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[Aller au sommaire du numéro](#)

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Résumé de l'article

Depuis 1978, la réforme économique et l'ouverture de la République populaire de Chine ont dramatiquement réorienté ce qui était auparavant une économie planifiée vers le libre marché, résultant en une économie de plus en plus dynamique. L'exode de la force de travail rurale de la campagne aux industries des villes a significativement soutenu le processus d'industrialisation et de réforme économique. Toutefois, la croissance économique rapide n'a pas coïncidé avec des développements sociaux appropriés, et n'a pas encore mené à une reconnaissance et à une extension proportionnelles des droits socio-économiques, civils et politiques. Cette dichotomie se reflète dans le maintien du système de *hukou* (enregistrement des ménages), qui limite la mobilité de la population, discriminant entre citoyens selon leur statut *hukou*. Cette contribution explore l'évolution du système de hukou chinois et ses conséquences en matière de droits humains. L'approche de la Chine envers les droits humains sera considérée en relation avec la gestion de la migration interne et les récentes propositions de réforme du système de *hukou*. Des préoccupations spécifiques relatives aux droits humains seront soulignées eu égard au droit à la liberté de mouvement et de résidence au sein du territoire d'un État, qui est inexorablement interdépendant avec plusieurs autres droits humains fondamentaux. Lever le voile sur les impacts transversaux et de grande portée en matière de droits humains du système *hukou* situe le principe général d'égalité et de non-discrimination en tant que standard ultime pour la protection des migrants internes chinois. Une approche holistique relative aux droits humains appliquée aux changements institutionnels récemment proposés s'avère cruciale afin de maintenir la stabilité économique et sociale de la Chine, ainsi qu'afin de mieux protéger son principe constitutif d'égalité.

THE CHINESE HUKOU SYSTEM: REFORMING INSTITUTIONS OF INEQUALITY BETWEEN THE NEED FOR ROOTS AND THE DEMANDS OF CHANGE

*Giulia Raimondo**

Since 1978, economic reform and opening-up in the People's Republic of China have dramatically reoriented the previous planned economy towards the free market, generating an increasingly dynamic economy. The exodus of the rural labour force from the countryside to the industries of the cities significantly sustained the process of industrialization and economic reform. The rapid economic growth did not, however, coincide with appropriate social developments and has not yet led to a commensurate recognition and extension of socio-economic, civil and political rights. This dichotomy is reflected in the maintenance of the *hukou* (household registration) system, which limits the mobility of the population discriminating between citizens depending on their *hukou* status. This contribution will explore the evolution of the Chinese *hukou* system and its human rights implications. It will consider China's human rights approach in relation to the management of internal migration and the recent proposals to reform the *hukou* system. Specific human rights concerns will be underscored with regard to the right of freedom of movement and residence within the territory of a State, which is inexorably intertwined with many other fundamental human rights. Unearthing the far-reaching and transversal human rights impact of the *hukou* system will unveil the overarching principle of equality and non-discrimination as the ultimate benchmark of protection for Chinese internal migrants. A holistic human rights approach to the recently propounded institutional changes is crucial to uphold China's economic and social stability as well as to better safeguard its founding principle of equality.

Depuis 1978, la réforme économique et l'ouverture de la République populaire de Chine ont dramatiquement réorienté ce qui était auparavant une économie planifiée vers le libre marché, résultant en une économie de plus en plus dynamique. L'exode de la force de travail rurale de la campagne aux industries des villes a significativement soutenu le processus d'industrialisation et de réforme économique. Toutefois, la croissance économique rapide n'a pas coïncidé avec des développements sociaux appropriés, et n'a pas encore mené à une reconnaissance et à une extension proportionnelles des droits socio-économiques, civils et politiques. Cette dichotomie se reflète dans le maintien du système de *hukou* (enregistrement des ménages), qui limite la mobilité de la population, discriminant entre citoyens selon leur statut *hukou*. Cette contribution explore l'évolution du système de *hukou* chinois et ses conséquences en matière de droits humains. L'approche de la Chine envers les droits humains sera considérée en relation avec la gestion de la migration interne et les récentes propositions de réforme du système de *hukou*. Des préoccupations spécifiques relatives aux droits humains seront soulignées eu égard au droit à la liberté de mouvement et de résidence au sein du territoire d'un État, qui est inexorablement interdépendant avec plusieurs autres droits humains fondamentaux. Lever le voile sur les impacts transversaux et de grande portée en matière de droits humains du système *hukou* situe le principe général d'égalité et de non-discrimination en tant que standard ultime pour la protection des migrants internes chinois. Une approche holistique relative aux droits humains appliquée aux changements institutionnels récemment proposés s'avère cruciale afin de maintenir la stabilité économique et sociale de la Chine, ainsi qu'afin de mieux protéger son principe constitutif d'égalité.

Desde 1978, la reforma económica y la apertura de la República Popular China han reorientado dramáticamente lo que solía ser una economía planificada hacia un mercado libre, lo que resulta en una economía cada vez más dinámica. El éxodo de la mano de obra rural del campo a las industrias urbanas ha apoyado significativamente el proceso de industrialización y reforma económica. Sin embargo, este rápido crecimiento económico no ha coincidido con los desarrollos sociales apropiados, y aún no ha conducido al reconocimiento proporcional y la extensión de los derechos socioeconómicos, civiles y políticos. Esta

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dicotomía se refleja en el mantenimiento del sistema *hukou* (registro de hogares), que limita la movilidad de la población, discriminando a los ciudadanos según su estado en el *hukou*. Esta contribución explora la evolución del sistema chino *hukou* y sus implicaciones para los derechos humanos. El enfoque de China sobre los derechos humanos se verá en relación con la gestión de la migración interna y las recientes propuestas para reformar el sistema *hukou*. Se destacarán preocupaciones específicas de derechos humanos con respecto al derecho a la libertad de movimiento y residencia dentro del territorio de un estado, que es inexorablemente interdependiente con varios otros derechos humanos básicos. Retirar el velo sobre los impactos transversales y de largo alcance sobre los derechos humanos del sistema *hukou* coloca el principio general de igualdad y no discriminación como el estándar final para la protección de los migrantes internos chinos. Un enfoque holístico de los derechos humanos a los cambios institucionales propuestos recientemente es crucial para mantener la estabilidad económica y social de China, así como para proteger su principio fundamental de la igualdad.

“To be rooted is perhaps the most important and least recognized need of the human soul. It is one of the hardest to define.”

Simone Weil,
L'Enracinement

I. Introduction

Over the past three decades, the People's Republic of China (China) has lifted hundreds of millions of people out of poverty.¹ Since 1978, economic reform and opening-up have dramatically reoriented the country's previous planned economy towards the free market, generating in its place an increasingly dynamic economy. Increased freedoms have broadened social and material opportunities for Chinese people.² The exodus of the rural labour force from the countryside to the industries of the cities significantly sustained the process of economic reform and industrialization. Economic growth, however, did not coincide with social development and has not yet led to a commensurate recognition of socio-economic, civil and political rights. One of the most relevant examples of the dichotomy between China's extensive economic growth and its traditionally hesitant (and most recently resistant) human rights' approach is the retention of the *hukou* system, a form of population registration required by law since 1958. Nearly all the rights and interests of the citizens are attached to the *hukou* (household registration), i.e., to everyone's official residence. Modelled after the Soviet *propiska* system³ and with deep roots in imperial China, the *hukou* system is a State institution that regulates and restricts population mobility. The *hukou* registration was one of the fundamental tools used by the Chinese government to realize a strategy of economic growth based on rapid industrialization in the cities and extraction of agricultural surplus in the farmlands.

With China's reform and opening-up, people began to move to the cities in search of better opportunities. However, the *hukou* system continued to constrain such movements. Notwithstanding various attempts to reform the system, its current implementation remains at the source of some of the most serious forms of institutional exclusion against rural migrant workers and their families in China. Under this system,

¹ See *inter alia*, Report of the Special Rapporteur on extreme poverty and human rights on his mission to China, UNGAOR, 35th Sess, UN Doc A/HRC/35/26/Add.2 (2017) at para 12ff [Report of the Special Rapporteur].

² Zonglai Wang & Bin Hu, “China's Reform and Opening-up and International Law” (2010) 9:1 Chinese J Intl L 193.

³ The *propiska* was both residence permit and a migration-recording tool employed in the Russian Empire and then reintroduced in the Union of Soviet Socialist Republics (USSR) in the thirties. This system of internal passports served the ultimate scope of restricting the mass immigration from rural areas to large cities that was caused by expanding urban industrialization and rural famine. Without a *propiska*, citizens could not work, rent an apartment, marry or have their children admitted to school. After the World War II, the *propiska* system was carried out in other socialist countries. It was known, for instance, as *ho khau* in Vietnam, and *hoju* in North Korea. See Hilary K Josephs, “Residence and Nationality as Determinants of Status in Modern China” (2011) 46 Tex Intl LJ 295 at 297–99 [Josephs]; Noah Rubins, “The Demise and Resurrection of the *Propiska*: Freedom of Movement in the Russian Federation” (1998) 39:2 Harv Intl LJ 545 [Rubins]; Cynthia Buckley, “The Myth of Managed Migration: Migration Control and Market in the Soviet Period” (1995) 54:4 Slavic Rev 896 [Buckley].

millions of Chinese citizens from the rural areas were treated as inferior second-class citizens: they were not only formally denied freedom of movement within their own country, but also excluded from access to welfare, state-provided goods and other entitlements.⁴

The *hukou* system contributed to fostering the discrimination and “uprootedness” of rural Chinese citizens. Uprootedness has been defined by the French philosopher Simone Weil as a spiritual malaise affecting the human soul, with far-reaching social and political consequences.⁵ In what follows, we shall outline the symptoms of such malady in the current configuration of the *hukou* system. We shall then submit that the most appropriate antidote could be found in a holistic human rights approach to the most recently propounded reforms of the system.

The hallmark of Weil’s contribution in this context is perhaps the dismissal of the language of rights—individual claims against others—and the shift to that of needs, duties and obligations as the basis of a good society.⁶ The vigour and lucidity of Weil’s conception of obligation have the potential to operate a truly Copernican revolution, subverting the logic of individual rights to that of subjectivity capable of responsibilities towards others, even before claiming rights. The work of Simone Weil, therefore, appears particularly relevant in a context where human rights are increasingly contested.⁷

In this article, we shall attempt to portray the tragedy of uprootedness in relation to the Chinese *hukou* system and to identify the human rights norms applicable in such context. To this end, the present contribution consists of three parts. The starting

⁴ Kam Wing Chan, “The Household Registration System and Migrant Labor in China: Notes on a Debate” (2010) 36:2 *Population & Development Rev* 357 at 358 [Chan, “Notes on a debate”].

⁵ Simone Weil, *L’Enracinement* (Paris: Gallimard, 1949); subsequently translated in English as: *The Need for Roots. Prelude to a Declaration of Duties towards Mankind* (London: Routledge, 1952) [Weil, “L’Enracinement”].

⁶ *Ibid.*: “The notion of obligations comes before that of rights, which is subordinate and relative to the former. A right is not effectual by itself, but only in relation to the obligation to which it corresponds, the effective exercise of a right springing not from the individual who possesses it, but from other men who consider themselves as being under a certain obligation towards him. Recognition of an obligation makes it effectual”. Given the limited scope of this paper, it is not possible to give a complete account of Simone Weil’s critique of rights in relation with power and force. However, it is worth noting that her notion of responsibility is not incompatible with that human rights; her critique is oriented toward the notion of rights in domestic law. It seems that the difference between her notion of rights in the domestic legal system and that of human rights reflects the hiatus existing between concepts of law and justice. Among the philosopher’s most relevant contributions, see Simone Weil, “La personne et le sacré” in *Écrits de Londres et dernières lettres* (Paris: Gallimard, 1957) 11; Simone Weil, “D’une antinomie du droit” in André A Devaux & Florence de Lussy, *Œuvres complètes*, vol I (Paris: Gallimard, 1988) 255; For an elucidation of Weil’s criticism of personalism and her conception of human rights and duties, see Filippo Pizzolato, “Oltre il Personalismo: Simone Weil e la Critica alla nozione di Diritto” (2014) 3 *JUS* 459.

