, could lead to military intervention.[108]

How Human Rights Watch categorised its forced Xinjiang labour allegation as a 'crime against humanity' is rather perplexing. In its 'Summary' section on page 2, Human Rights Watch effectively interpreted sub-article 7(1)(k) of the Rome Statute (a catchall provision for grave inhumane crimes) as encompassing forced labour.[109] However, in its 'International Legal Standards' section on page 44, Human Rights Watch interpreted sub-article 7(1)(c) of the Rome Statute (enslavement) as encompassing forced labour. Human Rights Watch did not reconcile these differing legal interpretations. It is unclear if the irregularity was due to carelessness or strategic hedging. Either way, the irregularity is surprising, given that the Mills Legal Clinic of the prestigious Stanford University Law School co-authored the report. It is noted that this is the first major issue with the Human Rights Watch report.

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[107] See, e.g., discussion in: Miles M Jackson, 'The Customary International Law Duty to Prosecute Crimes Against Humanity: A New Framework', *Tulane Journal of International and Comparative Law*, 2007, 16, 117-156; 'The Obligation to Extradite or Prosecute (*aut dedere aut judicare*): Final Report of the International Law Commission' in *Yearbook of the International Law Commission*, United Nations, 2014, vol. II (Part Two).

[108] See *2005 World Summit Outcome*, GA Res 60/1, UN Doc A/Res/60/1 (24 October 2005) paras 138 and 139 <online>. For a discussion of the 'Responsibility to Protect' principle in the context of military intervention, see Christopher C Joyner, 'The Responsibility to Protect: Humanitarian Concern and the Lawfulness of Armed Conflict', *Virginia Journal of International Law,* 2007, 47, 693-723, 700.

[109] The exact wording in the 'Summary' section was: *"**The specific crimes against humanity documented in this report include** imprisonment or other deprivation of liberty in violation of international law; persecution of an identifiable ethnic or religious group; enforced disappearance; torture; murder; and **alleged inhumane acts intentionally causing great suffering or serious injury to mental or physical health, notably forced labour** and sexual violence"* (emphasis added).

To extrapolate, according to the International Criminal Court's *Elements of Crimes* publication, the catchall article 7(1)(k) of the Rome Statute is made up of the following legal elements:

(i) the perpetrator **inflicted great suffering or serious injury to body or to mental or physical health by means of an inhumane act**;
(ii) such an act was of a character similar to other acts referred to in article 7(1) (such as, murder, extermination, enslavement, torture, rape, sexual slavery, enforced prostitution, apartheid), with the word 'character' referring to the nature and gravity of the act;
(iii) the perpetrator was aware of the factual circumstances that established the character of the act;
(iv) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
(v) the perpetrator knew that the conduct was part of, or intended the conduct to be part of, a widespread or systematic attack directed against a civilian population.[110]

It is noted that Human Rights Watch did not make any attempt at connecting these legal elements to its specific asserted facts of forced labour. Instead, Human Rights Watch simply tried to smuggle through a novel interpretation of article 7(1)(k) without any citation of legal reasoning from eminent jurists or international legal bodies; nor did Human Rights Watch tender its own legal reasoning. Thus, the interpretation of article 7(1)(k) by Human Rights Watch remains contestable; particularly when it can be assumed that, if the drafters of the Rome Statute intended for 'crimes against humanity' to encompass forced labour, the drafters would have explicitly listed forced labour in a separate sub-category in article 7.

Regarding article 7(1)(c) of the Rome Statute dealing with enslavement, according to the International Criminal Court's *Elements of Crimes* publication, it is made up of the following legal elements:

(i) the perpetrator exercised any or all of the powers attaching to the **right of ownership over one or more persons**, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a **similar deprivation of liberty**;
(ii) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

[110] 'Elements of Crimes', *International Criminal Court*, 2013, 8-9 <online>.

(iii) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[111]

Article 7(2)(c) of the Rome Statue also defines 'enslavement' as "the exercise of any or all of the powers attaching to the **right of ownership** over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children" (emphasis added).

The reference to 'deprivation of liberty' in the International Criminal Court's *Elements of Crimes* publication has a footnote with the following explanatory note: "It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956* ['Supplementary Convention']".[112] It is this footnote that Human Rights Watch relied upon to interpret the word 'enslavement' under article 7(1)(c) as encompassing forced labour.

Human Rights Watch's categorisation of what is occurring in Xinjiang as 'enslavement' is contestable. This is because the Supplementary Convention mentioned in the International Criminal Court's footnote refers to the gravest forms of enslavement, such as serfdom, child-selling, forced child marriage and international slave trade. These forms of enslavement involve a **degree of ownership** over a person that is not necessarily present in all cases of forced labour. Indeed, the Supplementary Convention builds upon the definitional foundation of 'slavery' under the League of Nations' *International Convention to Suppress the Slave Trade and Slavery 1926,* which refers to "the status or condition of a person over whom any or all of the powers attaching to the **right of ownership** are exercised" (emphasis added). On a contextual reading,[113] given that the definition of 'enslavement' under article 7(2)(c) of the Rome Statute also refers to ownership over a person, it would seem that, for unlawful forced labour to fall within article 7(1)(c), there would need to be a context akin to ownership over a labourer. It is noted that Human Rights Watch did not

[111] Ibid, 4.
[112] Ibid, footnote 11.
[113] According to article 31(1) the *Vienna Convention on the Law of Treaties 1969*, a convention "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty **in their context** and in light of its object and purpose" (emphasis added).

methodically make such a legal argument.[114] Regardless, it is submitted that article 7(1)(c), on balance, is a better ground for classing 'forced labour' as a 'crime against humanity' than article 7(1)(k).

Following on from this, it is noted that only pages 34 and 35 of Human Rights Watch's 53-page report were dedicated to an evidentiary discussion of its forced labour allegations. Yet, unlike the Amnesty International report, the Human Rights Watch report did not contain any first-hand testimony from individuals claiming to be forced into labour. Instead, the two pages of the report were essentially a brief literature review of secondary sources, not evidence from primary sources. Presumably, the references cited in the report were viewed by Human Rights Watch as the strongest evidence of forced labour it could find. And yet, given that the ASPI report was one of the references cited as evidence of forced labour, it can be assumed that Human Rights Watch (like Amnesty International) did not critically engage with any of its references. It is noted that this is the second major issue with the Human Rights Watch report.

What is of greatest surprise is that pages 34 and 35 of the report made no reference at all to international law; it simply declared a case of forced labour without connecting its evidence to the legal definition under the ILO Convention. It is noted that this is the third major issue with the Human Rights Watch report.

