

INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

Congress Signals Concern About Human Rights Abuses in China

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In late November of 2019, Congress passed the Hong Kong Human Rights and Democracy Act of 2019 (HKHRDA) with overwhelming bipartisan backing. Although its substantive provisions were modest in scope, this bill sent a strong indication of congressional support for protesters in Hong Kong. Despite having some reservations about this bill, President Trump signed it and a companion bill into law on November 27. The following month, Congress signaled attention to another human rights situation in China—the treatment of Uighurs in Xinjiang—by including a provision in the National Defense Authorization Act for Fiscal Year 2020 that requires an executive-branch report on this issue.

In June 2019, large-scale protests broke out in Hong Kong in response to a proposed bill that would have allowed defendants accused of certain crimes to be extradited to mainland China.¹ Following clashes with the police and the Hong Kong government, these protests expanded into demands for greater political reforms.² The protests continued over the following months, though dwindling by early 2020.³

In November 2019, Congress signaled support for the protesters through the passage of the HKHRDA. The section of the act setting forth policy objectives expressed strong support for the people of Hong Kong with respect to autonomy, human rights, and “democratic aspirations.”⁴ This section enumerated nine policy objectives, including the following:

It is the policy of the United States

...

(2) to support the high degree of autonomy and fundamental rights and freedoms of the people of Hong Kong, as enumerated by –

(A) the joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, done at Beijing December 19, 1984 . . . ;

(B) The International Covenant on Civil and Political Rights, done at New York December 19, 1966; and

(C) The Universal Declaration of Human Rights, done at Paris December 10, 1948.⁵

¹ Mike Ives, *What Is Hong Kong’s Extradition Bill?*, N.Y. TIMES (June 10, 2019), at <https://www.nytimes.com/2019/06/10/world/asia/hong-kong-extradition-bill.html>.

² Jin Wu, K.K. Rebecca Lai & Alan Yuhas, *Six Months of Hong Kong Protests. How Did We Get Here?*, N.Y. TIMES (Nov. 18, 2019), at https://www.nytimes.com/interactive/2019/world/asia/hong-kong-protests-arc.html?action=click&pgtype=Article&state=default&module=style-hong-kong&variant=show®ion=TOP_BANNER&context=Menu.

³ Chui-Wei Yap & Joyu Wang, *Hong Kong Protesters Refocus Ire on City’s Handling of Coronavirus Crisis*, WALL ST. J. (Jan. 31, 2020), at <https://www.wsj.com/articles/hong-kong-protesters-refocus-ire-on-citys-handling-of-coronavirus-crisis-11580475635> (noting that “fears about the [newly emerging coronavirus] have deterred large-scale gatherings”).

⁴ Hong Kong Human Rights and Democracy Act of 2019, at § 3, Pub. L. 116-76, 133 Stat. 1161 (2019) [hereinafter HKHRDA].

⁵ *Id.*

The act contained various provisions aimed at supporting the protesters in Hong Kong. Perhaps most importantly, the act requires annual recertification of Hong Kong's special status under the United States-Hong Kong Policy Act of 1992.⁶ Under this prior act, Hong Kong retains the same status vis-à-vis the United States as it did before its incorporation into China, meaning that it retains independent agreements with the United States on a number of fronts such as visa protections, trade, and the ability to freely trade the dollar.⁷ This special status has significant economic advantages for Hong Kong (and therefore presumably for China as well). Hong Kong's special status can be suspended, however, if "the President determines that Hong Kong is not sufficiently autonomous to justify treatment . . . different from that accorded the People's Republic of China."⁸ The HKHRDA amends the 1992 act by requiring the secretary of state to certify annually to Congress whether this special status remains justified.⁹ In doing so, the secretary of state is to consider the extent to which Hong Kong's government upholds human rights and the rule of law.¹⁰ As one commentator has observed, the HKHRDA "sets up an annual ritual . . . [which] will be noticed in China and Hong Kong and will thus keep Hong Kong high on the agenda of U.S.-China relations well into the next presidential administration."¹¹

The HKHRDA also includes two substantive provisions aimed at supporting the protesters. First, it specifies that Hong Kong students remain eligible for U.S. visas notwithstanding prior "politically-motivated" arrests.¹² Second, the act requires the president to report on persons who are responsible for serious human rights violations in Hong Kong and to impose sanctions on these persons.¹³ While prior law likely already provided the executive branch with authority in these two areas, the HKHRDA sends a clear congressional message that the executive branch should support the protesters through its visa decisions and its use of individualized sanctions.¹⁴

Alongside the HKHRDA, Congress also passed an act "[t]o prohibit the commercial export of covered munitions items to the Hong Kong Police Force."¹⁵ The act forbids the export of items such as tear gas, pepper spray, and rubber bullets.¹⁶ The president may waive these restrictions under certain conditions, and the act sunsets after one year.¹⁷

⁶ *Id.*, § 4(a).