⁷ For an overview of China’s approach to international human rights law, see Ann Kent, *China, the United Nations, and Human Rights* (Philadelphia: University of Pennsylvania Press, 1999); Björn Ahl, “The Rise of China and International Human Rights Law” (2015) 37:3 *Hum Rts Q* 637 [Ahl]; Surya P Subedi, “China’s Approach to Human Rights and the UN Human Rights Agenda” (2015) 14:3 *Chin J Int Law* 437; Junxiang Mao & Xi Sheng, “Strength of Review and Scale of Response: A Quantitative Analysis of Human Rights Council Universal Periodic Review on China” (2016-2017) 23 *Buff HRL Rev* 1.

point rests on a brief historical exploration of the *hukou* system's legal framework. In order to better understand the role of this peculiar system, we shall outline an overview of its evolution and unique features. The second part of the article considers the *hukou* system through the lens of international human rights standards. We propose to address the right to freedom of movement and residence within the territory of a State and its connections with other basic human rights. We shall emphasize that the possibility to move between and within states is an important condition for the exercise of human rights in general. It shall then be possible to unearth the principle of equality and non-discrimination as the ultimate benchmark for the protection internal migrants' rights. The crosscutting nature of this fundamental principle is evidenced by a concise consideration of *hukou* system's ramifications with respect to three broad areas of discrimination: the denial of just and fair conditions of work, the exclusion from health care and from public education.

Against this background, the third part of the article concludes with a comprehensive appraisal of the latest *hukou* reforms and their impact on the previously addressed human rights concerns. We shall finally submit that although the *hukou* system forms an important part of the Chinese social structure, it requires a thorough and far-reaching reform. This will be crucial to uphold China's human rights obligations and, as a consequence, to tackle the issue of its people's uprootedness.

II. Genealogy of the *Hukou* System

The origins of the *hukou* system are deeply rooted in the history of China and can be traced back to the Xia Dynasty (from 21st to 16th centuries BC). Thenceforth, until the fall of the Qing Dynasty (in AD 1911), the household registration system was one of the most significant instruments of social control, in terms of vital statistics, taxation and conscription.⁸ The influence of this system on Chinese society and on its cultural and political evolution is vital. However, despite its long history, the influence of the *hukou* system on the lives of the Chinese citizens was relatively negligible in the past.

It is noteworthy that Article 90 of the 1954 Chinese Constitution guaranteed, "freedom of residence and freedom to change their residence."⁹ The provision reiterated the historical practice concerning freedom of movement and residence as codified in the 1911 *Provisional Constitution of the Republic of China*.¹⁰ This constitutional guarantee was removed from the subsequent Constitutions, paving the way for the present *hukou* system. During the fifties, a uniform and far-reaching version of the *hukou* system was gradually introduced. The legal basis of the system was established

⁸ Kam Wing Chan, "The Chinese Hukou System at 50" (2009) 50:2 *Eurasian Geography & Economics* 197 at 199 [Chan, "Hukou System at 50"].

⁹ People's Republic of China, First National People's Congress, *Documents of the First Session of the First National People's Congress of the People's Republic of China* (Peking: Foreign Languages Press, 1955) at 160.

¹⁰ Tiejun Cheng & Mark Selden, "The Origins and Social Consequences of China's *Hukou* System" (1994) *China Q* 644 at 646.

in 1958, when the Standing Committee of the National People's Congress (NPC) promulgated the *People's Republic of China Regulations on Household Registration*.¹¹ These regulations represent the legal foundation of the *hukou* system and, although they have undergone various reforms during the years, they remain in force today.

Modelled after the Soviet *propiska* system,¹² the *hukou* system requires every citizen belonging to a household to be recorded in a register kept by the local authorities. Every citizen inherits a *hukou* registration at birth and it may be altered only under very limited, if not exceptional, circumstances.¹³ The term *hukou* refers to two aspects of the registration: the *hukou* location, corresponding to the geographical location of its holder; and the *hukou* type, related to its holder's occupation.¹⁴ With regard to the first aspect, all Chinese citizens were classified according to their permanent residence, i.e., the administrative unit (city, town or village) of the *hukou* registration. Thereafter, the second aspect of the *hukou* referred to the occupation of its holder, which could be of two types: agricultural and non-agricultural. The distinction determined one's entitlements to State-provided goods and services. Whereas agricultural *hukou* entailed the right to possess and cultivate the land, non-agricultural *hukou* were provided with goods and services necessary for their subsistence in the cities. When this taxonomy first came into being, it reflected the geographical and occupational division in China's economy, associating agricultural *hukou* with peasants living in the countryside and non-agricultural *hukou* with the industrial workers living in urban areas. In sum, while the *hukou* type defined which services and welfare were available to an individual, the *hukou* location determined where an individual would receive them.

Any official permanent movement from the countryside to the cities required approval from State authorities to convert the *hukou* type from agricultural to non-agricultural, a process referred to as *nongzhuangfei*; subsequently, it was possible to change the *hukou* location. In this two-step process, the conversion of the *hukou* type was the more critical, complex and strictly controlled. The rigid criteria for obtaining a *nongzhuangfei* were established by the central government and designed to serve the

¹¹ The Standing Committee is a permanent organ of the National People's Congress (NPC); It is convened once every two months between the annual plenary sessions of the NPC. It has the power i) to enact and amending laws, within limits set by the NPC; ii) to interpret the Constitution and laws, and to supervise legislation; iii) to decide upon major State issues; and iv) to appoint and remove from members of State organs. It is thus possible to argue that the Standing Committee functions as a legislative body; See The People's Republic of China, The State Council, *The NPC Standing Committee*, 27 February 2015 update, online: *The State Council, People's Republic of China* <english.gov.cn/2015/ncpcandppcc/2015/02/28/content_281475063089978.htm>.

¹² The *propiska* was both residence permit and a migration-recording tool employed in the Russian Empire and then reintroduced in the USSR in the thirties. This system of internal passports served the ultimate scope of restricting the mass immigration from rural areas to large cities that was caused by expanding urban industrialization and rural famine. Without a *propiska*, citizens could not work, rent an apartment, marry or have their children admitted to school. After the World War II, the *propiska* system was carried out in other socialist countries. It was known, for instance, as *ho khau* in Vietnam, and *hoju* in North Korea; See Josephs, *supra* note 3; Rubins, *supra* note 3; Buckley, *supra* note 3.

¹³ Chan, "Hukou System at 50", *supra* note 8 at 200.

¹⁴ Kam Wing Chan & Will Buckingham, "Is China Abolishing the *Hukou* System?" (2008) 195 *China Q* 582 at 587-90 [Wing Chan & Buckingham].

needs of the State.¹⁵

The 1958 codification of the *hukou* system was the result of the institution of a system of planned economy oriented towards industrialization that required social control and meticulous organization, coupled with a strategy premised on the unequal exchange of agriculture and industrial development.¹⁶ The ban on rural outflows, implemented by the *hukou* system, along with an array of measures related to economic planning, such as food rationing, collectivization of farmlands, urban welfare and centralized labour allocation enabled the extraction of value from the agricultural to the industrial sector in urban areas. Given that the agricultural population was supposed to obtain its means of livelihood and social security from lands, citizens with agricultural *hukou* registration were expected to be self-sufficient, receiving very limited, if any, support from the State. By contrast, those living in urban areas were automatically entitled to rationed food grain, State-guaranteed employment and an array of welfare provisions such as housing, education, medical care, and other benefits, distributed and funded by the central government.¹⁷ During the Maoist era, these mechanisms served to subsidize industrialization, while internal migrations were hindered. Without access to legal residence permit and all the related community membership-based facilities, rural population with agricultural *hukou* was *de jure* and *de facto* prevented from living in urban areas. This system confined rural citizens in the countryside, creating what has been defined as a “rural-urban apartheid.”¹⁸

The social and economic separation between rural and urban citizens determined by the *hukou* system was exacerbated by the reforms launched by Deng Xiaoping from 1978. The reform and opening-up stimulated China’s economic dynamism. This period was characterized by rural de-collectivization, marketization and urban expansion. Years of obstruction of free mobility and the exclusion of the rural population from non-agricultural employment in urban regions had curbed vitality and dynamism of urban economies. But starting from 1978, economic growth and free market alternatives increased non-compliance with *hukou* regulations established to prevent rural to urban migration.¹⁹ This situation determined the origins of a particularly vulnerable segment of society, which is *de facto* residing in a city or town, but maintains its *de jure* household registration in the countryside, without having access to many basic social services and experiencing higher levels of poverty compared to local *hukou* holders.

A synergy of various push and pull factors was emerging: growing dynamism in urban economies created numerous job opportunities, many of which were in labour-

¹⁵ *Ibid* at 588–91: In the past, *nongzhuangfei* was mainly conferred to those individuals who belonged to special categories: either recipients of compensation for past policy mistakes or people who had endured personal sacrifices and hardships because of their work for the State. Conversely, people responsible of certain crimes were deprived of non-agricultural *hukou* status.

¹⁶ Chan, “Hukou System at 50”, *supra* note 8 at 199.

¹⁷ Josephs, *supra* note 3 at 298; Wing Chan & Buckingham, *supra* note 14 at 588.

¹⁸ Peter Alexander & Anita Chan, “Does China Have an Apartheid Pass System?” (2004) 30:4 *J of Ethnic & Migration Studies* 609; Tim Luard, “China rethinks peasant ‘apartheid’”, *BBC News* (10 November 2005), online: <news.bbc.co.uk/2/hi/asia-pacific/4424944.stm> [Alexander & Chan].

¹⁹ Jason Young, *China’s Hukou system markets, migrants and institutional change* (New York: Palgrave Macmillan, 2013).

intensive sectors, such as construction and manufacturing; meanwhile, in the countryside, pollution, loss of farmland and desertification caused arable land to decrease dramatically together with the principal means of subsistence of the rural population. This, together with the de-collectivization of countryside, created a large surplus of the labour force that was rapidly accommodated in the industries of the urban areas. Such a synergy was made possible thanks to the gradual relaxation of migratory controls related to the *hukou* system.²⁰

Starting from the eighties, the government implemented a series of policies to adapt the rigorous *hukou* system to new exigencies of urbanization and industrialization and rural-urban migration, which was gaining momentum. Peasants were now allowed to move to urban areas, where they filled unwanted positions in the industrial sector, giving an essential contribution to the Chinese exponential economic growth. The opportunities opening in the cities were so attractive for the rural population that they endured working conditions intolerable for urban residents. Rural migrants rapidly became the major source of industrial labour. The law started consequently to adapt to this new reality.²¹

The major reforms of the *hukou* system have been combined with a process of decentralization.²² Since the eighties, the central government has gradually implemented various programs to devolve fiscal and administrative powers to regional governments. This included the management of the *hukou* system. General guidelines began to be introduced at national level, while direct regulations were issued at local level. One of the most emblematic practices of many urban local administrations was the “selling of *hukou*,” with the introduction of the “blue-stamped” *hukou*. The “blue-stamped” *hukou* (in contrast to the official “red-stamped” one) was mostly targeted at migrants who could afford to invest or purchase housing in host cities, or who were considered to be highly qualified talents urgently needed by local employers.²³ The commodification of *hukou* aimed at attracting the most desirable segments of the migrant population by providing them right of abode and certain social welfare in urban

²⁰ Peter W Mackenzie, “Strangers in the City: The *Hukou* and Urban Citizenship in China” (2002) 56:1 *J Intl Affairs* 305.

²¹ In 1984, the Standing Committee of the 12th National People’s Congress passed the *Identity Card Law*, which recognized citizens’ identity card as a proof of identification alternative to *hukou* registration. In 1985, the Ministry of Public Security issued the *Provisional Regulations for the Management of Temporary Residents in Cities and Towns*. The regulations established the citizens’ right to move and reside temporarily in areas outside of their permanent *hukou* residence, without going through the *nongzhuangfei* procedure. This policy aimed at accommodating the growing demand for low-skilled position in the industrial sector. Temporary migrants, however, were still not allowed to have complete access to all the rights and social benefits associated with local *hukou* registration; See People’s Republic of China, *Law of the People’s Republic of China on Resident Identity Cards*, Order no 4, Third Meeting of the Standing Committee of the Tenth National People’s Congress (2003); See also C Cindy Fan, *China on the Move: Migration, the State, and the Household* (Abingdon; New York: Routledge, 2008) [Fan]; Chan, “*Hukou* System at 50”, *supra* note 8; Chan, “Notes on a debate”, *supra* note 4.

²² For further discussion about the impact of decentralized migration policies on equity in social welfare delivery for rural–urban migrants, see Ling Wu, “Decentralization and *Hukou* Reforms in China” (2013) 32:1 *Policy & Society* 33 [Wu].

²³ Fan, *supra* note 21 at 50.

areas.²⁴ Local governments in their management of *hukou* policies are generally driven by their own local interests, hence the idea of commodifying the *hukou* through market selectivity. This combination of factors resulted in the exclusion of the great majority of rural—urban migrants from obtaining local *hukou* status due to the high entry thresholds. Local governments' policies have played an important role in stimulating the market competition, but at the same time have not duly considered the relevance of their responsibility for redistribution of social services.

