

# HUMAN RIGHTS, CHINA AND THE UN: A UPR MID-TERM ASSESSMENT<sup>1</sup>

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## [A] INTRODUCTION

In a world where the international legal order is on the defence,<sup>2</sup> the Universal Periodic Review (UPR) of China's human rights situation epitomizes the challenges inherent to the work of the United Nations (UN) bodies responsible for the monitoring and protection of human rights. We must be clear about the flaws, before considering what the European Union (EU), its member states and Europeans more widely might do to address them. It is in this spirit that the Jean Monnet Network on EU-China Legal and Judicial Cooperation (EUPLANT) convened a workshop to address China's growing role and influence in the UN human rights system, as well as an assessment of recent developments in the Xinjiang Uighur Autonomous Region (XUAR) and in Hong Kong in relation to recommendations put forward during China's third UPR conducted by the UN Human Rights Council.<sup>3</sup>

Over the past few years, following the nomination of Xi Jinping to Party General Secretary and President of the People's Republic of China (PRC), the Chinese Party-State has worked to perpetuate and intensify a system of governance to which human rights violations are inherent—in criminal

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<sup>2</sup> For an account of current debates, see Eilstrup-Sangiovanni & Hofman (2020) and Ikenberry (2020).

<sup>3</sup> 'Human Rights, China and the UN: A UPR Mid-term Assessment', public seminar chaired by Matthieu Burnay with panel contributions by Sophie Richardson and Eva Pils, 7 December 2020.

justice and access to justice; in public communication, now including social media; in the economic systems of exploitation and dispossession; and in the denial of political participation rights to all of its citizens (Pils 2018). There has always been much to criticize, but it is only under Xi Jinping that the trend of reform towards improvements was decisively reversed. Xi Jinping’s ‘New Era’ has hence been described as ‘the end of an era’ (Minzner 2018) or a ‘third revolution’ (Economy 2018) marking a deepening of authoritarianism in China’s governance. Teng Biao, one of the exiled critics of the system, has rightly characterized the turn under Xi as ‘high-tech totalitarian’ (Teng 2020).

The workshop began with a presentation by Dr Sophie Richardson (Human Rights Watch) that situated the UPR within the wider context of China’s engagement with the UN. It then moved on to discussing two of the most pressing human rights issues in China today. These interrelated discussions reflected the fact that Xi’s ‘New Era’ impacts the world, even as some of its worst consequences so far have been visited on two regions on the margin of this new empire—in human rights terms, the bleakest and the most advanced.

## [B] CHINA’S AMBITION TO CHANGE THE UN HUMAN RIGHTS SYSTEM

In line with the Party-State commitment to strengthen the country’s ‘discourse power and influence in international legal affairs’ (CCP Central Committee 2014), China has become increasingly engaged with UN bodies as part of its broader strategy to become an active shaper and sometimes shaker of global governance at both institutional and normative levels. Against the background of what has been described as a crisis of the liberal international order, the Party-State clearly perceives there is a momentum for China to reform existing institutions and change existing norms to make them serve China’s interests (Burnay 2020). These developments are particularly visible in the framework of UN Human Rights bodies. In the words of Richardson, drawing on her experience as China Director of Human Rights Watch, ‘Chinese authorities are trying to rewrite norms and manipulate existing procedures not only to minimize scrutiny of the Chinese government’s conduct, but also to achieve the same for all governments’ (2020a).

At institutional level, China was recently re-elected by the UN General Assembly to serve a consecutive three-year mandate at the UN Human Rights Council starting in January 2021. Yet, interestingly, one could notice a sharp decline in the support for China’s membership between

the 2016 election (180 votes in favour) and 2020 election (139 votes in favour) (Richardson 2020b). And, although China's membership of the UN Human Rights Council gives it an important avenue to influence the UN human rights framework, it nevertheless also brings China's own human rights record under increased scrutiny. For example, in April 2020, China was appointed to one of the five seats of the Consultative Group of the UN Human Rights Council. This influential committee is responsible for the selection of the key advisers and investigators who support the work of the Human Rights Council. In the coming year, this committee will be responsible for the appointment of global monitors on freedom of speech, health, enforced disappearances and arbitrary detention—in light of its systematic violations of this right (see below), an 'absurd and immoral' development in the words of the head of the non-governmental organization UN Watch (UN Watch 2020).

Within the UN Human Rights Council, China has not only attempted to silence criticisms against its own human rights record but also to promote a discourse driven by the Party-State's domestic discourse, norms and interests. This has, on the one hand, meant that China's normative activism in the UN Human Rights Council has promoted a conception of sovereignty and non-intervention as absolute (Hsu & Chen 2020). On the other hand, it has led to the propagation of Xi Jinping's notion of the 'community of shared future for humankind'—a conveniently open phrase that can serve to justify China's global power expansion. The Party-State's view on human rights is also informed by a strong emphasis on the right to development (China Human Rights White Paper 2016), which serves Beijing's narrative on mutually beneficial cooperation with developing countries in particular.