As it follows, at this stage of the analysis, readers of the Human Rights Watch report are left with: (i) allegations of a crime against humanity that are argued inconsistently and poorly; (ii) allegations of forced labour based on secondary sources that Human Rights Watch has seemingly not critically examined; and (iii) no analytical connection between the asserted facts of forced labour and the definition of forced labour under the ILO Convention.

It is submitted that these three major issues are red flags pointing to the Human Rights Watch report being an unreliable source for the allegations of forced Xinjiang labour. To further demonstrate the second deficiency, the references in the Human Rights Watch report that purportedly support the allegation of forced labour are critically examined in the sections that follow.

[114] The nearest claim to "ownership" made by Human Rights Watch was when it declared that the Chinese government "has exerted total and arbitrary power over the Muslim Turkic population": page 45 of the Human Rights Watch report. It is submitted that this explanation is far too broad and vague to have utility in evidencing cases of enslavement.

5.1. Human Rights Watch's Evidence of Forced Labour

The secondary sources cited by Human Rights Watch as evidence of forced labour were the following:

- a 2018 *New York Times* article written by Chris Buckley and Austin Ramzy;[115]
- a 2019 *Radio Free Asia* (RFA) article written by Shohret Hoshur;[116]
- a 2020 Issue Brief by the *Fair Labor Association* (FLA);[117]
- the 2020 ASPI report;
- a 2021 BBC News article written by John Sudworth;[118] and
- a 2019 "leaked" Nankai University study.[119]

As noted earlier, it is presumed that these six sources were chosen by Human Rights Watch because they were viewed as the strongest sources of evidence of forced labour. Consequently, it would be expected that each source could stand up to close scrutiny through a legal, merit or evidentiary lens. As such, the following sections examine the six sources through these lenses.

5.1.1. Chris Buckley and Austin Ramzy's *New York Times* Article

The first referenced claim in the Human Rights Watch report relating to forced labour is the following:
*"The evidence indicates that **detainees have been sent to perform forced labor after they were released** from Xinjiang's political education camps. Satellite images also show the recent **emergence of new factories, connected to or near the camps**, where inmates allegedly **provide low-cost or unpaid labor**"* (emphasis added).

[115] Chris Buckley and Austin Ramzy, 'China's Detention Camps for Muslims Turn to Forced Labor', The New York Times, 16 December 2018 <online>.
[116] Shoret Hoshur, 'Internment Camp Assigned Uyghur Forced Laborers to Xinjiang Textile Factory: Official', *Radio Free Asia*, 14 November 2019 <online>.
[117] 'Forced Labor Risk in Xinjiang, China', *Fair Labor Association*, Issue Brief, January 2020 <online>.
[118] John Sudworth, '"If the others go, I'll go": Inside China's scheme to transfer Uighurs into work', *BBC News*, 2 March 2021 <online>.
[119] 'Report on the Transfer of the Uyghur Labour Force to Alleviate Poverty in the Hotan Region of Xinjiang', *China Institute of Wealth and Economics*, Nankai University, 2019 <online>.

Chris Buckley and Austin Ramzy's *New York Times* article was cited for this claim. In analysing the relevant evidence provided by Buckley and Ramzy, the following three evidentiary groupings have been identified: (i) evidence of "releasees" forced into labour; (ii) evidence of new factories connected to "camps"; and (iii) evidence of "inmates" providing low-cost or unpaid labour.

(On a side comment, it is noted that Buckley and Ramzy's article was also referenced in the Amnesty International report as corroborative evidence of forced labour.[120] Therefore, this sub-section also has applicability to the Amnesty International report.)

5.1.1.1. Evidence of Releasees Forced into Labour

The purported evidence provided by Buckley and Ramzy for the claim that "camp" releasees are forced into labour is the following five paragraphs:

Paragraph 1

"Serikzhan Bilash, a founder of Atajurt Kazakh Human Rights, an organization in Kazakhstan that helps ethnic Kazakhs who have left neighboring Xinjiang, said he had interviewed ***relatives of 10 inmates who had told their families that they were made to work in factories*** *after undergoing indoctrination in the camps"* (emphasis added).

The following observations are made about this paragraph:

(i) it does not provide first-hand testimony, only hearsay evidence; and
(ii) it contains testimony that is anonymous and is therefore not verifiable or cross-examinable.

Accordingly, it is submitted that this part of Buckley and Ramzy's article is not a reliable source of evidence to substantiate the claim of releasees being forced into labour in breach of international law.

Paragraph 2

*"****It's not as though they have a choice of whether they get to work in a factory, or what factory they are assigned to," said Darren Byler****, a lecturer*

[120] Page 128 of the Amnesty International report.

*at the University of Washington who studies Xinjiang and visited the region in April. … He said it was safe to conclude that hundreds of thousands of detainees **could** be compelled to work in factories **if** the program were put in place at all the region's internment camps"* (emphasis added).

The following observations are made about this paragraph:

(i) it contains the implicit message that Darren Byler is a credible expert witness on forced Xinjiang labour whose opinion carries weight;

(ii) it seems to indicate that Byler is confusing the ability to freely choose **types of work** with the ability to **choose to work**; and

(iii) the estimate of hundreds of thousands of forced labourers is based on speculation.

To further explain the first observation, it is contestable as to whether Byler is deserving of expert status, given that he was an external referee of the ASPI report and approved the report for publication despite its many fatal flaws.[121] To further explain the second observation, the legal definition of forced labour (as outlined in Part 3 of this paper) applies to the free ability to enter or leave 'work or service'; it does not apply to the range of 'work or service' options available if those options can be turned down.

Accordingly, it is submitted that this part of Buckley and Ramzy's article is not a reliable source of evidence to substantiate the claim of releasees being forced into labour in breach of international law.

Paragraph 3

*"The documents detail plans for inmates, even those **formally released from the camps**, to take **jobs at factories that work closely with the camps to continue to monitor and control them**"* (emphasis added).

The following observations are made about this paragraph:

(i) it does not provide a link to the 'documents' it references in order to enable third-party verification of the wording of the documents; and

[121] Jaq James, 'The Australian Strategic Policy Institute's "Uyghurs for Sale" Report: Scholarly Analysis or Strategic Disinformation?', *Geo-Law Narratives*, Working Paper 1/2022.
It is noted that Byler was also the third lead witness who gave oral testimony to the Australian Senate Committee's inquiry into forced Uyghur labour: see public hearing program, 'Customs Amendment (Banning Goods Produced By Uyghur Forced Labour) Bill 2020', *Foreign Affairs, Defence and Trade Legislation Committee*, 27 April 2021 <online>.

(ii) it does not consider whether "monitor and control" acts form part of a conditional release within a court-ordered sentence (see article 2(2)(c) of the ILO Convention and article 8(3)(c)(i) of the ICCPR) or form part of a consensual and lawful pre-trial diversion agreement, for example.