Furthermore, few municipalities and provinces began to abolish the *nongzhuanfei*, i.e., the agricultural/non-agricultural status distinction. Consequently, the conversion of one's *hukou*, which used to be a two-step process, was simplified to a unique procedure merely concerning the localization of the *hukou* registration. Each local administration defined the eligibility conditions to change one's *hukou* location.²⁵ These criteria, especially in large cities, were very stringent—in general, the decision of city governments to bestow local permanent *hukou* was mostly based on (significant) financial means, educational accomplishments and marriage with local residents. Ordinary peasants resulted almost completely excluded from obtaining local *hukou* status in the large cities, whereas small towns, with far fewer social benefits, had the lowest entry thresholds. Small urban centres, however, were not migrants' targets due to the lack of job opportunities.

It is also worth noting that *hukou* reforms have often gone hand in hand with the attempt to separate land use rights and the *hukou* status of individuals—and, therefore, the land relations in the countryside.²⁶ Agricultural land was highly demanded for urban expansion. It has therefore been the target of local governments through expropriation and *hukou* reforms. Many local governments eliminated the distinction between agricultural and non-agricultural *hukou*, with the declared objective to remove social and legal discrimination against agricultural *hukou* holders.²⁷ It seems, however, undisputable that the reform also served the disguised purpose to separate rural *hukou* from land rights. The rights to rural land represent not only a membership status arguably linked to one's identity, but also an important form of long-term security. Thus, rural migrants living in the cities were generally disinclined to sell land

²⁴ The commodification of freedom of movement appears as a common denominator between migration policies implemented at different levels, namely internal and international. In this vein, Fan interestingly observed how the *hukou* commodification that occurred in Chinese cities can be compared to the immigration policies of nation states such as Canada or the United States of America which favour foreign investors or highly skilled immigrants; See *Ibid.*

²⁵ Wing Chan & Buckingham, *supra* note 14 at p 594.

²⁶ Shaohua Zhan & Joel Andreas, "Beyond the Countryside: *Hukou* Reform and Agrarian Capitalism in China" (Paper, written in April 2015, delivered at the Land Grabbing, Conflict and Agrarian-Environmental Transformations: Perspectives from East and Southeast Asia International Academic Conference, Chiang Mai University, 5 & 6 June 2015) at 11, online (pdf): [ISS <https://www.iss.nl/sites/corporate/files/CMCP_7-Zhan_and_Andreas.pdf>](https://www.iss.nl/sites/corporate/files/CMCP_7-Zhan_and_Andreas.pdf) [Zhan & Andreas].

²⁷ For instance, in 2010, the municipal government of Chongqing declared that it aimed to turn 3.38 million farmers, mainly the new-generation migrant workers, into urban citizens within two years; See Xinhua, "Chongqing Starts Household Registration Reform", *China Daily* (29 July 2010), online: www.chinadaily.com.cn/china/2010-07/29/content_11067678.htm.

rights in exchange for an urban *hukou*.²⁸

The decentralized nature of the *hukou* system implies the problem of effective implementation of central guidelines by local administrations, which have limited financial funding to support the extension of public services to the migrant population. Hence the reluctance of local authorities to open their *hukou* system doors indiscriminately and include migrant workers in community-based welfare systems. It remains unclear what enforcement mechanisms will be put in place in order to implement and encourage compliance at local level.²⁹

Notwithstanding various attempts to reform this discriminatory system, the application of the *hukou* system remains the source of the most serious forms of institutional exclusion against rural migrant workers and their families. It is ultimately possible to observe two different categories of migrants: those who have *hukou* related rights and those who do not. Despite more permissive policies related to mobility, rural citizens remain heavily constrained by the discriminatory institutional legacy of the *hukou* system. These citizens, though working and residing in cities and towns, in most cases are still not considered local workers and residents. As a result, they are excluded from most of the public benefits and entitlements provided to urban *hukou*-registered citizens.

The *hukou* system plays a complex role in Chinese society. Its preservation has often been justified by arguments underscoring its pivotal contribution to the nation's socio-political stability and economic growth.³⁰ The *hukou* system allows for selective internal migration. It provides the government with the means to control labour allocation and therefore to facilitate the growth of market economy.³¹ Furthermore, the *hukou* system is deep-rooted in Chinese social life and profoundly influences people's identity. Hence, it is argued that through its inherent discriminatory logic, based on a hierarchy of *hukou* statuses, the *hukou* system facilitates authoritarian governmentality in China. As Bentham's panopticon, the contemporary *hukou* has become a tool of surveillance.³² Hence, the complex and profound socio-political and economic functions of the *hukou* system in contemporary China make its reform both symbolically delicate and highly complicated.

The human rights relevance of the *hukou* system is linked to its coordination with centralized policies of planned economy, which dealt with the redistribution of

²⁸ Shuming Bao et al, "The Regulation of Migration in a Transition Economy: China's *Hukou* System" (2011) 29:4 Contemporary Economic Policy 564; Wu, *supra* note 22; Chan & Buckingham, *supra* note 14; Zhan & Andreas, *supra* note 26.

²⁹ Charlotte Goodburn, "The end of the *hukou* system? Not yet" (2014) China Policy Institute Policy Paper No 2 at 5–6, online (pdf): *University of Nottingham* <www.nottingham.ac.uk/iaps/documents/cpi/policy-papers/cpi-policy-paper-2014-no-2-goodburn.pdf>.

³⁰ For a complete account of the purportedly positive and negative functions of the *hukou* system, see Fei-Ling Wang, "Brewing Tensions while Maintaining Stability: The Dual Role of the *Hukou* System in Contemporary China" (2005) 29:4 *Asian Perspective* 85.

³¹ *Ibid* at 101–04.

³² Fenglong Wang & Yungang Liu, "Interpreting Chinese *Hukou* System from a Foucauldian Perspective" (2018) 36:2 *Urban Policy & Research* 153 at 160–61.

social and economic resources.³³ A coordination that, to some extent, is still in place; consequently, people have access to public services and welfare based on their *hukou* registration. In this vein, before turning to the human rights implication of this system, it might be worth mentioning a final caveat. Even if this essay makes generalizations about the *hukou* system, it is important to bear in mind that it is still not implemented evenhandedly across China. The discretion of various local authorities determines uneven policies, which might lead to different human rights implications.

III. The *Hukou* System and International Human Rights Law

The impact of international human rights law on the *hukou* system and its reforms should be considered within the general framework in which international law operates in the Chinese legal system. In China, the abstract relationship between international law and domestic law is explained neither in terms of monism nor dualism. Instead, Chinese scholars adopted a dialectical approach according to which international law and domestic law are separate systems that infiltrate and supplement one another.³⁴ The Chinese Constitution is silent regarding the status of public international law in the domestic legal system. There is thus no need for further incorporation into national law: domestic courts can directly apply a ratified international treaty. Despite this, practice courts are quite hesitant to directly refer to international law in their decisions.³⁵ Generally, the impact of international law on the Chinese *hukou* system can be observed at two levels: one concerns the human rights obligations that China has towards individuals based on the treaties it has ratified; the other concerns the obligations deriving from customary international law and the general principles informing the international legal system.

As it will be shown in the following sections, the *hukou* system, as it currently stands, appears inconsistent with the obligations established by international human rights treaties that China has ratified or may ratify in the future. The first human right obligation infringed upon by this peculiar system is the freedom of movement and residence within the territory of States, included in the *International Covenant on Civil and Political Rights*³⁶ (*ICCPR*) and the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*).³⁷ In this respect, it may be worth remembering that China has signed the *ICESCR* and the *ICCPR*, but while it has ratified the former it has

³³ Fan, *supra* note 21 at 45–47.

³⁴ Ahl, *supra* note 7; Zhaojie Li (James), “The Role of Domestic Courts in the Adjudication of International Human Rights: A Survey of the Practice and Problems in China” in Benedetto Conforti & Francesco Francioni, *Enforcing International Human Rights in Domestic Courts* (The Hague, The Netherlands: Martinus Nijhoff Publishers, 1997) 329.

³⁵ The ratification “and the subsequent publication of treaty text in the Official Gazette do not have the capacity to allow the administration and the courts to apply treaty provisions directly. Direct application requires either a statutory reference norm or a judicial interpretation of the Supreme People’s Court referring to the relevant international treaty”, Ahl, *supra* note 7 at 641.

³⁶ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 art 12 [*ICCPR*].

³⁷ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 [*ICESCR*].

still not accessed to the latter.³⁸ However, China is a party to the *International Convention on the Elimination of All Forms of Racial Discrimination*,³⁹ the *Convention on the Elimination of All Forms of Discrimination Against Women*,⁴⁰ the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,⁴¹ the *Convention on the Rights of the Child*,⁴² and the *Convention of the Rights of Persons With Disabilities*.⁴³ All these instruments deal with civil and political rights, such as freedom of movement, to a various extent. Furthermore, the *hukou* system appears at odds not only with the right to freedom of internal movement, but also with several human rights obligations, such as the right to just and favourable conditions of work, the right to education, the right to health and the comprehensive and crosscutting right to equal treatment with regard to the enjoyment of all these rights. These rights are intertwined with the freedom of internal movement and are included in various treaties that China has ratified. The common denominator of all these human rights concerns rests on the fundamental principle of equality and non-discrimination, the ultimate guarantee of migrants' rights.

In what follows, we shall provide a brief overview of the human rights obligations that descend from the international legal instruments that bind China. In doing so, we shall highlight the legal complexities which arise in their actual implementation, as well as the possible avenues for their reception in the Chinese context.

A. The Right to Freedom of Movement within the Territory of a State

Restrictions on the freedom of movement of people have been considered by different philosophical stances to be morally unjustifiable, economically inefficient and socially unjust. For instance, while Adam Smith considered restrictions on the possibility to move freely in one's country as a violation of natural justice,⁴⁴ Vladimir Lenin argued that "[u]nless the population becomes mobile, it cannot develop."⁴⁵ According to Lenin, migration should be regarded as a progressive phenomenon which

³⁸ China ratified the *ICESCR* on 27 March 2001, while it signed the *ICCPR* on 5 October 1998. As of August 2019, ratification of this latter treaty is still pending.

³⁹ *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 mars 1966, 660 UNTS 195 s 5(d) (entered into force 4 January 1969, accession by China 29 December 1981) [*International Convention on the Elimination of All Forms of Racial Discrimination*].

⁴⁰ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981, accession by China 4 November 1980).

⁴¹ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987, accession by China 4 October 1988).

⁴² *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, accession by China 2 March 1992).

⁴³ *Convention of the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008, accession by China 1 August 2008).

⁴⁴ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (London: Edwin Caman, 1904) at 142.

⁴⁵ Vladimir Lenin, "The Development of Capitalism in Russia" in *Collected Works*, 5th ed (Moscow: Progress Publishers, 2009) vol 3 at 251.

has the potential to destroy “bonded forms of hire and labour-service.”⁴⁶ It might thus appear surprising that China, whose Constitution praises the guidance of Marxism-Leninism and whose leaders at the same time favourably quote Adam Smith’s moral philosophy,⁴⁷ upholds a system premised on severe restrictions of people’s freedom of movement and residence.⁴⁸

Freedom of movement is the norm in human history, and the right to freedom of movement, as recognized in international human rights instruments, can be easily connected to notions of individual autonomy and self-determination. Correspondingly, freedom of internal movement and residence emerges from the preparatory work to the *ICCPR* as “an important human right and one which was an essential part of the right to personal liberty.”⁴⁹ In the words of the UN Human Rights Committee, “[l]iberty of movement is an indispensable condition for the free development of a person.”⁵⁰ The right of freedom of movement is certainly one of the core rights of citizenship guaranteed by democratic States and one of the most fundamental human rights protected by international law.⁵¹ The related rights of entry, residence and exit are inextricably interdependent: “The denial of any one makes the assertion of the others a chimera rather than a reality.”⁵² The *sine qua non* for these rights is the freedom of movement and residence within the borders of a State.

Freedom of internal movement and residence, however, does not merely pertain the domain of individual rights. It also is of crucial significance for collective values such as democracy and the rule of law. In fact, the right to freedom of internal movement and the right to non-discrimination accompanying such movement constrain the capacity of domestic political actors to scapegoat and exclude minorities, refusing

⁴⁶ Lenin criticized laws meant to prevent rural workers to move and seek employment at the most advantageous conditions. Restriction of labour mobility meant that employers took advantage of these workers setting up factories in rural areas to exploit cheap labour. According to Lenin, workers’ mobility “not only yields ‘purely economic’ advantages to the workers themselves, but in general should be regarded as progressive; that public attention should not be directed towards replacing outside employment by local ‘occupations close at hand,’ but, on the contrary, towards removing all the obstacles in the way of migration, towards facilitating it in every way, towards improving and reducing the costs of all conditions of the workers’ travel”, *Ibid* at 249–51.

⁴⁷ Interview of Wen Jiabao by Lionel Barber (2 February 2009) in *Financial Times*, online: <www.ft.com/content/795d2bca-f0fe-11dd-8790-0000779fd2ac>; See also Ryan Patrick Hanley, “The ‘Wisdom of the State’: Adam Smith on China and Tartary” (2014) 108:2 *American Political Science Rev* 371.