## [C] HONG KONG'S ACCELERATING COLLAPSE AS A MANIFESTATION OF GLOBAL AUTOCRATIZATION

During the last UPR in 2018, the situation of the 8 million inhabitants of the Hong Kong Special Administrative Region (HKSAR) on China's South coast was already precarious, but there was no acute crisis. The region had gone through a mass campaign of demonstrations for democratic elections in 2014, followed by a crackdown on the initiators, and there were fears, partly grounded in the Chinese government's unilateral claim in 2017, that the international treaty upon which Hong Kong's system is based was no longer binding. The UPR *Conclusions and Recommendations* in 2018 included Australia's recommendation to 'uphold the rights, freedoms and

rule of law embodied in the one country, two systems framework for Hong Kong’ (Australia 28.343) and Canada’s recommendation to ‘ensure the right of Hong Kong people to take part in government without distinction of any kind’ (Canada 28.345).<sup>4</sup>

Within the two short years since then, however, Hong Kong’s legal-political system has been brought to the brink of collapse. An attempt to create legislation that would have allowed extradition of criminal suspects from Hong Kong into China’s feared criminal justice system triggered peaceful street protests at an unprecedented scale and—following heavy-handed, repressive responses from the authorities—violent clashes between students and the police (Davis 2020; *Time Magazine* 2020). The situation seemed to be untenable, and the world waited with bated breath for the central authorities’ response, which came the following summer. In June 2020, the PRC enacted a ‘Law for the Protection of National Security in the Hong Kong Special Administrative Region’ (NSL) which came into force on 1 July 2020.<sup>5</sup>

Although less than half of the promised 50 years of transition had passed, the provisions of the NSL, as well as the institutions set up under it, spell the end of Hong Kong’s constitutional system, supposedly safeguarded by the Sino-British Joint Declaration, an international treaty, and by the applicability to Hong Kong of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. The law introduces broadly defined crimes of secession (Article 20), subversion (Article 22), terrorist activities (Article 24) and ‘collusion with a foreign country or with external elements to endanger national security’ (Article 29), likely to be used to punish peaceful political criticism. It establishes a PRC-led security apparatus within the HKSAR; substantially ousts judicial review over NSL matters; and allows some cases to be diverted entirely into the mainland criminal justice system—effectively bringing back ‘extradition’ with a vengeance, albeit under a different name.

Moreover, as though this were not bad enough, the central authorities have since administered further shocks to Hong Kong’s imperilled constitutional system. In November 2020, they ousted four legislators belonging to the oppositional pro-democratic-reform wing (Government of the HKSAR 2020; National People’s Congress Standing Committee 2020), prompting their colleagues to resign in protest. In December 2020, at a ‘Legal Forum’ featuring speeches from several high-ranking officials and

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<sup>4</sup> UN Human Rights Council 2018b, comments by Australia (28.343) and Canada (28.345).

<sup>5</sup> For a reliable English translation of the authoritative Chinese text, see China Law Translate 2020.

academic advocates frequently wheeled out to speak on behalf of the central authorities, the deputy head of the central government's Hong Kong and Macau Affairs Office spoke cryptically of 'judicial reforms' in Hong Kong in a speech that also postulated that only those who 'love Hong Kong and the motherland' should rule Hong Kong (Zhang 2020).

There is no doubt that these changes have undermined Hong Kong's civil and political rights by effectively criminalizing government criticism. They thereby remove the foundations of what was once a thriving and vitally important civil society, able to address human rights issues not only in Hong Kong but also in mainland China and beyond. They are threatening academic freedom, as numerous academics have been affected by varying levels of political persecution (Wang 2020; Wong 2020; *The Economist* 2020), including the criminal convictions of Professors Benny Tai (Hong Kong University) and Chan Kin-Man (Chinese University of Hong Kong), and, although some independent media organizations are holding up against pressure, the high-profile arrest of 'Apple Daily' media entrepreneur Jimmy Lai under the new NSL seems symbolic of threats to media freedom (Davidson 2020).

## [D] ABUSES AND CRIMES IN THE XUAR

While the trends discussed so far are deeply concerning, it is the situation in the XUAR that raises the most profound current human rights concerns—concerns that were beginning to be raised in 2018 but that have dramatically increased in the meantime (Byler 2020; Harris 2020; Mahmut 2020; Klimes & Smith-Finley 2020; UN Human Rights Council 2018b).<sup>6</sup>

There, beginning in 2017, the authorities have interned an estimated 1 million or more individuals, predominantly belonging to ethnoreligious minorities including the Uighurs, targeting those deemed at risk of 'religious extremism' under (local) domestic law with measures including incarceration, forced labour, rape, forced 'medication', torture and suspect deaths in custody. Additionally, the government is engaging in mass online and offline surveillance; monitoring and control—including facial recognition technology; enforced 'homestays' by Han Chinese officials; a reported campaign of forced sterilizations disproportionately affecting minority women; the removal of children from families; the destruction or 'disneyfication' of cultural and religious sites; and the repression of domestic criticism and advocacy accompanied by an elaborate state media disinformation campaign (Smith Finley 2020).

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<sup>6</sup> For a periodically updated bibliography, see Fiskesjø 2020.