Accordingly, it is submitted that this part of Buckley and Ramzy's article is not a reliable source of evidence to substantiate the claim of releasees being forced into labour in breach of international law.

Paragraph 4

"Kashgar, an ancient, predominantly Uighur area of southern Xinjiang that is a focus of the program, reported that in 2018 alone it ***aimed to send 100,000 inmates who had been through the "vocational training centers" to work in factories****, according to a plan issued in August"* (emphasis added).

The following observations are made about this paragraph:

(i) it does not consider whether the work in the factories was either consensual or formed part of a conditional release within a court-ordered sentence (see article 2(2)(c) of the ILO Convention and article 8(3)(c)(i) of the ICCPR); and

(ii) it contains a broken link to the "plan issued in August", which hinders any third-party analysis of its relevance.

Accordingly, it is submitted that this part of Buckley and Ramzy's article is not a reliable source of evidence to substantiate the claim of releasees being forced into labour in breach of international law.

Paragraph 5

*"**Mr. Byler said a relative of a Uighur friend** was sent to an indoctrination camp in March and formally released this fall. But he was then **told he had to work for up to three years in a clothing factory.** … A government official, Mr Byler said, suggested to his friend's family that if the relative worked hard, his time in the factory might be reduced"* (emphasis added).

The following observations are made about this paragraph:

(i) it does not provide first-hand testimony, only hearsay evidence;

(ii) it contains testimony that is anonymous and is therefore not verifiable or cross-examinable; and

(iii) it contains insufficient context to determine whether the work in the clothing factory amounts to forced labour under international law.

Accordingly, it is submitted that this part of Buckley and Ramzy's article is not a reliable source of evidence to substantiate the claim of releasees being forced into labour in breach of international law.

5.1.1.2. Evidence of New Factories Connected to "Camps"

The purported evidence provided by Buckley and Ramzy for the claim that satellite images show new factories connected to the "camps" (with the implication being that forced labour is occurring inside the factories) is the following image, image caption and paragraph:

Caption: *"A satellite image taken in September shows an internment camp in Xinjiang.* ***The buildings in the upper left corner appear to be of a design commonly used by factories****"* (emphasis added).

Paragraph: *"Satellite imagery suggests that* ***production lines are being built inside some internment camps****. … Images of one camp featured in the state television broadcast, for example, show* ***10 to 12 large buildings with a single-story, one-room design commonly used for factories,*** *said Nathan Ruser, a researcher at the Australian Strategic Policy Institute"* (emphasis added).

The following observations are made about the image, image caption and paragraph:

(i) they suggest it is possible to conclude from a bird's-eye-view that non-transparent buildings are factories with productions lines inside them;[122]

(ii) they reference Nathan Ruser, who is on the record for misinterpreting a satellite image of a Xinjiang high school as a political indoctrination camp in the ASPI report, thus demonstrating his lack of expertise in satellite imagery analysis;[123] and

(iii) even if the ten blue buildings were factories, it cannot be concluded that forced labour is occurring inside them without knowing whether the three legal elements of 'forced labour' under article 2(1) of the ILO Convention were met, and whether the exclusion article 2(2)(c) of the ILO Convention and article 8(3)(c)(i) of the ICCPR were triggered.

Accordingly, it is submitted that this part of Buckley and Ramzy's article is not a reliable source of evidence to substantiate the claim that "camps" have new factories where forced labour is occurring in breach of international law.

5.1.1.3. Evidence of "Inmates" Providing Low-Cost or Unpaid Labour

The purported evidence provided by Buckley and Ramzy for the claim that "inmates" provide low-cost or unpaid labour is the following paragraph:

*"'These people who are detained provide **free or low-cost forced labor for these factories**,' said Mehmet Volkan Kasikci, a researcher in Turkey who has collected accounts of inmates in the factories by **interviewing relatives** who have left China. 'Stories continue to come to me,' he said"* (emphasis added).

[122] It is noted that Buckley and Ramzy did not even attempt to point out what specific features of the buildings were evidence that the buildings are factories. For example: Are they factories because the buildings look more modern than the other buildings? Are they factories because they have blue roofs? Are they factories because there are ten buildings? Are they factories because the outside lay-out is U-shaped and the middle layout is square-shaped? Are they factories because some buildings are longer in length and others are shorter in length? Are they factories because they buttress roads? By not providing such information and comparison reference points, an unfair expectation is placed on the reader to accept Ruser's claim at face value.

[123] Jaq James, 'The Australian Strategic Policy Institute's "Uyghurs for Sale" Report: Scholarly Analysis or Strategic Disinformation?', *Geo-Law Narratives*, Working Paper 1/2022, 49-53.

The following observations are made about this paragraph:

(i) it does not provide first-hand testimony, only hearsay evidence;

(ii) it contains testimony that is anonymous and therefore is not verifiable or cross-examinable; and

(iii) seems to wrongly suggest that compensation is a forced labour issue rather than a work standards issue (see Part 3 of this paper).

Accordingly, it is submitted that this part of Buckley and Ramzy's article is not a reliable source of evidence to substantiate the claim of "inmates" being forced into labour in breach of international law.

5.1.2. Shohret Hoshur's *Radio Free Asia* (RFA) Article

The second referenced claim in the Human Rights Watch report relating to forced labour is the following:
"In at least one instance, such ***a factory purportedly became an extension of a political education camp; laborers live in dormitories, may be prohibited from returning home on a regular basis, and receive no pay for their work*** *until they 'complete their training'"* (emphasis added).

Shohret Hoshur's *Radio Free Asia* (RFA) article was cited for this claim. In analysing the relevant evidence provided by Hoshur, the following two evidentiary groupings have been identified: (i) evidence of a factory becoming an extension of a political indoctrination camp; and (ii) evidence of workers living in dormitories, prohibited from returning home regularly, and receiving no payment.

(On a side comment, it is noted that Hoshur's article was also referenced in the Amnesty International report as corroborative evidence of forced labour.[124] Therefore, this sub-section also has applicability to the Amnesty International report.)

[124] Page 128 of the Amnesty International report.

5.1.2.1. Evidence of a Factory Becoming an Extension of a "Political Indoctrination Camp"

The purported evidence provided by Hoshur for the claim that a factory became an extension of a "political indoctrination camp" is the following paragraphs:

Paragraph 1

*"**An official who works within the judiciary** in [Xinjiang's] Kashgar (in Chinese, Kashi) prefecture recently told RFA's Uyghur Service that **14 Uyghurs who were formerly held at an internment camp had been sent to work against their will** at the Ruyi Textile Factory in the prefecture's Yengisheher (Shule) county. … 'In the township where I am working, there are 14 people [who are former camp detainees] working in a factory,' said the official, **who spoke on condition of anonymity**, confirming that **the group had been assigned to work at the facility through their internment camp**. … "When asked if **he had personally brought the group of 14 people to the factory**, the official said, 'Yes'"* (emphasis added).