⁴⁸ Eric Monkman, “The Hybrid *Hukou*: A New Proposal to Enhance Labor Mobility in China” (2014) 7:1 *Tsinghua China L Rev* 79 at 92–93 [Monkman].

⁴⁹ Marc J Bossuyt, *Guide to the ‘travaux Préparatoires’ of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff Publishers, 1987) at 253 [Bossuyt].

⁵⁰ UNHRC, *General Comment no 27 (67) Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights: Freedom of Movement (Article 12)*, UN Doc CCPR/C/21/Rev.1/Add.9, November 1999 at para 1 [*General Comment no 27*].

⁵¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948), art 13 [*Universal Declaration*].

⁵² Rosalyn Higgins, “The Right in International Law of an Individual to Enter, Stay in and Leave a Country” (1973) 49:3 *Intl Affairs* 341 at 342.

them access to their legally guaranteed rights.⁵³ In this vein, the right to freedom of movement and residence to some extent constitute the “hallmark of a democratic society.”⁵⁴

The importance of freedom of movement and residence within the territory of a State is evident. With the gradual spread of international human rights law into domestic affairs, the issue of freedom of internal movement and residence is no longer an issue of exclusive domestic concern.⁵⁵ Notably, in 1948, the *Universal Declaration of Human Rights (UDHR)* affirmed that “everyone has the right to freedom of movement and residence within the borders of each State.”⁵⁶ Similarly, Section 12(1) of the *ICCPR* reads as follows: “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.” According to the UN Human Rights Committee:

The right to move freely relates to the whole territory of a State, including all parts of federal States. [...] The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place.⁵⁷

At the same time, Section 12(3) provides exceptional circumstances in which this right may be restricted. Restrictions on freedom of movement shall be, however, constrained by the legal requirements included in the provisions that stipulate such freedom. Most notably, Section 12(3) of the *ICCPR* commands that restrictions of freedom of movement and residence should be a) provided by law; b) necessary to protect national security, public order, public health or morals and others; and c) consistent with the other rights enshrined in the *ICCPR*.⁵⁸

The right to freedom of internal movement should be, however, qualified with its possible restrictions, based on legal, reasonably justified and necessary criteria. The right to freedom of movement and residence within the territory of the State should be regarded as a rule to which restrictions are the exception. Given their exceptional nature, such restrictions must be provided by the law and narrowly interpreted.⁵⁹

⁵³ In the context of European integration, de Witte discusses free movement as a possibility for emancipation and as a recalibration of justice and democracy: Floris de Witte, “Freedom of Movement Under Attack: Is it Worth Defending as the Core of EU Citizenship?” (2016) European University Institute, Robert Schuman Centre for Advanced Studies Working Paper No 2016/69, online: <cadmus.eui.eu/handle/1814/44567>.

⁵⁴ Atle Grahl-Madsen, Göran Melander & Rolf Ring, “Article 13” in Gudmundur Alfredsson & Asbjørn Eide, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague, The Netherlands: Martinus Nijhoff Publishers, 1999) 265 at 268.

⁵⁵ See especially Chaloka Beyani, *Human Rights Standards and the Free Movement of People within States* (New York: Oxford University Press, 2000) [Beyani].

⁵⁶ *Universal Declaration*, *supra* note 51, s 13(1).

⁵⁷ *General Comment No 27*, *supra* note 50 at para 5.

⁵⁸ Section 12(3) *ICCPR* reads as follows: “The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”

⁵⁹ In this regard, the Human Rights Committee clarified that “the restrictions must not impair the essence of the right [...] the relation between right and restriction, between norm and exception, must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not

Furthermore, it is not sufficient that such restrictions respond to the principle of legality. Restrictive measures must be necessary to achieve their legitimate purposes; they must conform to the principle of proportionality.⁶⁰ Finally, as observed by the UN Human Rights Committee, these constraints need to be consistent not only with the principle of legality and proportionality, but also with the fundamental principles of equality and non-discrimination.⁶¹

As the universal underpinning of international human rights law, the *ICCPR* ensures a solid conventional basis to the right of freedom of movement within the territory of a State. This solid conventional basis has been confirmed and reinforced by many other universal and regional treaties. To date, the right of freedom of internal movement and residence have been included in a wide range of international and regional human rights conventions,⁶² as well as endorsed in a number of soft-law instruments.⁶³ In the light of the consistency of State practice and general recognition

confer unfettered discretion on those charged with their execution”, *General Comment no 27, supra* note 50 at para 13; At regional level, Article 18 of the *European Convention of Human Rights* commands that any restriction to the rights and freedoms enshrined in the Convention “shall not be applied for any purpose other than those for which they have been prescribed.”, Council of Europe, European Court of Human Rights, *European Convention of Human Rights* (1950), art 18.

⁶⁰ *General Comment no 27, supra* note 50 at para 14; See also International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at para 136 [*Wall in the Occupied Palestinian Territory*].

⁶¹ *General Comment no 27, supra* note 50 at para 18.

⁶² At international level, these include: *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, art 26 (entered into force 22 April 1954); *International Convention on the Elimination of All Forms of Racial Discrimination, supra* note 39; *International Convention on the Suppression and Punishment of the Crime of Apartheid*, GA Res 3068 (XXVIII), UNGAOR, 1973, UN Doc A/RES/3068(XXVIII), s 2(c) (entered into force 18 July 1976); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, 2220 UNTS 3, art 39 (entered into force 1 July 2003); While at regional level, the list of human rights treaties containing a clause on freedom of internal movement is copious and it includes: Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 16 September 1963, ETS 46, art 2; OAS, Inter-American Commission on Human Rights, *American Declaration of the Rights and Duties of Man* (1948), art VIII; OAS, *American Convention on Human Rights, “Pact of San Jose”* (1969), art 22.1; Organization of African Unity, *African Charter on Human and Peoples’ Rights*, OAU CAB/LEG/67/3 rev. 5, 21 I.L.M. 5827 (1982), art 12; League of Arab States, *Arab Charter on Human Rights* (1994), art 20; Article 12 of the Commonwealth of Independent States, *Convention on Human Rights and Fundamental Freedoms* (1995); Moreover, assigned residence in times of armed conflict is treated as the most severe permissible restriction to which the detaining States may resort when other measures have proved inadequate, as provided by the widely ratified *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287, arts 41–43 (entered into force 21 October 1950).

⁶³ Among the General Assembly Resolutions, see *Protection of Migrants*, GA Res 65/212, UNGAOR, 65th Sess, UN Doc GA/RES/65/212 (2011), preambular para 2; *Protection of Migrants*, GA Res 64/166, UNGAOR, 64th Sess, UN Doc GA/RES/64/166 (2010), preambular para 3; *Protection of Migrants*, GA Res 63/184, UNGAOR, 63rd Sess, UN Doc GA/RES/63/184 (2009); *Protection of Migrants*, GA Res 62/156, UNGAOR, 62nd Sess, UN Doc GA/RES/62/156 (2007), preambular para 3; *Protection of Migrants*, GA Res 61/165, UNGAOR, 61st Sess, UN Doc GA/RES/61/165 (2006), preambular para 3. Among the resolutions of the Human Rights Council, see *Situation of human rights in the Democratic People’s Republic of Korea*, HRC Res 34/24, UNHRCOR, 34th Sess, UN Doc A/HRC/RES/34/24 (2017) at para 2c); *Protection of the human rights of migrants: strengthening the promotion and protection of the human rights of migrants, including in large movements*, HRC Res 32/14, UNHRCOR, 32nd Sess, UN Doc A/HRC/RES/32/14 (2016) preambular para 4; *Human rights of migrants*, HRC Res

of a qualified right of freedom of internal movement, it could be possible to infer the initiation of a process leading to the emergence of a customary law norm. This would imply that all the members of the international community would be bound to respect the right to freedom of internal movement automatically and independently of any specific assent.⁶⁴ By contrast, however, it has been argued that even though both the right to leave and the right to return are well established in conventional and customary international law,⁶⁵ the right to freedom of internal movement has not yet obtained the same legal status.⁶⁶

The emergence of a customary legal norm notwithstanding, the procedural guarantees that restrictions on the right to freedom of internal movement entail are informed by general principles of law and as such they are binding on China irrespective of express consent. The principles of legality, proportionality, restrictive interpretation, equality and non-discrimination aim to restrain arbitrariness and the unfettered discretion of States⁶⁷ and, therefore, become particularly relevant when juxtaposed to the analysis of the *hukou* system.

23/20, UNHRCOR, 23rd Sess, UN Doc A/HRC/RES/23/20 (2013), preambular para 5; *Human rights of internally displaced persons*, HRC Res 20/9, UNHRCOR, 20th Sess, UN Doc A/HRC/RES/20/9 (2012), preambular para 7; *Report of the Human Rights Council on its seventeenth session*, HRC Res 17/2, UNHRCOR, 17th Sess, UN Doc A/HRC/17/2 (2011) at para 5; *Human Rights of Migrants*, HRC Res 15/16, UNHRCOR, 15th Sess, UN Doc A/HRC/RES/15/16 (2010), preambular para 5; Furthermore, according to principle 14 of the *Guiding Principles on Internal Displacement*, “[e]very internally displaced person has the right to liberty of movement and freedom to choose his or her residence” (*Guiding Principles on Internal Displacement*, UNCHROR, 54th Sess, UN Doc E/CN.4/1998/53/Add.2 (1998) at Principle 14(1)); Among the soft law instrument adopted at regional level, see *inter alia* *American Declaration of the Rights and Duties of Man*, *supra* note 62 art VIII; Organization of the Islamic Conference, *Cairo Declaration on Human Rights in Islam* (1990), reproduced in English at *Cairo Declaration on Human Rights in Islam*, UNWCHR, 4th Sess, Annex, Agenda Item 5, UN Doc A/CONF.157/PC/62/Add.18 (1993), art 12; Association of Southeast Asian Nations, *ASEAN Human Rights Declaration* (2012), art 15.

⁶⁴ *Cases concerning the North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, [1969] ICJ Rep 3 at paras 37–39.

⁶⁵ For a complete reconstruction, see especially Vincent Chetail, “The Transnational Movement of Persons Under General International Law - Mapping the Customary Law Foundations of International Migration Law” in Vincent Chetail & Céline Bauloz, *Research Handbook on International Law and Migration* (Cheltenham: Edward Elgar Publishing, 2014) 1.

⁶⁶ However, many scholars have suggested that the *Universal Declaration of Human Rights* (UDHR) has acquired customary law status *in toto*; Accordingly, Article 13 UDHR would have a customary legal nature binding all the members of the international community; See Myres S McDougal, Harold D Lasswell & Lung-Chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven and London: Yale University Press, 1980) at 273–74, 325–27; Lung-Chu Chen, “Protection of Persons (Natural and Juridical)”, (1989) 14:2 *Yale J Int'l L* 542 at 546–47; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (New York: Oxford University Press, 1989) at chapter II; Within the UN practice, the Commission on Human Rights’ Special Rapporteur on the situation in Iran, Mr. Galindo Pohl, concluded that: “The rights and freedoms set out in the Universal Declaration have become international customary law through State practice and *opinio juris*” (Galindo Pohl, *Report on the Human Rights Situation in the Islamic Republic of Iran*, UNCHROR, 43th Sess, UN Doc E/CN.4/1987/23 (1987) at para 22). Since the freedom of internal movement and residence is contained in Article 13 UDHR, it thus acquires the status of customary international law, having binding force on all the members of the international community.

⁶⁷ Lijiang Zhu, “The *hukou* system of the People’s Republic of China: A critical Appraisal under International Standards of Internal Movement and Residence” (2003) 2:2 *Chinese J Int'l L* 519 at 523 [Zhu].

First, one can question whether the current configuration of the *hukou* system is in line with the principle of legality. Some commentators have already put forward the argument that the *hukou* system rests on rather frail legal basis.⁶⁸ According to these authors, despite its important impact on the lives of Chinese citizens, the system originates from a set of administrative regulations and ministerial decrees that in the hierarchy of legal sources are in a subordinate position to that of laws.⁶⁹ Accordingly, even though the 1958 *People's Republic of China Regulations on Household Registration* were issued by the Standing Committee of the National People's Congress, they cannot be considered as *law* under international human rights law.⁷⁰ However, it is difficult to claim that the implementation of such system does not respond to the fundamental requirement of generality, publicity and certainty.⁷¹

Second, the *hukou* system is arguably not a set of measures necessary for the protection of national security, public order, public health, morals or the right and freedom of others and cannot be regarded as a legitimate means to achieve such ends. It appears inapt to achieve its purported functions (that is, to maintain social and economic stability). It could be contended that the *hukou* system serves to protect the public interest or public order. The system was indeed defended in public discourse as preventing mass migration from rural to urban areas and the consequent proliferation of slums as in many developing countries.⁷² The accuracy of such an assertion can be questioned at least from two perspectives. First, the *hukou* restrictions on labour mobility are economically inefficient. Empirical studies show that such restrictions decrease productivity and hinder aggregate consumption.⁷³ Indeed, the *hukou* system places an unnecessary burden on rural migrant workers, who incur in important costs of migration, which could be used to improve their quality of life and reduce socio-economic inequalities.⁷⁴ Second, the increasing divide between urban and rural *hukou*

⁶⁸ *Ibid*; Josephs, *supra* note 3.