⁷ United States-Hong Kong Policy Act of 1992, Pub. L. 102-383, 106 Stat. 1448 (1992).

⁸ *Id.*, § 202(a).

⁹ HKHRDA, *supra* note 4, § 4(a) (also providing that the secretary of state can waive the certification requirement under certain conditions).

¹⁰ *Id.*

¹¹ Julian Ku, *The Hong Kong Human Rights and Democracy Act Is Redundant, but Still Worthwhile*, LAWFARE (Nov. 25, 2019), at <https://www.lawfareblog.com/hong-kong-human-rights-and-democracy-act-redundant-still-worthwhile>.

¹² HKHRDA *supra* note 4, § 4(b).

¹³ *Id.*, § 7 (further providing that the president can waive these sanctions upon certification "that such a waiver is in the national interests of the United States").

¹⁴ Ku, *supra* note 11 (concluding that while "the HKHRDA is largely symbolic and redundant as a legal matter," the "political force of a message from a rarely united Congress during this era of impeachment is hard to overstate").

¹⁵ Pub. L. 116-77, 133 Stat. 1173 (2019).

¹⁶ *Id.*, § 2(a).

¹⁷ *Id.*, §§ 2(b), 3.

Both bills passed with virtually no opposition in Congress,¹⁸ notwithstanding the backdrop of comprehensive trade negotiations between the United States and China. In October of 2019, the United States had announced a preliminary “phase one” trade deal, but negotiations to finalize this deal were still ongoing at the time both bills passed in November of 2019.¹⁹ After the HKHRDA had passed both houses of Congress, President Trump was asked if he would veto it as requested by China, and he replied: “we have to stand with Hong Kong but I’m also standing with President Xi. He’s a friend of mine . . . we also are in the process of making the largest trade deal in history.”²⁰

Nonetheless, on November 27, Trump signed both acts into law. He stated:

I signed these bills out of respect for President Xi, China, and the people of Hong Kong. They are being enacted in the hope that Leaders and Representatives of China and Hong Kong will be able to amicably settle their differences leading to long term peace and prosperity for all.²¹

In response, China’s Foreign Ministry commissioner to Hong Kong stated that the bill was a “violation of China’s internal affairs.”²² China announced that it would suspend access to Hong Kong for the U.S. military and would take action against several U.S. nonprofit organizations operating in Hong Kong.²³ But following Trump’s decision to sign the bills, the Chinese Commerce Ministry did not link these bills to the trade negotiations.²⁴ The “phase one” trade deal was formally signed on January 15, 2020.²⁵

¹⁸ Patricia Zengerle & Richard Cowan, *U.S. House Passes Hong Kong Rights Bills, Trump Expected to Sign*, REUTERS (Nov. 20, 2019), at <https://www.reuters.com/article/us-hongkong-protests-usa/us-house-passes-hong-kong-human-rights-bills-idUSKBN1XU2CJ> (noting only one recorded vote in opposition to either bill).

¹⁹ Jean Galbraith, *Contemporary Practice of the United States*, 114 AJIL 137, 138 (2020) (describing the timing of the trade negotiations).

²⁰ *Trump Calls in to “Fox & Friends” Amid Impeachment Probe, Upcoming FISA Report*, REAL CLEAR POLITICS, at 45:08 (Nov. 22, 2019), at https://www.realclearpolitics.com/video/2019/11/22/trump_calls_in_to_fox_friend-s_amid_impeachment_probe_upcoming_fisa_report.html.

²¹ Donald J. Trump, *Statement on Signing Legislation Regarding United States Policy Towards Hong Kong*, 2019 DAILY COMP. PRES. DOC. 837 (Nov. 27, 2019). Given the strong support for the HKHRDA in Congress, a veto—if cast—might have been overridden. Trump issued an additional signing statement with respect to the HKHRDA in which he stated that “[c]ertain provisions of the Act would interfere with the exercise of the President’s constitutional authority to state the foreign policy of the United States” and that his “[a]dministration will treat each of the provisions of the Act consistently with the President’s constitutional authorities with respect to foreign relations.” Donald J. Trump, *Statement on Signing the Hong Kong Human Rights and Democracy Act of 2019*, 2019 DAILY COMP. PRES. DOC. 832 (Nov. 27, 2019).

²² Owen Churchill & Teddy Ng, *US’ Hong Kong Democracy Act Slanders China to a Level Close to Madness, Foreign Minister Wang Yi Says*, SOUTH CHINA MORNING POST (Nov. 21, 2019), at <https://www.scmp.com/news/china/diplomacy/article/3038789/us-hong-kong-democracy-act-slanders-china-level-close-madness>.