The following observations are made about this paragraph:

(i) it contains testimony that is anonymous and therefore is not verifiable or cross-examinable;

(ii) it does not clearly indicate how the judicial official determined that the 14 Uyghurs were sent to work against their will in breach of international law;

(iii) it does not explain why a judicial-arm officer performed the type of work normally done by an executive-arm officer (which may bring the officer's testimony into some doubt); and

(iv) it does not seem to consider whether the work in the factory formed part of conditional releases within court-ordered sentences (see article 2(2)(c) of the ILO Convention and article 8(3)(c)(i) of the ICCPR), or formed part of consensual and lawful pre-trial diversion agreements, for example.

Accordingly, without more information, it is submitted that this part of Hoshur's article is not a reliable source of evidence to substantiate the claim of the factory being a place of forced labour in breach of international law.

Paragraph 2

*"RFA also spoke with the **ruling Communist Party secretary** of a township in Yengisheher who said that of the 202 people from the area under his administration that are currently detained in internment camps, **13 have been sent to the Ruyi factory as part of the forced labor scheme**"* (emphasis added).

The following observations are made about this paragraph:

(i) it is effectively anonymous testimony, as the county of Yengisheher contains fourteen townships, so the ruling Communist Party secretary is not readily identifiable and therefore his claim is not verifiable or cross-examinable; and

(ii) it contains an on-the-record confession of a "forced labour scheme", which is doubtful to come from a Communist Party secretary.

Accordingly, without the ability to question the Communist Party secretary to verify what he did or did not say to *Radio Free Asia*, it is submitted that this part of Hoshur's article is not a reliable source of evidence to substantiate the claim of the Ruyi factory being a place of forced labour in breach of international law.

5.1.2.2. Evidence of Workers Living in Dormitories, Prohibited from Returning Home Regularly and Receiving No Payment

The purported evidence provided by Hoshur for the claim that factory workers live in dormitories, are prohibited from returning home regularly, and receive no payment until they complete their training is the following paragraphs:

Paragraph 1

*"**'They are housed in dormitories,' the source said**, adding that **whether or not workers are allowed to go home 'depends on their circumstances'**. … 'I **heard** that some people go home once a week, others once a month, and some once every three months'"* (emphasis added).

The following observations are made about this paragraph:

(i) it does not provide first-hand testimony, only hearsay evidence;
(ii) it contains testimony that is anonymous and therefore is not verifiable or cross-examinable;
(iii) it confirms that dormitories are utilised, but it is a meaningless confirmation given that countless factories across China provide on-site dormitories for their workers; and
(iv) it does not consider whether the workers' ability to go home is based on permission from the factory or mere practicality (in terms of the distance between the factory and a worker's hometown).

Accordingly, it is submitted that this part of Hoshur's article is not a reliable source of evidence to substantiate the claim of factory workers being forced into labour in breach of international law.

Paragraph 2

"While people who work at similar textile factories can earn up to 5,000 yuan (U.S. $710) a month, ***the source*** *told RFA that* ***most who are assigned to work through internment camps make nothing at all until they 'complete their training****.' … '****There are a few people who receive low wages****,' the source said. … 'I went to visit a family and* ***the parents said*** *their son is working in [the Ruyi] factory. He receives slightly more than 2,000 yuan (U.S. $285) every two months'"* (emphasis added).

The following observations are made about this paragraph:

(i) it does not provide first-hand testimony, only hearsay evidence;
(ii) it contains testimony that is anonymous and therefore is not verifiable or cross-examinable;
(iii) it does not consider that what the source views as 'work' may actually be 'vocational training' not amounting to extraction of 'work or service' (as per the definition of forced labour under article 2(1) of the ILO Convention); and
(iv) it seems to wrongly suggest that substandard compensation is a legal element of forced labour rather than a work standards issue.

Accordingly, it is submitted that this part of Hoshur's article is not a reliable source of evidence to substantiate the claim of factory workers being forced into labour in breach of international law.

5.1.3. Fair Labor Association's (FLA) Issue Brief

The third referenced claim in the Human Rights Watch report relating to forced labour is the following:
"The crackdown on Turkic Muslims since 2014 also coincides with the Chinese government's encouragement of the vertical integration of China's garment manufacturing sector by moving textile and garment factories closer to the cotton production centered in Xinjiang, hinting at ***a textile and apparel expansion plan that depends heavily on the forced labor of inmates at the various detention facilities****"* (emphasis added).

The Fair Labor Association's (FLA) Issue Brief was cited for this claim. The relevant evidence provided by the FLA that the textile and apparel expansion plan is heavily dependent on forced prison labour (as opposed to being related to poverty alleviation measures) appears to be the following paragraph:
*"****China has a long history of using prison labor in Xinjiang****, particularly in the cotton sector. What used to be an isolated upstream risk for cotton production has now* ***expanded to the finished goods sector for apparel products****. Recent reporting from* ***Citizen Power Initiative for China documents the use of prison labor in Xinjiang in the apparel sector***" (emphasis added).

The following observations are made about this paragraph:

(i) it implies that all prison labour in Xinjiang is forced labour, but does not consider whether the work was consensual or fell within the exclusion article 2(2)(c) of the ILO Convention and article 8(3)(c)(i) of the ICCPR; and

(ii) it contains a broken link to the "Citizen Power Initiative for China documents", which hinders any third-party analysis of their relevance.

Accordingly, it is submitted that the FLA Issue Brief is not a reliable source of evidence to substantiate the claim that the Xinjiang textile and apparel expansion plan depends heavily on forced prison labour. It is also noted that it is rather strange that Human Rights Watch chose the FLA Issue Brief as a citation for its claim, as the FLA Issue Brief does not present its own original findings on the issue. Thus, the FLA Issue brief could be described as not even being a secondary source, but a tertiary source.

5.1.4. The ASPI Report

The fourth referenced claim in the Human Rights Watch report relating to forced labour is the following:
"authorities have assembled Turkic Muslims and sent them to factories in various Chinese provinces. The conditions strongly suggest coercion, including the use of minders and political indoctrination of exported workers."

The citation for this claim is the 2020 ASPI report. As noted earlier in this paper, the ASPI report was thoroughly refuted in the first Geo-Law Narratives' paper,[125] and is therefore an unreliable source for the claim made by Human Rights Watch.

5.1.5. John Sudworth's *BBC News* Article

The fifth referenced claim in the Human Rights Watch report relating to forced labour is the following:
"A 2017 state television report showed how ***officials pressured one young woman into participating in such schemes****, even though she did not wish to be away from home*" (emphasis added).