⁶⁹ Under Section 62(3) of the Chinese Constitution of 1982, as amended in 2004, only the National People's Congress has the power to issue laws concerning criminal and civil affairs; People's Republic of China, *Constitution of the People's Republic of China*, 4 December 1982, after the amendment of 14 March 2004, online: <www.refworld.org/docid/4c31ea082.html> [*Chinese Constitution*]; Moreover, the *Legislation Law of the People's Republic of China* recognizes that mandatory measures involving the deprivation of the political rights of the citizens or restricting their personal liberty shall be regulated by the law. Hence, all the legislation concerning restrictions of the right to freedom of movement should emanate from the appropriate legislative organ, that is the NPC; See People's Republic of China, *Legislation Law of the People's Republic of China*, Order no 31, Third Session of the Ninth National People's Congress (2000), s 8(5).

⁷⁰ Zhu, *supra* note 67 at 557.

⁷¹ For further discussion see Oscar M Garibaldi, "General Limitations on Human Rights: The Principle of Legality" (1976) 17:3 Harv Intl LJ 503.

⁷² Monkman, *supra* note 48; Josephs, *supra* note 3.

⁷³ Binkai Chen, Ming Lu & Ninghua Zhong, "Hukou and Consumption Heterogeneity: Migrants' Expenditure is Depressed by Institutional Constraints in Urban China" (2012) Institute of Economic Research, Hitotsubashi University Discussion Paper No gd11-221; Christian Dreger, Tongsan Wang & Yanqun Zhang, "Understanding Chinese Consumption: The Impact of Hukou" (2013) IZA Discussion Paper No 7819.

⁷⁴ Rural law-skilled *hukou* holders are often not allowed to move to larger cities where they could ameliorate their competences, and therefore contribute to enhancing labour productivity. Rural workers sustain the costs of bureaucratic procedures linked to internal migration and are generally discouraged to settle where they work, hence they incur transportation costs to visit their families back in the

population with the creation of a social underclass has the potential to generate social unrest. In the light of the above, the *hukou* system cannot be regarded as “the least intrusive instrument among those which might achieve the desired result.”⁷⁵

Third, the consistency of the *hukou* system with the principle of proportionality is also doubtful. The *hukou* registration system represents perhaps, “the strictest set of controls over the movement of the population of any State in the modern world.”⁷⁶ Generally, States regulate the movement and residence of individuals within their territory by a variety of means, which include travel permits, registration, identity cards, passports or other documents. Systems of registering persons do not constitute *per se* a restriction of movement, but they provide a means for doing so, under specific circumstances provided by the law, should the necessity arise.⁷⁷ The *hukou* system, however, makes the restrictions to freedom of movement so severe that it deprives those subject to it from such freedom.

Fourth, the principle of equality and non-discrimination is also inconsistent with the current implementation of the *hukou* system. Such fundamental principle is not respected by a discriminatory policy which makes distinctions on the basis of social origin. In the following paragraphs, this question will be addressed in further detail. For the time being, it is worth noting that even if the right to freedom of internal movement has not yet obtained the status of customary international human rights law, the principle of non-discrimination can not only be regarded as a general principle informing international human rights law, but also generally recognized as a rule of customary international law. The principle of equality and non-discrimination must therefore be respected by all members of the international community.

To conclude, the *hukou* system is inconsistent with the international human rights standards concerning the right to freedom of movement and residence mainly enshrined in Article 13 *UDHR*, as well as in Article 12 *ICCPR* and other international and regional treaties. China has, however, not yet ratified the *ICCPR* and is not bound by Article 12.⁷⁸ By the same token, China is also not subject to the treaty’s monitoring body, the Human Rights Committee (HRC), which has already critically questioned the compatibility of systems of travel restriction comparable to the *hukou*.⁷⁹ That notwithstanding, the principles of legality, proportionality, restrictive interpretation, equality and non-discrimination remain the fundamental benchmarks for the evaluation of the *hukou* system and for the protection of internal migrants’ rights, irrespective of

countryside, in particular their children, which cannot be educated in the cities where their parents work. All these costs could be better allocated, for instance investing in the education of migrants’ children; See Monkman, *supra* note 48 at 84–89.

⁷⁵ *General Comment No 27*, *supra* note 50 at para 14.

⁷⁶ Zhu, *supra* note 67 at 556.

⁷⁷ Beyani, *supra* note 55 at 21.

⁷⁸ For a discussion about the interpretation of the *ICCPR* by Chinese scholars in view of an eventual ratification, see Shiyun Sun, “The Understanding and Interpretation of the *ICCPR* in the Context of China’s Possible Ratification” (2007) 6:1 *Chinese J Intl L* 17.

⁷⁹ *Concluding Observations of the Human Rights Committee: Democratic People’s Republic of Korea*, UNHRCOR, 72nd Sess, UN Doc CCPR/CO/72/PRK (2001) at para 19.

China's membership to a given treaty.⁸⁰

Finally, and from a different angle, despite the inapplicability of Article 12, it is worth remembering that the People's Republic of China signed the *ICCPR* on 5 October 1998 and has ever since been seriously pondering the issue of ratification.⁸¹ It could thus be argued that there is a legitimate expectation that China will abstain from any action that would have the effect of defeating the object and purpose of the Convention. The legitimate expectations that a party of a treaty would act with reasonable loyalty are protected by the general principle of good faith. The principle of good faith permeates the law of treaties.⁸² Good faith is particularly relevant when it comes to the interim obligations of signatories of treaties not yet in force. In this vein, according to Article 18 of the *Vienna Convention on the Law of Treaties (VCLT)*:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.⁸³

⁸⁰ Bruno Simma & Philip Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" (1988) 12 *Australian YB Intl L* 82.

⁸¹ The white paper on *China's Progress in Human Rights in 2004* stated that "[w]ith a sincere and responsible attitude, the Chinese government is actively considering approving the International Covenant on Civil and Political Rights": People's Republic of China, Information Office of the State Council, *China's Progress in Human Rights in 2004*, (2005) at chapter VII, online: <www.gov.cn/english/official/2005-07/28/content_18115.htm>; According to the *National Human Rights Action Plan of China (2009-2010)*, "China has signed the International Covenant on Civil and Political Rights (ICCPR), and will continue legislative, judicial and administrative reforms to make domestic laws better linked with this Covenant, and prepare the ground for approval of the ICCPR": People's Republic of China, Information Office of the State Council, *National Human Rights Action Plan of China (2009-2010)* (2009) online: <www.gov.cn/english/official/2009-04/13/content_1284128.htm>. Further, one of the objectives of the *National Human Rights Action Plan of China (2016-2020)* is "[a]ctively participating in international human rights work. China will fulfill its obligations to international human rights conventions, get actively involved in the work of the United Nations human rights mechanism; conduct extensive human rights dialogues, exchanges and cooperation, and provide technical aid related to human rights to those developing countries that need it": People's Republic of China, Information Office of the State Council, *National Human Rights Action Plan of China (2016-2020)* (2016) online: <english.www.gov.cn/archive/publications/2016/09/29/content_281475454482622.htm> [*National HR Action Plan*].

⁸² Pierre-Marie Dupuy, *L'Unité de l'ordre juridique international: cours général de droit international public* (Leiden: Martinus Nijhoff Publishers, 2003) at 126–27; Robert Kolb, *Good Faith in International Law* (Portland: Hart Publishing, 2017) at 41 [Kolb].

⁸³ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 18 (*VCLT*); Among the luxurious literature on this provision, see Ian McTaggart Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed (Manchester: Manchester University Press, 1984) at 13, 19; Joni S Charme, "The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma" (1991) 25 *Geo Wash Intl L Rev* 71; Enzo Cannizzaro, *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press, 2011); Kolb, *supra* note 82 at 41–49. Article 18 *VCLT* has been applied by analogy to suspended treaties: see Francesco Bestagno, *Le Clausole Di Salvaguardia Economica Nel Diritto Internazionale* (Milan: Giuffrè, 1998) at 196.

Given the multifarious repercussions that the *hukou* restrictions on freedom of internal movement have on many other fundamental rights,⁸⁴ as well as its incompatibility with the idea of individual freedom propounded by the *ICCPR*,⁸⁵ it seems conceivable that by maintaining such restrictions China would defeat the object and purpose of the *ICCPR*. The principle of good faith mandates that, in preparation for its eventual ratification of the *ICCPR*, China should enact gradual reforms to enhance people mobility, while including every citizen irrespective of their social status or origins in the basic public service system.

B. Economic, Social and Cultural Inequalities

Arbitrary restrictions upon the right to freedom of internal movement often lead to the denial of economic, social and cultural rights, as well as of other civil and political rights.⁸⁶ The *hukou* system showcases this delicate interplay. In what follows, we shall focus on its relation to economic, social and cultural rights. Bearing in mind that China has ratified the ICESCR, and that the State is thus obliged to the progressive realization of legal obligations enshrined therein,⁸⁷ it is important to emphasize that the exercise of such rights is subject to the principle of equality and non-discrimination which, as will be discussed in the next section, is directly applicable.⁸⁸

Restrictions on freedom of movement and the inherent discriminatory nature of the *hukou* system determines inequality in various ways. First, they prevent rural

⁸⁴ *The Right to Education: Report Submitted by the Special Rapporteur, Katarina Tomaevski: Addendum - Mission to China*, UNCHROR, 60th Sess, UN Doc E/CN.4/2004/45/Add.1 (2003) at para 27; *Report of the Special Rapporteur*, *supra* note 1 at para 27; Committee on the Rights of the Child, *Report on the Fortieth Session*, UNCRCOR, 40th Sess, UN Doc CRC/C/153 (2006) at para 324; Human Rights Council, *Report of the Working Group on the Universal Periodic Review - China*, UNHRCOR, 11th Sess, UN Doc A/HRC/11/25 (2009) at para 92(f); Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of China*, UNCRCOR, 64th Sess, UN Doc CRC/C/CHN/CO/3-4 (2013) at paras 39, 48, 81.

⁸⁵ *ICCPR*, *supra* note 36, preamble. See also Bossuyt, *supra* note 49 at 253.

⁸⁶ For a complete account of the interplay between freedom of movement and freedom of religion of Chinese migrant workers, see Lawrence Cox, "Freedom of Religion in China: Religious, Economic and Social Disenfranchisement for China's Internal Migrant Workers" (2006–2007) 8:2 *Asian Pac L & Pol'y J* 370; For the connection between land rights and the *hukou* system, see Zhan & Andreas, *supra* note 26.

⁸⁷ As evidenced by Article 2 ICESCR, *supra* note 37.

⁸⁸ See *Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights* ("Limburg Principles"), UNCHROR, 43rd Sess, UN Doc E/CN.4/1987/17 (1987) at para 22 [*Note verbale*]; Dongping Yang, "From Equality of Right to Equality of Opportunity: the Slot of Educational Equity in New China" (2006) 4:2 *Peking University Education Rev* [Yang]; Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, UNCESCROR, 5th Sess, UN Doc E/1991/23 (1990) at para 1 [*General Comment No 3*]; Committee on Economic, Social and Cultural Rights, *General Comment No. 18: The Right to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights)*, UNCESCROR, 35th Sess, UN Doc E/C.12/GC/18 (2006) at para 33 [*General Comment No 18*]; Committee on Economic, Social and Cultural Rights, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights)*, UNCESCROR, 42nd Sess, UN Doc E/C.12/GC/20 (2009) at paras 2, 7 [*General Comment no 20*].

residents from moving to urban areas where these residents would have access to better opportunities in relation to their work and consequent income.⁸⁹ Second, citizens with rural *hukou* registration have access to poorer education compared to their urban counterparts, creating educational disparities that exacerbate social inequalities.⁹⁰ Third, the *hukou* status, in combination with the restriction of mobility and uneven distribution of resources, led to significant inequalities in access to health-related goods and services for different segments of the population.⁹¹

Migrants' contribution to economic growth in China has come at a human cost, especially for those in an irregular situation. This is generally the case of migrant workers without local *hukou* registration, who are still forced by circumstances to migrate in order to find work in larger cities at whatever physical, psychological or economic cost.⁹² Their irregular position makes it more difficult for migrant workers to demand a labour contract, and it exposes them to exploitative working conditions without any effective legal remedy.⁹³ Article 7 *ICESCR* mandates the guarantee of just and favourable conditions of work, including "fair wages and equal remuneration for work of equal value without distinction of any kind."⁹⁴ The *hukou* system, with its barriers to workers' legal mobility, leads to unequal conditions of work, where rural migrant workers are less paid and are less protected by the legal system than their urban peers.