²³ Gerry Shih, *China Announces Sanctions Against U.S.-Based Nonprofit Groups in Response to Congress’s Hong Kong Legislation*, WASH. POST (Dec. 2, 2019), at https://www.washingtonpost.com/world/asia-pacific/china-announces-sanctions-against-us-based-nonprofits-in-response-to-congress-hong-kong-legislation/2019/12/02/9f414616-14e0-11ea-80d6-d0ca7007273f_story.html.

²⁴ Keith Bradsher, Javier Hernández & Alexandra Stevenson, *China Condemns U.S. Over Hong Kong. That Won’t Stop Trade Talks*, N.Y. TIMES (Nov. 28, 2019), at <https://www.nytimes.com/2019/11/28/business/china-hong-kong-trump-trade.html>.

²⁵ White House Press Release, *President Donald J. Trump is Signing a Landmark Phase One Trade Agreement with China* (Jan. 15, 2020), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-signing-landmark-phase-one-trade-agreement-china> [<https://perma.cc/HV3J-5XTF>].

The U.S. government has also signaled concern about human rights violations in the Chinese region of Xinjiang, where Chinese authorities have reportedly orchestrated the detention, indoctrination, and forced labor of over a million Uighurs and other ethnic and religious minorities.²⁶ On October 7, 2019, the Commerce Department's Bureau of Industry and Security limited the export of sensitive items to twenty-eight Chinese-associated governmental and commercial organizations "that have been implicated in human rights violations and abuses in China's campaign targeting Uighurs. . . ."²⁷ The following day, the State Department issued visa restrictions on certain "Chinese government and Communist Party officials who are believed to be responsible for. . . the detention or abuse of Uighurs. . . ."²⁸ In December of 2019, Congress included a provision in the National Defense Authorization Act for Fiscal Year 2020 that required the intelligence agencies to prepare "a report on activity by the People's Republic of China to repress ethnic Muslim minorities in the Xinjiang region of China."²⁹ The report is due in May 2020.³⁰

INTERNATIONAL CRIMINAL LAW

Issuing Several Pardons, President Trump Intervenes in Proceedings of U.S. Troops Charged or Convicted of Acts Amounting to War Crimes

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On November 15, 2019, President Trump pardoned or otherwise removed punishments for three members of the military—Lieutenant Clint Lorange, Major Mathew Golsteyn, and Chief Petty Officer Edward Gallagher—who had been found to commit, or had allegedly committed, criminal acts abroad that amounted to war crimes. These actions follow Trump's May 2019 pardon of First Lieutenant Michael Behenna, who had been found guilty of murdering a detainee in Iraq. These intrusions into military proceedings were an unusual use of the president's pardon power and have raised concerns about the U.S. commitment to international humanitarian law.

²⁶ See Austin Ramzy & Chris Buckley, *Leaked China Files Show Internment Camps Are Ruled by Secrecy and Spying*, N.Y. TIMES (Nov. 24, 2019), at <https://www.nytimes.com/2019/11/24/world/asia/leak-chinas-internment-camps.html?searchResultPosition=4>; Eva Dou & Philip Wen, "Admit Your Mistakes, Repent": China's Shifts Campaign to Control Xinjiang's Muslims, WALL ST. J. (Feb. 6, 2020), at <https://www.wsj.com/articles/china-shifts-to-new-phase-in-campaign-to-control-xinjiangs-muslims-11580985000>.

²⁷ U.S. Dep't. of Commerce Press Release, U.S. Department of Commerce Adds 28 Chinese Organizations to Its Entity List (Oct. 7, 2019), at <https://www.commerce.gov/news/press-releases/2019/10/us-department-commerce-adds-28-chinese-organizations-its-entity-list> [<https://perma.cc/T75K-LJDE>].

²⁸ U.S. Dep't. of State Press Release, U.S. Department of State Imposes Visa Restrictions on Chinese Officials for Repression in Xinjiang (Oct. 8, 2019), at <https://www.state.gov/u-s-department-of-state-imposes-visa-restrictions-on-chinese-officials-for-repression-in-xinjiang> [<https://perma.cc/HVD7-2378>].

²⁹ National Defense Authorization Act for Fiscal Year 2020, § 5512, Pub. L. No. 116-92, 133 Stat. 1198 (2019).

³⁰ See *id.* (requiring the report with 150 days of the act's passage). In December of 2019, the House of Representatives passed, by a 407–1 vote, a bill that would authorize or require the imposition of various sanctions and export controls related to China's treatment of the Uighurs. Uyghur Human Rights Policy Act of 2019, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/178/all-actions?overview=closed&q=%22roll-call-vote%22:%22all%22&KWICView=false> [<https://perma.cc/2KH8-9VQ3>]. This bill is now pending in the Senate. *Id.*