John Sudworth's *BBC News* article was cited for this claim. The relevant evidence provided by Sudworth that government officials pressured a young woman into participating in a work scheme is in the further excerpt below.

(On a side comment, it is noted that Sudworth's article was also referenced in the Amnesty International report as corroborative evidence of forced labour.[126] Therefore, this sub-section also has applicability to the Amnesty International report.)

> *The officials speak to one father who is clearly reluctant to send his daughter, Buzaynap, so far away.*

[125] Jaq James, 'The Australian Strategic Policy Institute's "Uyghurs for Sale" Report: Scholarly Analysis or Strategic Disinformation?', *Geo-Law Narratives*, Working Paper 1/2022.
[126] Page 128 of the Amnesty International report.

"There must be someone else who'd like to go," he tries to plead. "We can make our living here, let us live a life like this."

"They speak directly to 19-year-old Buzaynap, telling her that, if she stays she will be married soon and never able to leave.

'Have a think, will you go?' they ask.

Under the intense scrutiny of the government officials and state-TV journalists she shakes her head and replies, 'I won't go.'

Still, the pressure continues until eventually, weeping, she concedes.

'I'll go if others go,' she says."

For the sake of completeness and contextualisation, the full transcript of the relevant part from the original CGTN news report,[127] on which Sudworth based his commentary, has been included below:

CGTN reporter: *"19-year-old Buzaynap is a high school graduate. She has stayed home most of her life and her parents have started finding her a suiter. To her father, Buzaynap working in Anhui was out of the question."*

Buzaynap's father: *"No, she can't leave us alone at home. We are worried that she'd be too far away. We both have poor health. Forget it. There must be others who are willing to go. We are fine living this way in the village."*

CGTN reporter: *"Most girls in the village devote their lives to their families after finishing junior, senior or vocational high school. Buzaynap has three sisters. Her 28-year-old elder sister is a mother of three kids. As her father speaks with the work group, Buzaynap keeps her head down."*

Zhang Bo (Anhui Aid – Xinjiang Committee) to Buzaynap: *"You may follow the path of your elder sister if you stay home, get married and never leave your home. Would you really want to lose this chance?"*

Buzaynap, shaking her head: *"I won't go."*

Wang Fei (Village Cadre) to Buzaynap: *"Just give it a try. Come back if you don't like it, okay? They will buy you roundtrip tickets."*

[127] 'Transforming Lives and Building Bridges in Xinjiang', *CGTN*, 6 November 2017 <online>.

> Buzaynap, tearful: *"I will go if another one is leaving. I won't if no one else goes."*
>
> Liang Wenlong (Anhui Aid – Xinjiang Committee) to the reporter: *"I saw [Buzaynap] wipe tears just now. I wonder if I said something wrong. I meant well when I convinced her to go so she could help her family with more income. But I'd be stunned if I said something wrong. Something might have hurt her unintentionally."*

A number of comments can be made about this transcript. First, it is argued that the persuasion techniques used by the cadres did not reach the threshold of unlawful psychological coercion that falls within the category of "menace of any penalty", as required under article 2(1) of the ILO Covenant to amount to forced labour. The cadres clearly stated that they just wanted Buzaynap to give work a try, she retained the ability to revoke her consent to work, and her revocation would be facilitated through covering the cost of returning home.

Second, the cadre's moment of self-reflection on whether he said something wrong to make Buzaynap tear-up arguably shows he possessed an intent to persuade, not to coerce.

Third, the fact that Buzaynap's father felt comfortable enough to unequivocally refuse giving his daughter permission to work away from home, and Buzaynap felt comfortable enough to initially refuse the offer to work and then offered a qualified refusal, arguably suggests that neither of them felt they were under duress to acquiesce to the cadres.

Fourth, it is noted that the United Nations *Convention on the Elimination of All Forms of Discrimination Against Women 1979* ('CEDAW') places a positive obligation on governments to protect females from discrimination by private actors (which would include families) and take steps directly aimed at eliminating customary practices that prevent females from being "free to develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices".[128] In order to ensure the full development and advancement of females, governments are also obligated to

[128] *General recommendation No 28 on the core obligations of states under article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, United Nations Committee on the Elimination of All Forms of Discrimination against Women, UN Doc CEDAW/C/GC/28 (16 December 2010) 5 <online>.

consider intersectionality factors that compound discrimination against females, including religious beliefs, ethnicity and age.[129]

In the case of Buzaynap, it could be that her father's refusal to allow her to go off to work was due to discriminatory customary beliefs that females must stay at home and be unpaid caretakers of family members (which, in itself, may amount to forced labour) and females must also live a married life with a man of the family's choosing (which, in itself, may amount to servile marriage). And yet, Human Rights Watch does not consider these matters through the lens of modern slavery. Indeed, another Xinjiang woman who was later interviewed in the same CGTN report remarked that: "They claim women must remain home to be married and look after kids. Their positions are at home only, and to others the money they make is dirty. No one will marry them after they come back." In other words, Buzaynap may have been expected by her family and her community to serve culture, not culture serve her. If this was the case, it is arguable that the cadres had a positive obligation under CEDAW to intervene and present Buzaynap with alternative life choices and help her achieve alternative life pathways denied to her by cultural practices imposed on her by her family and community. Indeed, Human Rights Watch should be supporting Buzaynap's human rights under CEDAW, not standing in her way.

Accordingly, it is submitted that Sudworth's article is not a reliable source of evidence to substantiate the claim of forced labour in breach of international law.

5.1.6. Nankai University Study

The sixth referenced claim in the HRW report relating to forced labour is the following:
*"A leaked Nankai University study of these schemes described how 'some [exported] workers **are unwilling to leave** and have been **seriously homesick**'"* (emphasis added).

The citation for this claim is a "leaked" Nankai University document.[130] The evidence provided by Nankai University relevant to Human Rights Watch's claim is the

[129] Ibid, 4.
[130] It is questionable as to whether the term "leaked" is an accurate description, given it was Nankai University that published the study on its own website, not a third-party publication.

paragraph below (noting that the paragraph was in a document about poverty alleviation):

*"**bound by traditional ideas, there are still some labourers who are not willing to venture away from home, and severe homesickness is a concern**. In recent years, thanks to strong guidance from the government, the situation has improved, although it still exists in some cases. Despite this, an outlook of contentment with the status quo and subsistence living is widespread. Issues with such attributes and mindsets **cannot be overcome within a short period of time; it requires the adoption of persistent measures**"* (emphasis added).[131]

It is submitted that, by representing this paragraph as evidence of forced labour, Human Rights Watch is 'drawing a long bow'. Acknowledgement of mindsets and feelings is not the same as evidence of those mindsets and feelings being callously dismissed by the Chinese government and labourers being forced into work. In fact, the last sentence indicates that long-term persuasion is the preferred option, not threats of penalty. It has to be remembered that, when it comes to poverty eradication, the United Nations General Assembly has pledged a position of "no one will be left behind", "reach the furthest behind first", and has stressed the urgent need to "take measures to address the root causes and challenges of poverty in all its forms and dimensions".[132] In applying the United Nations General Assembly's position to Xinjiang, if mindsets are one of the root causes and challenges of poverty, then it can be argued that the Chinese government has a positive obligation to help transform those mindsets (in a lawful way) to make the concept of worker mobility palatable to those people. Indeed, Human Rights Watch should be supporting the Chinese government in identifying and addressing root causes of poverty, not standing in their way.