⁸⁹ Fei-Ling Wang, "Conflict, Resistance and the Transformation of the *Hukou* System" in Elizabeth J Perry & Mark Selden, *Chinese Society: Change, Conflict and Resistance*, 3rd ed (London; New York: Routledge, 2010) 80; Alexander & Chan, *supra* note 18; Dong Yan, "Chinese Labour Law Development and *Hukou* Discrimination" in *Fundam Labour Rights China - Leg Implement Cult Log, Ius Gentium: Comparative Perspectives on Law and Justice* (Springer, Cham, 2016) 219; Kam Wing Chan, "China: Internal Migration" in Peter Bellwood & Immanuel Ness, *Encyclopedia of Global Human Migration* (Hoboken: Blackwell Publishing Ltd, 2013).

⁹⁰ Jessica L Montgomery, "The Inheritance of Inequality: *Hukou* and related Barriers to Compulsory Education for China's Migrant Children" (2012) 21 *Pac Rim L & Pol'y J* 591; Holly H Ming, *The Education of Migrant Children and China's Future: The Urban Left Behind* (2014); Nunzio Nazareno Donzuso, "'Equality of Opportunities' in Education for Migrant Children in China" (2015) 2:1 *Global Social Welfare* 9.

⁹¹ Yapeng Zhu, Kinglun Ngok & Wenmin Li, "Policy Actors and Policy Making for Better Migrant Health in China: From a Policy Network Perspective" (2014) 4 *J Public Adm* 004; Therese Hesketh et al, "Health Status and Access to Health Care of Migrant Workers in China" (2008) 123:2 *Public Health Rep* 189.

⁹² Na Lan, "Is There New Hope in Labor Rights Protection for Chinese Migrant Workers" (2009) 10:2 *Asian Pac L & Pol'y J* 482; Malcolm Sargeant & Maria Giovannone, *Vulnerable Workers: Health, Safety and Well-being* (Farnham: Gower Publishing, 2011); Jing Dai et al, "Internal Migration, Mental Health, and Suicidal Behaviors in Young Rural Chinese" (2015) 50:4 *Social Psychiatry & Psychiatric Epidemiology* 621; Among many reports from international NGOs, see Human Rights Watch, "*One Year of My Blood*": *Exploitation of Migrant Construction Workers in Beijing* (12 March 2008, Vol 20, No 3(C)), online: <www.hrw.org/reports/2008/china0308/>.

⁹³ Amnesty International, *People's Republic of China Internal Migrants: Discrimination and Abuse The Human Cost of an Economic 'Miracle'* (2007) online (pdf): <www.amnesty.org/download/Documents/64000/asa170082007en.pdf>; Haining Wang, Fei Guo and Zhiming Cheng, "Discrimination in Migrant Workers' Welfare Entitlements and Benefits in Urban Labour Market: Findings from a Four-City Study in China" (2015) 21:2 *Population, Space and Place* 124.

⁹⁴ *ICESCR*, *supra* note 37, art 7.

In terms of health care, Chinese internal migrants inhabit an environment of vulnerability and marginalization. Their status as outsiders in the urban areas virtually excludes them from the health care system. They are typically not eligible for urban health insurance, which is available only to urban residents. Moreover, expensive insurance programs are beyond their economic capacities. The health care available to Chinese internal migrants is usually provided in the rural areas from which they come by virtue of their *hukou* registration. However, in general, rural health care is remarkably inferior to that offered in the cities.⁹⁵ Article 12 *ICESCR* recognizes, “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” It provides that States must take the necessary measures to achieve the full realization of this right. According to the Committee on Economic, Social and Cultural Rights (CESCR), services related to health care and the determinants of health must be:

[...] based on the principle of equity, ensuring that these services, either privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.⁹⁶

The irregular situation of the most part of migrants’ workers in urban areas causes severe difficulties of access to social services. Given the inherited nature of the *hukou*, this problem also affects migrant workers’ children if they move to the cities with parents in an irregular situation.⁹⁷ Lacking urban *hukou* registration, migrant children in the largest cities have no access to public education.⁹⁸ Migrant families are often faced with the decision whether to leave their children behind in the villages, where they would receive state-subsidized education, or turn to expensive and often inefficient private system alternatives.⁹⁹ Article 10 *ICESCR* requires States to

⁹⁵ According to Amnesty International, even though the health care system in China declined, the still existent government investment in health care is mostly allocated in urban areas. About 80% of the total health care budgeted is in fact invested in medical facilities and other health benefits in large cities: Amnesty International, *supra* note 93.

⁹⁶ Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UNCESCROR, 22nd Sess, UN Doc E/C.12/2000/4 (2000) at para 12.

⁹⁷ Migrant parents often leave behind their children in the countryside, where they are able to receive a state-subsidized education, and grow up with other family members, friends, or alone, taking care of themselves. According to figures from UNICEF, in 2010, the number of “left-behind children” in China was 69.73 million. The majority of them was living in rural areas: UNICEF, *Children in China: An Atlas of Social Indicators* (2014), online: <www.unicef.cn/en/atlas-social-indicators-children-china-2014>; In 2014, the UN Committee on Economic, Social and Cultural Rights (CESCR) reported that owing to the *hukou* system, an estimated number of 55 to 60 million children have been left behind by their parents in the rural areas, CESCR, *Concluding Observations on the Second Periodic Report of China, Including Hong Kong, China, and Macao, China*, UNCESCROR, 2014, UN Doc E/C.12/CHN/CO/2 at para 15 [*Concluding Observations on the Second Periodic Report*].

⁹⁸ UNICEF, *The State of the World’s Children 2016: A Fair Chance for Every Child* (2016) at 79, online: <www.unicef.org/publications/index_91711.html>; For further discussion, see Montgomery, *supra* note 90.

⁹⁹ Minhua Ling, ““Bad Students Go to Vocational Schools!”: Education, Social Reproduction and Migrant Youth in Urban China” (2015) 73 *China J* 108.

recognize, “the widest possible protection and assistance [...] to the family [...] particularly for its establishment and while it is responsible for the care and education of dependent children.”¹⁰⁰ Further, Article 13 *ICESCR* mandates the recognition of “the right of everyone to education.”¹⁰¹ These rights are guaranteed and protected in the Chinese domestic legal system.¹⁰² The 1995 *Education Law of the People’s Republic of China* provides the legal framework sustaining the Chinese educational system. In accordance with a general decentralization trend, the State Council is responsible for the overall planning, coordination and management of education policies, while local administrative departments of education take responsibility for concrete educational activities in their respective local jurisdictions.¹⁰³ Notwithstanding various laws and regulations issued by the central government to urge local administrations to undertake the costs of compulsory education for migrant children, these laws have been rarely implemented thus far.¹⁰⁴ Local authorities do not receive additional funding for migrant children education from the central government and, therefore, take virtually no responsibility for their education. National laws regarding the State’s commitment to provide free, compulsory education to all children are interpreted as imposing local authorities’ responsibility only for the education of children registered in the districts whose parents are permanent residents. Thus, public schools often claim to be full or set quotas and very high (or even unachievable) admission criteria. It emerges that the institutional division among citizens created by the *hukou* system, accompanied with growing financial decentralization and consequent unchecked discretion of local public administrations, still jeopardizes the inclusion of migrant children into state’s compulsory education system.

It might be worth remembering that according to Article 4 *ICESCR*:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

In this respect, the same considerations already put forward with regard to the limitations of right of freedom of movement. Freedom of movement is inherently intertwined with the enjoyment of economic social and cultural rights.¹⁰⁵ The *hukou*

¹⁰⁰ *ICESCR*, *supra* note 37, art 10.

¹⁰¹ *Ibid*, s 13(1).

¹⁰² The primary legal source addressing the right to education is the *Chinese Constitution*, *supra* note 69, which at Article 46 reads as follows: “Citizens of the People’s Republic of China have the duty as well as the right to receive education”; In addition to this general principle, Article 9 of the *Education Law of the People’s Republic of China* stipulates that “[c]itizens shall enjoy equal opportunity of education regardless of their ethnic community, race, sex, occupation, property or religious belief”, People’s Republic of China, *Education Law of the People’s Republic of China*, Order No. 45, Third Session of the Standing Committee of the Eighth National People’s Congress (1995) [*Education Law*].

¹⁰³ *Education Law*, *supra* note 102, arts 14–15.

¹⁰⁴ For a complete account of the legal and regulatory framework covering internal migrant children’s right to education, see Wenxin Li, *Chinese Internal Rural Migrant Children and their Access to Compulsory Education* (PhD Thesis, Queen Mary University of London, 2013) [unpublished].

¹⁰⁵ See e.g. *Wall in the Occupied Palestinian Territory*, *supra* note 60 at para 133.

system has been described as an “invisible wall”¹⁰⁶ that not only impedes free movement, but also restricts the economic social and cultural rights of the Chinese rural population.¹⁰⁷ The current implementation of the *hukou* system fails to meet a condition laid down by Article 4 *ICESCR*: that is to say that its unique purpose is not the promotion of “the general welfare in a democratic society.” Instead, it contributes to perpetrating inequality and discrimination.

In its 2014 report to the Committee on Economic, Social and Cultural Rights, China has provided a list of the main measures taken to reform the household registration system. These measures regard, in particular, access to employment, social security, public health services and education and are meant to progressively align the situation of rural-to-urban migrant workers to that of urban residents.¹⁰⁸ The political and technical complexities that a comprehensive reform entails risk to reduce such statement into mere wishful thinking. Further steps need to be taken, as observed by the Committee, which in its concluding observations remained concerned about the vulnerable position of migrant workers, particularly those who lack household registration.¹⁰⁹

C. The Principle of Equality and Non-Discrimination and the *Hukou* Invisible Wall

Equality is a deep-rooted idea in human morality. It is therefore unsurprising that it has widely been legally recognized as a fundamental principle in most constitutions. The principle of equality and non-discrimination is enshrined among the founding norms of the Chinese Constitution. Yet, the law still neglects discrimination based on *hukou* registration.¹¹⁰

The inherent discriminatory nature of the *hukou* system is the hallmark of the various human rights violations that it occasions. This system divides China’s population into two distinct “social classes”: *hukou* registered citizens and those who are not. This division determines inequality in various ways. It significantly affects the rural population hindering their legal mobility and their access to many opportunities and social benefits. Even after several reforms, this system remains one of the major

¹⁰⁶ See *inter alia* Kam Wing Chan, *Cities With Invisible Walls: Reinterpreting Urbanization in Post-1949 China* (New York: Oxford University Press, 1994).

¹⁰⁷ The International Court of Justice has already had the occasion of linking the two questions with regard to *Wall in the Occupied Palestinian Territory*, *supra* note 60 at para 133.

¹⁰⁸ Committee on Economic, Social and Cultural Rights, *List of issues in Relation to the Second Periodic Report of China, Including Hong Kong, China and Macao, China - Addendum: Replies of China to the List of Issues*, UNCESCOR, 52nd Sess, UN Doc E/C.12/CHN/Q/2/Add.1(2014) at paras 25–30.

¹⁰⁹ *Concluding Observations on the Second Periodic Report*, *supra* note 97 at para 15.

¹¹⁰ See *Chinese Constitution*, *supra* note 69, arts 4, 33; See also People’s Republic of China, *Law of the People’s Republic of China on the Protection of Rights and Interests of Women*, 17th meeting of the Standing Committee of the 10th National People’s Congress (2005) (entered into force 1 December 2005), art 2; People’s Republic of China, *Law of the People’s Republic of China on the Protection of Disabled Persons*, 17th meeting of the Standing Committee of the Seventh National People’s Congress (1990, amended 2008) (entered into force 1 July 2008), art 3.

sources of discrimination and inequality in China and arguably contributes to the country's most prevalent human rights violations.

Equality is coupled with non-discrimination to prohibit unjustifiable and differential treatment. While the notion of equality expresses the fundamental value of respect for the inherent dignity of all human beings, non-discrimination ensures that no one is denied the protection of the law based on unjustified and exogenous factors. The idea of equality and non-discrimination is a fundamental principle of general international law.¹¹¹ It is generally recognized that such principle is a rule of customary international law and the rules prohibiting the most serious forms of discrimination are *jus cogens* norms in international law.¹¹² However, it is worth remembering that the principle of non-discrimination does not prohibit all differences in treatment. A differential treatment is still admissible provided that the conditions for such differentiation are deemed "reasonable and objective."¹¹³ This confers on States a relatively broad margin of appreciation.¹¹⁴ In this sense, treaty law might be helpful to grasp with somewhat more certainty the implications of such fundamental principle with regard to the *hukou* system.