Many of these practices violate China's own criminal law, as well as international human rights law. Furthermore, they systematically violate numerous core human rights norms, including: the rights to life, liberty and integrity of person; right not to be tortured; the right to reproductive self-determination; the rights to freedom of expression and freedom of religion or belief; antidiscrimination rights, and so on—rights protected under the Universal Declaration of Human Rights, UN Convention against Torture, UN Convention on the Rights of the Child, UN International Convention on the Elimination of All Forms of Racial Discrimination and other instruments; as well as the rights to be protected from forced labour, also in transnational supply chains, enshrined in the Slavery Convention and in the *ius cogens* norms of customary international law.

At the time of the 2018 UPR, Xinjiang was already widely discussed, as is reflected in proposals to 'implement the recommendations of the Committee on the Elimination of Racial Discrimination on Xinjiang and allow the United Nations unrestricted access to monitor the implementation' (United Kingdom); and to 'abolish all forms of arbitrary detention, including internment camps in Xinjiang, and immediately release the hundreds of thousands, possibly millions, of individuals detained in these camps' (United States of America) (UN Human Rights Council 2018b: 28.22, 28.23 and 28.177).

But our understanding today, most concerningly, indicates that these practices also constitute crimes against humanity, as defined by the Rome Statute of the International Criminal Court (to which China is not a party) and raise the spectre of genocide (Smith Finley 2020; Wan 2020).

## [E] CONCLUSION: A GLOBAL POWER CHALLENGED, IF NOT CHECKED BY INTERNATIONAL LAW?

At first glance, the efforts of 'the international community' to address China's human rights violations through the UN appear to have been an almost total failure. Duelling statements on the situations in Hong Kong and Xinjiang have shed light on the existence of opposing coalitions in the Human Rights Council. When the Hong Kong NSL was adopted, a coalition led by Cuba emphasized it is 'not a human rights issue and therefore not subject to discussion at the Human Rights Council' (Cuba 2020), while a coalition led by the UK emphasized the NSL has 'clear implications for the human rights of people in Hong Kong' (Foreign and Commonwealth Office 2020). When the first reports on mass detention in XUAR emerged in August 2018 (UN Office of the High Commissioner

on Human Rights (UN OHCHR) 2018), the issue quickly escalated and came under increased international scrutiny including in the framework of the UN Human Rights Council. It led to two successive rows of duelling letters in 2019 and 2020. In the summer of 2019, 22 state representatives called for China to ‘respect human rights and fundamental freedoms ... in Xinjiang’ (22 States 2019) in response to which another coalition of more than 50 states submitted another statement justifying China’s action by referring to the ‘grave challenge of terrorism and extremism’ in the region (Xie & Bai 2019). Another round in this rhetorical fight took place one year later when the German Ambassador to the UN submitted a statement on behalf of 39 nations calling upon China ‘to allow immediate, meaningful and unfettered access to Xinjiang for independent observers’ (Statement by Ambassador 2020).

In a nutshell, debates on Hong Kong and Xinjiang in the UN Human Rights Council have not led to any concrete responses. Rather, they have shed light on the very divisions that exist within the international community regarding the universality of human rights, in particular where China is concerned, and UN human rights bodies lack effective mechanisms to secure compliance with powerful member states’ international human rights commitments. Beyond the human rights mechanisms of the UN, moreover, it is also clear that there would be extraordinarily challenging obstacles to seeking accountability through the mechanisms set up to deal with international crimes (Wan 2020).

And yet, despite the structural weaknesses of the UN human rights system and the mechanisms of public international law more widely, the workshop also reminded us of the centrality of adherence to norms whose substance has remained relevant not only to the victims of their violation, but also to the embattled idea of an international rule of law (Sandholtz 2019). ‘[P]eople need to appeal to institutions beyond their government’s immediate control’ (Richardson 2020b). Not only does China’s growing presence and visibility in the UN human rights system put its own human rights record under greater international scrutiny, one can also note that China’s ability to shape and shake UN institutions and norms have not always been as successful as expected. In that sense, the alarming deterioration of the human rights situation in China has, *inter alia*, led to a call by 50 experts to create a China-specific mandate or take other ‘appropriate measures’ (UN OHCHR 2020). In addition, records of the UN Human Rights Council proceedings demonstrate a declining support for draft resolutions proposed by China on ‘mutually beneficial cooperation in the field of human rights’. While the 2018 Resolution (UN Human Rights Council 2018a) was adopted by 28 to 1 with 17 abstentions,

there was a clear declining support for the 2020 Resolution (UN Human Rights Council 2020) that was adopted by 23 to 16 with 8 abstentions (Richardson 2020b).

Against this background, initiatives at bilateral level (i.e. human rights dialogues) or the adoption of Magnitsky-style legislation should be seen as complementary to the existing multilateral framework. Whilst the robustness (and weakness) of the UN human rights framework will likely be challenged again before China's next UPR, there is a strong need to avoid any kind of cynicism and to reaffirm the centrality of multilateral platforms that enable individuals, civil society organizations and governments to shed light on human rights violations wherever they happen.

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