Accordingly, it is submitted that this part of the Nankai University study is not a reliable source of evidence to substantiate the claim of forced labour in breach of international law.

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[131] The original text is: 受传统观念的束缚，仍有部分劳动者不愿意背井离乡，思乡情结严重，最近几年在政府的大力引导下有很大改进，但部分仍是存在的，安于现状、小富即安的人生观比较普遍。素质与观念问题不是短期可以很好解决的，需要持之以恒地采取措施。

[132] *Implementation of the Third United Nations Decade for the Eradication of Poverty (2018-2027)*, United Nations General Assembly, UN Doc A/C.2/73/L.9 (18 October 2018) paras 4 and 5 <online>.

5.2. Summary

In the end, none of the sources cited by Human Rights Watch to support its allegation of forced Xinjiang labour pass close scrutiny. The Buckley and Ramzy article was plagued with problems of hearsay and anonymous evidence, lay opinions passed off as expert opinions, and a lack of sufficient context to categorically determine whether the legal elements of forced labour had been met. The Hoshur article did not provide sufficient information to determine the reliability of witness testimony. The FLA Issue Brief did not indicate that the full facts were considered within the full context of international law, and did not even include its own original research. Regarding the ASPI report, the first Geo-Law Narratives' paper has already shown it to be a reprehensible piece of strategic disinformation propaganda. The Sudworth article recontextualised a news report to the point that it effectively undermines CEDAW. The Nankai University study merely diagnosed a root cause of poverty; it did not provide incriminating evidence of forced labour. Extraordinarily, not a single source cited by Human Rights Watch (relevant to its forced labour claims) contained first-hand testimony that was not anonymous. Given these stark shortcomings, it begs the question: what methodology (if any) did Human Rights Watch use to select its references?

Considering everything, it is surprising that Human Rights Watch (and Stanford University Law School's Mills Legal Clinic) considered its 'Forced Labour' section of its report to be its "strongest" section in terms of the "amount and quality of information meeting the elements of the crime [against humanity]" under the Rome Statute.[133] If the forced labour allegations were indeed Human Rights Watch's strongest allegations, one is left to wonder: just how flimsy is Human Rights Watch's evidence relating to its other allegations of crimes against humanity committed in Xinjiang?

All of the problems with Human Rights Watch's references are compounded by the fact that: (i) Human Rights Watch could not make up its mind over which category of 'crimes against humanity' forced labour fell into; (ii) Human Rights Watch did not sufficiently connect the legal elements of forced labour to the alleged facts; and (iii) Human Rights Watch did not even do its own original research on the forced labour issue. Yet, there will still be people with political influence who will cite the report as supporting the narrative of forced labour just because the names of

[133] Page 44 of the Human Rights Watch report.

'Human Rights Watch' (and 'Stanford University Law School') are attached to it. Another case of 'mission accomplished'.

As with the Amnesty International report, it could be the case that the Human Rights Watch report is ultimately right – that there is unlawful forced labour occurring in Xinjiang.[134] However, the Human Rights Watch report, as it currently stands, does not provide enough information to safely draw this conclusion. A person with an analytical mind would be asking more questions and demanding more answers.

If Human Rights Watch is wrong – that is, the Chinese government is actually complying with international law in all respects – then Human Rights Watch, as with Amnesty International, have effectively undermined the United Nations and the International Labour Organization's position that work is a beneficial distraction for offenders, and that work and training opportunities is a praiseworthy measure for reducing recidivism and ensuring societal integration.

Either way, as with the Amnesty International report, it has to be asked: is the Human Rights Watch report just a piece of junk research or is it also a case of something much more worrying? This question is explored in the next part of this paper.

[134] Even if the hearsay and anonymous sources were indeed forced into labour, it would need to be determined if they were isolated cases or a sample of a larger and systematic program of forced labour run by the Chinese government. The United Nations High Commissioner for Human Rights' anticipated 2022 report on Xinjiang may help shed light on whether the Chinese government has run a widespread and systematic forced labour program in Xinjiang.

6. JUNK RESEARCH OR NOBLE CAUSE CORRUPTION?

What occurred with the Amnesty International and Human Rights Watch reports can arguably be analogised with what is seen in wrongful conviction cases (which are not exceedingly rare).[135] Two contributing factors in wrongful convictions identified by experts are 'junk science' and 'noble cause corruption'. Similarly, it could be asserted that two contributing factors of wrongful accusations of human rights abuses are 'junk research' as well as 'noble cause corruption'. These two phenomena are explained and applied in the following sections.

6.1. Junk Science/Research

'Junk science' are disciplines that are "cloaked in science but lack even the most basic scientific standards".[136] Examples of junk science include dog scent line-ups, bite mark comparisons, arson science, and hair and fibre analysis.[137] The term emerged in the late 1980s and early 1990s, and was popularised by Peter Huber (an American lawyer) in his 1991 book *Galileo's Revenge: Junk Science in the Courtroom*.[138] Huber (1991) described 'junk science' as "the mirror image of real science, with much of the same form but none of the substance".[139] He also described the function of junk scientists as "saxophones" in the courtroom: "the lawyer calls the tune and the expert plays it".[140] In the eyes of the average jury member, junk science may look indistinguishable from real science.[141]

Analogising the phenomena of courtroom junk science and junk scientists to the field of human rights advocacy, it is not inconceivable that there are experts entering the human rights field who also play the role of a "saxophone", as well as there being the

[135] In the United States alone, over 3000 exonerees of wrongful convictions have been recorded since 1989: 'The National Registry of Exonerations', *Michigan State University (College of Law)* <online>.
[136] Joseph M Price and Gretchen Gates Kelly, 'Junk Science in the Courtroom: Causes, Effects and Controls', *Hamline Law Review*, 1996, 395-408, 395.
[137] Sabra Thomas, 'Addressing Wrongful Convictions: An Examination of Texas's New Junk Science Writ and Other Measures for Protecting the Innocent', *Houston Law Review*, 2015, 1037-1066, 1042.
[138] Gary Edmund and David Mercer, 'Trashing "Junk Science"', *Stanford Technology Law Review*, 1998, 3-40, 5.
[139] Peter W Huber, *Galileo's Revenge: Junk Science in the Courtroom* (Basic Books: 1991) 2.
[140] Ibid, 19.
[141] Sabra Thomas, 'Addressing Wrongful Convictions: An Examination of Texas's New Junk Science Writ and Other Measures for Protecting the Innocent', *Houston Law Review*, 2015, 1037-1066, 1045.

circulation of junk research (that is, institutional reports that look like real research, but have none of the substance, such as lacking a transparent and reliable interview methodology, lacking critical engagement with primary and secondary sources, and lacking accurate and meaningful application of the law).