Two of the core UN human rights treaties, of which China is a State party, are entirely devoted to the issue of equality and non-discrimination: the *Convention on the Elimination of All Forms of Discrimination Against Women*¹¹⁵ and *International Convention on the Elimination of All Forms of Racial Discrimination*.¹¹⁶ All the other UN human rights treaties (except the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*)¹¹⁷ deal with the issue of non-discrimination on various grounds.¹¹⁸

¹¹¹ Among the vast literature on the topic, see Warwick McKean, *Equality and Discrimination under International Law* (New York: Oxford University Press, 1983); Anne F Bayefsky, "The Principle of Equality or Non-Discrimination in International Law" (1990) 11:1-2 HRLJ 1; Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Oxford: Intersentia, 2005); Samantha Besson, "The Principle of Non-Discrimination in the Convention on the Rights of the Child" (2005) 13:4 Intl J Child Rts 433; Ryszard Cholewinski & Shauna Olney, "Migrant Workers and the Right to Non-discrimination and Equality" in Cathryn Costello & Mark Freedland, *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford: Oxford University Press, 2014) 259; Vincent Chetail, "The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights" (2013) 28:1 Geo Immigr LJ 225.

¹¹² The Inter-American Court of Human Rights has even considered that "[a]t the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*", *Advisory Opinion of the Inter-American Court of Human Rights (Juridical Condition and Rights of the Undocumented Migrants) (United Mexican States)* (2003) Advisory Opinion OC-18/03, Inter-Am Ct HR (Ser A) No 18, at paras 100–101.

¹¹³ *General Comment No 20, supra* note 88 at para 13; Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, CERDOR, 64th & 65th Sess, Supp No 18, UN Doc A/59/18 (2004) at para 469 (4).

¹¹⁴ Chetail, *supra* note 65 at 70.

¹¹⁵ *Convention on the Elimination of All Forms of Discrimination Against Women, supra* note 40.

¹¹⁶ *International Convention on the Elimination of All Forms of Racial Discrimination, supra* note 39.

¹¹⁷ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra* note 41.

¹¹⁸ For a complete analysis of the interpretation and application of the principles of equality and non-discrimination among UN Treaty Bodies, see Vandenhole, *supra* note 111.

Equality and non-discrimination is a *leitmotif* with respect to civil and political as well as economic, social and cultural rights. There are, however, some differences between the two most prominent international treaties protecting these two groups of rights. On the one hand, while Section 2(1) *ICCPR* limits the prohibition of discrimination to the Covenant's rights, Article 26 holds an independent guarantee of equality before the law and equal protection of the law.¹¹⁹ Both provisions prohibit discrimination of any ground such as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."¹²⁰ On the other hand, the *ICESCR* does not include a "free-standing" provision on non-discrimination.¹²¹ The obligation of non-discrimination established under Article 2 *ICESCR* is accessory to a violation of a substantive right guaranteed by the Covenant. According to Section 2(2), similarly to its counterpart in the *ICCPR*, the rights included in the *ICESCR* should be provided without discrimination on grounds such as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."¹²² Most importantly, the *ICESCR* anticipates the progressive realization of the rights defined therein. However, the principle of equality non-discrimination is "immediately applicable and is neither subject to progressive implementation nor dependent on available resources."¹²³ Even though the *ICESCR* endorses obligations of results in relation to the progressive realization of the rights recognized therein, the principle of non-discrimination and equal treatment is considered to have an immediate and crosscutting effect. State parties have therefore the immediate obligation to adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes, which cause or perpetuate *de jure* or *de facto* discrimination.¹²⁴

The *hukou* system creates several institutional and social barriers to the exercise of the rights included in the core UN human rights treaties.¹²⁵ Such hindrances

¹¹⁹ *Werner Petersen v Germany*, HRC Dec 1115/2002, UNHRCOR, 80th Sess, UN Doc CCPR/C/80/D/1115/2002 (2004) at para 6.7.

¹²⁰ As previously observed, given the current state of China's ratification of the *ICCPR*, the application of this provision to the issues raised by the *hukou* system might be a daunting task. However, the same considerations put forward below, with regard to China's interim obligation of good faith would apply.

¹²¹ Vandenhoe, *supra* note 111 at 22.

¹²² *ICESCR*, *supra* note 37, s 2(2).

¹²³ See *Note Verbale*, *supra* note 88 at para 22; *General Comment No 3*, *supra* note 88 at para 1; *General Comment No 18*, *supra* note 88 at para 33; *General comment No 20*, *supra* note 88 at paras 2, 7; Yang, *supra* note 88.

¹²⁴ *General Comment No 20*, *supra* note 88 at para 8.

¹²⁵ Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: People's Republic of China (including Hong Kong and Macao)*, UNCESCROR, 34th Sess, UN Doc E/C.12/1/Add.107 (2005) at para 15 [*Concluding observations of the CESCR*]; *Concluding Observations of the Committee on the Elimination of Racial Discrimination: China (Including Hong Kong and Macau Special Administrative Regions)*, UNCERDOR, 75th Sess, UN Doc CERD/C/CHN/CO/10-13 (2009) at para 14 [*Concluding Observations of the CERD*]; *Report of the Committee on the Elimination of Racial Discrimination*, UNCERDOR, 74th & 75th Sess, Supp No 18, UN Doc A/64/18 (2009) at para 32(14) [*Report of the CERD*]; Human Rights Council, *Report of the Working Group on the Issue of Discrimination Against Women in Law and in Practice: Mission to China*, UNHRCOR, 26th Sess, UN Doc A/HRC/26/39/Add.2 (2014) at para 71 [*Report of the HRC on the Issue of Discrimination Against Women*]; *Concluding Observations on the Second Periodic Report*, *supra* note 97 at para 15.

discriminate Chinese citizens on the basis of their social origin, i.e., on the basis of their *hukou* registration. According to the Committee on Economic, Social and Political Rights, the expression “social origin” refers to a “person’s inherited social status.”¹²⁶ Since individuals’ *hukou* registration generally depends upon the holder’s place of birth and upon his or her parents’ *hukou* statuses, it indisputably qualifies as “social status.” Accordingly, the UN Committee on Economic, Social and Cultural Rights has recommended the complete abolition of the *hukou* system.¹²⁷ With regard to the *Convention on the Elimination of All Forms of Discrimination Against Women*¹²⁸ and the *International Convention on the Elimination of All Forms of Racial Discrimination*,¹²⁹ while the *hukou* system has been the object of severe criticism, its gradual reform was welcomed as a positive step towards equality.¹³⁰

The principle of non-discrimination implies the prohibition of direct, indirect or systematic discrimination to ensure real and effective equality. Discrimination consists not only of different treatments of similar situations, but it may also arise by failing to take due and positive account of all relevant differences. This implies that the principle of equality and non-discrimination imposes to take adequate steps to ensure that the rights and collective advantages are genuinely accessible by and to all. By hindering people from moving to areas where they would be economically productive, the *hukou* system has contributed to economic and social inequality. Furthermore, even if the system has been the object of various reforms and it may no longer permanently confine citizens to their place of birth, some of its bureaucratic barriers remain in place and deter the free movement of people, as well as their access to other economic, social and cultural rights. Through its fundamental function in the distribution of social services, this system continues to deter legal mobility and contributes to social inequalities. The challenge ahead will be to fight substantive and systemic discrimination, which in practice requires paying sufficient attention to a group of individuals that continues to suffer persistent prejudice.¹³¹

IV. Most Recent Reforms and Challenges Ahead

Some scholars have pointed out that, though manifestly discriminatory, the *hukou* system serves the need to maintain a certain degree of social stability.¹³² By preventing large-scale movement of rural populations to the cities on a permanent basis, the *hukou* system reduces pressure on China’s congested cities with implications that concern not only migrants themselves, but also society as a whole. Indeed, the rapid

¹²⁶ *General Comment No 20*, *supra* note 88 at para 24.

¹²⁷ *Concluding Observations of CESCR*, *supra* note 125 at paras 15, 46; *Concluding Observations on the Second Periodic Report*, *supra* note 97 at para 15.

¹²⁸ *Convention on the Elimination of All Forms of Discrimination Against Women*, *supra* note 40.

¹²⁹ *International Convention on the Elimination of All Forms of Racial Discrimination*, *supra* note 39.

¹³⁰ See *Concluding Observations of the CERD*, *supra* note 125 at para 14; *Report of the CERD*, *supra* note 125 at para 14; *Report of the HRC on the Issue of Discrimination Against Women*, *supra* note 125 at paras 71–73.

¹³¹ *General Comment No 20*, *supra* note 88 at para 12.

¹³² See *inter alia* Monkman, *supra* note 48 at 97.

movement of people from rural to urban areas in developing countries has already led to social marginalization and exclusion, reflected by the creation of areas where the poor live with limited social services, inadequate public infrastructure and scarce economic opportunities. The failure of many developing countries to manage the pressure of internal migration is evident in the slums present in the cities of countries such as India and Brazil.¹³³ The *hukou* system has consistently mitigated some of the concerns that accompanied urbanization. For this reason, despite the problems related to the consistency of the *hukou* dualism with many human rights obligations, and the calls from the UN, academics, civil society and the media for its abolition, reforms have been somehow hesitant.¹³⁴ In the same vein, many scholars, instead of suggesting the complete elimination of this system, prefer to advance various proposals for its amendment.¹³⁵ Reform proposals include, *inter alia*, the removal of all the extra functions related to the *hukou* system and the establishment of implementation mechanisms including judicial review;¹³⁶ the creation of a hybrid *hukou* registration, which would allow its holder to exchange his or her rural *hukou* for an urban one after several years of residence in a city or to return to the countryside and there invest their earnings;¹³⁷ a nationwide harmonization, in which the central government will put forward general guidelines pertaining to social welfare.¹³⁸

The continuing inequities and inequalities of the *hukou* system are a source of deep concern and discontent in China. Thus, the system's renovation was one of the main objectives of the reform plan outlined by President Xi Jinping.¹³⁹ In March 2014, China's central government released its *New National Urbanization Plan*, which proposed to grant approximately 100 million rural migrant workers and other long-term residents a local urban *hukou* by 2020. The priority group is that of migrant workers with stable employment in urban areas, but other groups are also included: graduates of universities, vocational and technical schools, workers from other cities and local population with a rural (rather than urban) *hukou*.¹⁴⁰ On 24 July 2014, the State Council, the cabinet which supervises China's government apparatus, released a circular pertaining its *Opinions on Further Promoting the Reform of the Hukou System* that proposed to unify the registration system, implementing a comprehensive residence

¹³³ *Ibid* at 96.

¹³⁴ *Concluding Observations of CESCR*, *supra* note 125 at para 46; *Concluding Observations on the Second Periodic Report*, *supra* note 97 at para 15; Chan, "Hukou System at 50", *supra* note 8; Bao et al, *supra* note 28; Ying Li & Ernest Chui, "China's Policy on Rural-Urban Migrants and Urban Social Harmony" (2011) 7:7 *Asian Social Science* 12; Human Rights Watch, *China: Congress Should End Migrant Discrimination* (3 March 2009), online: <www.hrw.org/news/2009/03/03/china-congress-should-end-migrant-discrimination>.

¹³⁵ See *inter alia* Zhu, *supra* note 67; Zhan & Andreas, *supra* note 26; Monkman, *supra* note 48.

¹³⁶ Zhu, *supra* note 67 at 564.

¹³⁷ Monkman, *supra* note 48.

¹³⁸ Fang Cai, "Hukou System Reform and Unification of Rural-urban Social Welfare" (2011) 19:3 *China & World Economy* 33.

¹³⁹ China Daily, "Xi urged *hukou* reform in 2001 PhD paper", *China Daily* (31 July 2014), online: <www.chinadaily.com.cn/china/2014-07/31/content_18220187.htm>.

¹⁴⁰ Memorandum from Kam Wing Chan, "Achieving Comprehensive *Hukou* Reform in China" (Chicago: Paulson Institute, December 2014), online: <www.paulsoninstitute.org/think-tank/2014/12/16/achieving-comprehensive-hukou-reform-in-china/>.

permit system and an improved mechanism of basic public service supply.¹⁴¹

These initiatives reflect China's central government commitment to change the present system through comprehensive reform. More generally, the Chinese government seems determined to demonstrate to the world and to its own population its commitment to improve the human rights situation in the country.¹⁴² In this vein, in June 2015, the Information Office of the State Council issued a white paper on *Progress in China's Human Rights in 2014*.¹⁴³ The document reported the increase of basic public services coverage in both urban and rural areas, the heightened awareness about the limited access to education of children of rural migrant workers and the improvement of legitimate rights and interests of rural migrant workers thanks to a series of measures, such as the *Plan to Raise the Vocational Skills of Migrant Workers* and the State Council's *Opinions on Further Promoting Household Registration System Reform*.¹⁴⁴ Further, in 2015, the State Council issued the *Interim Regulation on Residence Permits*, which was aimed at "promoting the sound development of new-type urbanization, enhancing the availability of basic urban public services and conveniences to all permanent residents, protecting the lawful rights and interests of citizens, and promoting social fairness and justice."¹⁴⁵ The *Interim Regulation on Residence Permits* was enacted in January 2016 and requested provinces to formulate detailed regulations on residence permits, and therefore, on access to social welfare according to local economic and social situations.