This paper has demonstrated that the Amnesty International report has the hallmarks of junk research. This paper has also demonstrated that the Human Rights Watch report has the hallmarks of junk research. Historically, MacArthur (1992) demonstrated that Amnesty International published junk research when it presented the falsified 'Kuwaiti Incubator Story' as factual.[142] And, also historically, in 2008, one-hundred scholars found that another Human Rights Watch report (on Venezuela) did not meet "even the most minimal standards of scholarship, impartiality, accuracy, or credibility"[143] – in other words, junk research. One is left to wonder how much more junk research Amnesty International and Human Rights Watch have produced over the years that has gone unexamined. As such, it is proposed that the terms 'junk research' and 'junk experts' be introduced into the field of human rights, as they are potent labels that enable the differentiation between the work of real professional advocates who have earned their place in the field from the work of charlatans and hired-guns who should be promptly ousted from the field.

6.2. Noble Cause Corruption

The term 'noble cause corruption' first entered the police studies literature with Edwin Delattre's influential 1989 book, *Character and Cops: Ethics in Policing.*[144] The term is defined as "breaking fundamental laws, not for personal gain, but for a purpose that appeals to our basic moral sensibilities".[145] 'Noble cause corruption' has since been described in many other ways too, such as: "misconduct [that] is justified in the name of good ends";[146] "manipulation of the justice system, usually to ensure

[142] John R MacArthur, *Second Front: Censorship and Propaganda in the 1991 Gulf War* (University of California Press: 1992).
[143] 'More Than 100 Latin America Experts Question Human Rights Watch's Venezuela Report', *VenezuelAnalysis.com*, 17 December 2008 <online>.
[144] John Kleinig, 'Rethinking Noble Cause Corruption', *International Journal of Police Science & Management*, 2002, vol. 4(4), 282-314, 289.
[145] Edwin Delattre, *Character and Cops: Ethics in Policing* (AEI Press: 2011: 6th ed) 211.
[146] Geoff Dean, Peter Bell and Mark Lauchs, 'Conceptual Framework for Managing Knowledge of Police Deviance', *Policing & Society*, 2010, vol. 20(2), 204-222, 205.

a conviction";[147] "investigating, arresting, and 'testi-lying' [of] people who are 'deserving' of punishment";[148] and corruption involving "organisational gain … carried out to secure convictions".[149] Essentially these descriptions cover situations where police officers violate criminal investigation procedures and courtroom procedures in order to achieve a supposed legitimate objective. Such illegitimate means can include fabrication of material evidence, false claims about how evidence was obtained, selective presentation of evidence, and improper collusion in the presentation of evidence.[150]

Applying the concept of 'noble cause corruption' to the human rights advocacy field, it is not inconceivable that there are individuals inside human rights advocacy organisations who employ an 'ends justify the means' calculation when alleging human rights abuses. To give an example, Blumenthal (2021) describes Human Rights Watch's Executive Director, Kenneth Roth, as "an obsessive antagonist of China's government and cheerleader of regime change operations against virtually any state that defies Washington".[151] To support this characterisation, Blumenthal (2021) cites some of Roth's over-the-top anti-China Twitter posts, including a meme comparing Beijing to Nazi Germany, a fake video that Roth claimed depicted Chinese "killer robots" (which was actually a special-effects training video), and repeated speculation that COVID-19 was brewed in a Chinese laboratory. It is also noted that Roth's tagline on his Twitter page is "[p]roudly 'sanctioned' by the Chinese government".[152] Such public comments suggest that Roth lacks full objective professionalism when it comes to China. This leaves open to speculation whether Roth's anti-China prejudices influence the objectivity of other Human Rights Watch personnel working under him. After all, it is the leaders that set the tone for organisational culture. Indeed, the China Director at Human Rights Watch who works under Roth, Sophie Richardson, is also known for making frenzied comments about China on Twitter. For example, she has claimed that the Chinese government is a

[147] Shannon Merrington, Mark Lauchs, Peter Bell and Robyn Keast, 'An Exploratory Study of Noble Cause Corruption: The Wood Royal Commission, New South Wales, Australia, 1994-1997', *International Journal of Management and Administrative Sciences*, 2014, vol. 2(4), 18-29, 20.
[148] Wesley G Skogan and Tracey L Meares, 'Lawful Policing', *Annals of the American Academy of Political and Social Science*, 2004, vol. 593(1), 66-83, 74.
[149] Louise E Porter and Celia Warrender, 'A Multivariate Model of Police Deviance: Examining the Nature of Corruption, Crime and Misconduct, *Policing and Society*, 2009, vol. 19(1), 79-99, 80.
[150] John Kleinig, 'Rethinking Noble Cause Corruption', *International Journal of Police Science & Management*, 2002, vol. 4(4), 282-314, 290.
[151] Max Blumenthal, 'Xinjiang Shakedown: US anti-China lobby cashed in on "forced labour" campaign that cost Uyghur workers their jobs', *The Grayzone*, 30 April 2021 <online>.
[152] See Kenneth Roth's Twitter account <online>.

"disgrace" because it arranged for the Olympics cauldron to be lit by a Uyghur "and there is not a hell hot enough for whoever thought this up".[153]

If the objectivity of other Human Rights Watch personnel is also clouded, it could be that the people who worked on the Human Rights Watch report secretly felt that flouting the rules of reliable research and legal analysis satisfied a much higher and nobler cause of inculpating the Chinese government because it is deserving of demonisation in any regard. If so, then the Human Rights Watch report could be tainted by noble cause corruption. As such, it could be the case that Human Rights Watch did actually engage with its secondary sources critically and recognised the unreliability of its sources, but hoped that its readers would not do the same.

As for Amnesty International, something more sinister than noble cause corruption may have been afoot. Human rights lawyer and professor of international law at the University of Illinois, Francis Boyle, was a board member of the United States branch of Amnesty International at the time the 'Kuwaiti Incubator Story' was being propagated. He claimed that he questioned Amnesty International's entire report on Iraq's abuses in Kuwait and repeatedly attempted to pull the incubator story from the report. However, he said he was ignored by the Amnesty International secretariat in London. Boyle came to believe that Amnesty International had been infiltrated: "My conclusion was that a high-level official of Amnesty International at that time, whom I will not name, was a British intelligence agent. Moreover, my fellow board member, who also investigated this independently of me, reached the exact same conclusion."[154] As Oddo (2018) notes, historians should have investigated Boyle's claim of undercover interference.[155] If reliable evidence was uncovered of intelligence infiltration of Amnesty International during Boyle's time, then one would be left to wonder if an undercover intelligence saboteur was inside Amnesty International when it wrote its report on Xinjiang. In such a case, the Amnesty International report could possibly be tainted with **ignoble** cause corruption, perhaps in furtherance of an East Turkistan separatist agenda that benefits Western geopolitical interests. As such, it could be that Amnesty International actually disproved some of its interviewees' claims or knew that some of their claims were questionable, but such information was withheld from its readers.

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[153] See Sophie Richardson's Twitter post of 5 February 2022 <online>.
[154] Dennis Bernstein, 'Interview: Amnesty on Jenin: Dennis Bernstein and Dr Francis Boyle Discuss the Politics of Human Rights', Covert Action Quarterly, 2002, No. 73, 9-12 <online>.
[155] John Oddo, *The Discourse of Propaganda: Case Studies from the Persian Gulf War and the War on Terror* (Pennsylvania State University Press: 2018) 92.

In the end, confidently determining whether the Amnesty International and Human Rights Watch reports were affected by noble or ignoble cause corruption is an impossible task without having access to the missing information that this paper has identified. Nevertheless, these are important considerations to have in the back of one's mind, as rational uncertainty is preferable to irrational certainty, with the latter unfortunately being a condition of many enthusiasts in the human rights field, especially when it comes to China.

7. CONCLUSION

The objective of this paper was not to claim that there are no cases of forced labour occurring in Xinjiang. Instead, the objective of this paper was to critically examine the information presented by Amnesty International and Human Rights Watch to determine whether it supported a foundation for Senator Patrick and the Senate Committee's proposed legislation outlawing the import of Uyghur-made goods into Australia. In the process, this paper demonstrated that the Amnesty International and Human Rights Watch reports contained serious deficiencies, including a lack of transparent research methodologies, a lack of reliable evidence, and a lack of cogent legal analyses. Accordingly, based on both reports, it cannot be concluded that forced labour is occurring in Xinjiang in breach of international law until Amnesty International and Human Rights Watch put forward a credible case.

With regard to Amnesty International, it appears that its researchers merely arranged for interviewees to tell their stories, but did not go much further in terms of corroborating or disproving the interviewees' claims. If noble or ignoble cause corruption was involved, it could be that some of the interviewees' claims were actually disproved by Amnesty International or Amnesty International knew that some of the claims were questionable, but such information was withheld from its readers. In the case of Human Rights Watch, it appears that its researchers did not critically engage with the secondary sources, nor establish a scholarly methodology for selecting the secondary sources. If noble or ignoble cause corruption was involved, it could be as bad as Human Rights Watch presenting to its readers secondary sources that it knew were unreliable. It could also be said that Human Rights Watch indirectly denounced examples of human rights law compliance as human rights law abuse: an inexcusable mischaracterisation, if this was the intention. Furthermore, both reports unduly pushed international law to the rear, rather than bringing the law to the fore. Taking everything into account, it can be hypothesised that Amnesty International and Human Rights Watch were in the business of seeking out evidence that took them towards their pre-existing beliefs and shunned evidence that took them away from their beliefs.

Given the significant shortcomings with both reports, professionals in the human rights field, as well as the labour rights field, and also the general public, need to keep their eyes wide open. In the first Geo-Law Narratives' paper, a strong case was presented that ASPI had bastardised the forced labour legal category for

propagandistic ends. It could be a similar situation with Amnesty International and Human Rights Watch – through junk research, noble cause corruption or even ignoble cause corruption, the forced labour legal category may have been bastardised again.

In the end, due process matters. It matters in the courtroom, in order to avoid wrongful convictions of innocent people; and it matters in the human rights advocacy field, in order to avoid false human rights abuse allegations that could ultimately trigger the international law principles of 'Responsibility to Protect' and '*aut dedere aut judicare*', thereby infringing on a fundamental tenet of international law – a country's entitlement to sovereignty.[156]

Due process also matters to protecting the status of the human rights framework, itself. Piggybacking off the sanctified nature of the human rights lexicon makes it easier for the genuinely disempowered and oppressed to access pathways of validation, dignification and emancipation. Other vocabulary frameworks, such as social justice or feminism, arguably do not offer such ease of access, as they do not have the same degree of public relations sway and institutional support that the rights-based framework possesses. The more the human rights lexicon is mischaracterised or misused by careless or bad faith actors, the less leverage it will have for those who really need it.[157]

Returning to where this all began – that is, Senator Patrick and the Senate Committee uncritically accepting the claims of forced Uyghur labour – it is submitted that the Australian public, and even the international community, have a right to question whether Senator Patrick and the Senate Committee were overtaken by an irrational certainty when they took the position that "there is no doubt that the events that have purported to have taken place are true".[158] The fact is that there are reasonable doubts to be had around the accuracy and reliability of the forced labour claims from two international 'heavyweights' in the human rights advocacy field, on top of the false claims put out by a world-famous defence and strategic policy think tank. If these organisations have not reached the threshold for reliable research and legal analysis, it is feasible that less credible and less renowned human rights groups have also not crossed the threshold. This arguably adds further weight

[156] See article 2 of the *Charter of the United Nations 1945*.
[157] For a discussion of this issue, see David Kennedy, 'The International Human Rights Movement: Part of the Problem?', *Harvard Human Rights Journal*, 2002, vol. 15, 101-125.
[158] See Part 2 of this paper.

to the assertion that Senator Patrick and the Senate Committee proposed legislation with a questionable foundation.

Perhaps Senator Patrick's endorsement of human rights groups as a seemingly unquestionable source for human rights abuse claims may be due to an over-leaning faith in them being cathedrals of truthfulness and goodness. Alternatively, he may perceive them "as a frail child, in need of protection from critical assessment".[159] Indeed, these are two paradigms that all human rights groups arguably benefit from today.

It is hoped that this paper has convinced its readers that Amnesty International and Human Rights Watch should no longer have the benefit of 'the wind at their backs'. It is time for these organisations to legitimately earn their reputations by publicly demonstrating their transparency, competency and honesty on a report-by-report basis. In reality, however, this can only be achieved if their donors start agitating for change. Alas, an impetus for such change is dependent on one critical question being answered **honestly** by their donors: are they paying for human rights advocacy or are they paying for a 'China bad' story?

[159] David Kennedy, 'The International Human Rights Movement: Part of the Problem?', *Harvard Human Rights Journal*, 2002, vol. 15, 101-125, 125.