The new governmental strategies oriented towards the promotion of a comprehensive *hukou* system reform should be regarded as a positive step towards equality and social justice. Many crucial issues, however, have yet to be adequately addressed and resolved. First, the eligibility conditions for obtaining a residence permit under the *Interim Regulation on Residence Permits* appear rather narrowly defined. According to Article 2, the possibility to request a residence permit applies to those citizens who, having left their permanent residence, reside in another city for more than half a year and satisfy one of the following conditions: 1) having a legal and stable job; 2) having a legal and stable residence; 3) attending school continuously.¹⁴⁶ These conditions appear inapplicable to most part of migrant workers who are irregularly working and living in the cities. Second, the distinction based on *hukou* locations still represents a legally consecrated distinction between two different classes of citizens:

¹⁴¹ The full text of the State Council circular is available in Chinese online: China Government Network <www.gov.cn/zhengce/content/2014-07/30/content_8944.htm>. An English translation is available at China Law Translate, "关于进一步推进户籍制度改革的意见", online: <chinalawtranslate.com/state-council-opinion-of-hukou-reform/?lang=en>.

¹⁴² Subedi, *supra* note 7 at 441.

¹⁴³ People's Republic of China, Information Office of the State Council, *Progress in China's Human Rights in 2014* (2015), online: <english.www.gov.cn/archive/white_paper/2015/06/08/content_281475123202380.htm>.

¹⁴⁴ *Opinions of the State Council on Further Promoting the Reform of the Household Registration System*, 30 July 2014.

¹⁴⁵ People's Republic of China, State Council, *The Interim Regulation on Residence Permits*, Order no 663, 109th Executive Meeting (2015), online: *Peking University* <en.pkulaw.cn/display.aspx?cgid=73486fc333ab2ac2bdfb&lib=law>.

¹⁴⁶ *Ibid.*, art 2.

the local and the non-local. Notwithstanding the removal of the *hukou* registration requirement in towns and smaller cities and its relaxation in medium-sized cities, largest cities—the main migration destinations—maintain severe control regimes limiting the possibility to obtain a local *hukou* conversion. This will imply that for the vast majority of Chinese internal migrants the situation will not change: they will still be legally excluded from basic state-provided services and welfare dedicated to local *hukou* holders. Most recently, the *National Human Rights Action Plan for 2016–2020*¹⁴⁷ reiterated that ongoing *hukou* reforms would remove the differences between agricultural and non-agricultural registration. However, abolishing the agricultural/non-agricultural *hukou* distinction at national level will probably have scarce effect on migrants in Chinese larger cities if they cannot obtain a local *hukou*.

There continues to be a lack of political will accompanied by resistance from urban residents to any *hukou* reform that would provide an easier path to regularization for migrant workers in largest cities. Given the decentralized nature of these policies, local administrations have insufficient incentives to open their *hukou* systems door to migrant workers.¹⁴⁸ In this vein, the UN Special Rapporteur on extreme poverty and human rights recently pointed out that “[r]eforms would only be feasible if accompanied by additional governmental resource allocations.”¹⁴⁹

Finally, it is worth noting that the *hukou* system can have a significant impact not only on internal, but also on international migration, a phenomenon that is now gaining momentum in China. In 2003, Zhu observed that:

If the disparity between the urban areas and rural areas in terms of living standards becomes little through economic development, the mutual flowing of persons between the urban areas and rural areas will hopefully be helpful for the settlement of the problem of huge population in cities.¹⁵⁰

With the gradual approximation of living standards, people might be less willing to move from rural to urban areas. This, however, will open new challenges for the industrial sector, which will no more be able to rely on the cheap labour of internal migrants. As it is often the case, the solution can come from international migrants.¹⁵¹

¹⁴⁷ *National HR Action Plan*, *supra* note 81 at s I(3).

¹⁴⁸ As aptly observed by Wu, “[t]he more *hukou* population in a territory, the more financial pressure the locality must undertake to meet the social needs of its citizens. Therefore, if the local host governments open the *hukou* system door to their migrant workers, they must take care of these migrants in all the decentralized responsibilities of social provision. However, without officially accepting this population group, temporary migrants have been excluded by the local authorities in host cities within a legal institutional framework”, Wu, *supra* note 22 at 39.

¹⁴⁹ *Report of the Special Rapporteur*, *supra* note 1 at para 28; See also *Report submitted by the Special Rapporteur on the Right to Food - Addendum : Preliminary Note on the Mission to China*, UNHRCOR, 16th Sess, UN Doc A/HRC/16/49/Add.3 (2011) at paras 16–17 [*Report on the Right to Food*], highlighting the significance of fiscal reforms to integrate the rural migrants into the urban public service schemes.

¹⁵⁰ Zhu, *supra* note 67 at 558.

¹⁵¹ International Labour Organization and International Organization for Migration, *Attracting Skilled International Migrants to China: A Review and Comparison of Policies and Practices* (Geneva: International Labour Organisation, 2017), online (pdf): [International Organization for Migration <publications.iom.int/system/files/pdf/attracting_skilled_en_0.pdf>](http://publications.iom.int/system/files/pdf/attracting_skilled_en_0.pdf).

This development might open new protection gaps, since international migration is controlled through the *hukou* system.¹⁵² The consequences of this new phenomenon have yet to be observed and call for further research.

With these words, Simone Weil lucidly described in 1943 what she considered the most dangerous malady to which human societies are exposed: uprootedness. As a consequence of the disconnection from the past and the loss of one's community, uprootedness results in the inability to actively participate in the life of the different communities to which one belongs. Being rooted is not synonymous with immobility or closure. Weil's call for the preservation of roots, "doesn't mean they should be fenced in. On the contrary, never was plenty of fresh air more indispensable. Rooting in and the multiplying of contacts are complementary to one another."¹⁵³ In this sense, roots themselves are constantly moving and fluidly changing.¹⁵⁴

The contemporary phenomenon of uprootedness has a global dimension that presents a great challenge to international human rights law.¹⁵⁵ Uprootedness emerges in the domain of global migration and manifests itself in various forms in different regions of the world. The primacy of the capital overwork, which corresponds to the preeminence of egoism over solidarity, emerges in the condition of irregular migrants all over the world.¹⁵⁶ The vulnerable condition of international migrants in an irregular situation, to some extent, mirrors that of Chinese internal migrants without a regular *hukou* registration.

This article has attempted to show how the *hukou* system, in its modern declination, has contributed to uprooting millions of Chinese migrant workers and their

¹⁵² People's Republic of China, *Exit and Entry Administration Law of the People's Republic of China*, Order no 57, 27th meeting of the Standing Committee of the Eleventh National People's Congress of the People's Republic of China (2012), art 39 (entered into force 1 July 2013), online: *China Consular Service Network* <cs.mfa.gov.cn/wgrlh/lhqz/lhqzjjs/t1120988.shtml>; Foreigners must register their housing at the local authorities within 24 hours from the arrival. Local authorities thus have information about foreigners' whereabouts and residence permit; For a complete analysis, see Heidi Østbø Haugen, "Destination China: The Country Adjusts to its New Migration Reality" (2015) *The Online J of the Migration Policy Institute*, online: <www.migrationpolicy.org/article/destination-china-country-adjusts-its-new-migration-reality>.

¹⁵³ Weil, "L'enracinement", *supra* note 5 at 52.

¹⁵⁴ For an insightful discussion about the concept of roots as a metaphor for the multiplicity of attachments that people form to places, see Liisa Malkki, "National Geographic: The Rooting of Peoples and the Territorialization of National Identity Among Scholars and Refugees" (1992) 7:1 *Cultural Anthropology* 24; Gonzalez Rice & David Laurence, *At the Threshold with Simone Weil: A Political Theory of Migration and Refuge* (Political Science Dissertation, Duke University, 2012), online: <dukespace.lib.duke.edu/dspace/handle/10161/5485>.

¹⁵⁵ See the eloquent concurring opinion of Judge Antônio A. Cançado Trindade in the Inter-American Court of Human Rights *Case of Haitian and Haitian-origin Dominican Persons in the Dominican Republic (Provisional Measures Requested by the Inter-American Commission on Human Rights) (Dominican Republic)*, (2000), Inter-Am Ct HR No 12.271 at para 2.

¹⁵⁶ *Ibid* at para 4.

families within their own country. Disconnected from both original home and host communities, Chinese internal migrants are forced in a condition of exclusion and marginalization. In line with the dominant hydraulic metaphor around international migration—which tends to dehumanize migrants by treating them in terms of canalization, dams and infiltrations—Chinese internal migrants are generally represented as the “floating population.”¹⁵⁷ These waves of “floating illegalities” are wasted lives, with no other option than trying to keep afloat in the urban stagnant waters conveyed by market exigencies.

The socio-economic inequality determined by the *hukou* system was not an appalling accident, but a structural necessity for the Chinese economic system. It was the price to be paid to reach economic growth and development. In the name of the greater good of the nation’s economic growth, the rural population has been forced to live in the poorest conditions and to experience systemic discrimination.

Profound divisions remain even though the “invisible wall” of the pre-reform years between urban and rural China no longer exists. Whereas rural migrants do not face the same legal restrictions as before, the removal of those formal barriers has merely provided them a second-class form of citizenship, which maintains their discrimination in terms of entitlement to employment, education and medical care in the cities. Disregard for the fundamental principle of equality and non-discrimination underlies the uprooted condition of the “floating population.”

Simone Weil’s sharp prescriptions against uprootedness cogently translate abstract speculation into concrete action. Prescriptions such as public and compulsory education accessible to all, vocational training and workers’ mobility provide lucid guidelines for the realization of a more just and equitable social order. In this sense, Weil’s prescriptions mirror those later incorporated in the core UN human rights treaties.¹⁵⁸ Accordingly, the problem of the uprootedness fostered by the *hukou* system should be considered within a framework of action oriented towards the eradication of discrimination, social exclusion and extreme poverty. A holistic human rights approach to the recently propounded institutional changes is crucial in order to allow China to maintain socio-economic and uphold its founding principle of equality.

¹⁵⁷ See Dorothy J Solinger, *Contesting Citizenship in Urban China: Peasant Migrants, the State, and the Logic of the Market* (Berkeley, Los Angeles: University of California Press, 1999) at xiii; Dorothy J Solinger, “The Creation of a New Underclass in China and Its Implications” (2006) 18:1 *Environment & Urbanization* 177; Yinjun Zhao et al., “Health Insurance Coverage and Its Impact on Medical Cost: Observations from the Floating Population in China” (2014) 9:11 *PLoS ONE* e111555; Thomas Scharping, *Floating Population and Migration in China. The Impact of Economic Reforms* (Hamburg: Mitteilungen des Instituts für Asienkunde, 1997); See also Marc Bernardot, “Petit traité de navigation dans la langue migratoire” (2016) 64:3 *Multitudes* 63.

¹⁵⁸ The limited scope of this paper does not allow a complete analysis of Weil’s objections, and alternative to a philosophy based on rights. It is, however, important to make a distinction between Weil’s conception of rights in national law as disguised expression of force, and human rights as the protection of the most vulnerable. International human rights law is the “juridical vest” of such protection; See Rita Fulco, “Diritto e diritti umani in Simone Weil” (2010) 12 *Dialegethai, Rivista telematica di filosofia* 1128, online: <mondodamani.org/dialegethai/rf02.htm>; *Contra* Edward Andrew, “Simone Weil on the Injustice of Rights-Based Doctrines” (1986) 48:1 *Rev Politics* 60.

The reform agenda proposed by the central government in 2016 should be regarded as a positive step towards the eradication of legal and social inequalities. The persistent concern about internal migrants' access to social provisions cannot be solved by the governments of sending provinces, because of their insufficient financial capabilities, nor can it be addressed by the local destination authorities, which do not have enough incentives to abandon the *hukou* system and integrate migrants. The renewed political orientation of the central government signals more disposition for progressive reforms and has the potential to facilitate a more open public discussion on the intertwined issues of citizenship, equality and solidarity. The concrete implementation of the governmental reform agenda will be crucial, and the monitoring function of the UN treaty bodies could play a relatively significant role in that process, not least with regard to the public exposure that *hukou* reforms have gained. The critical challenge would be to strike a balance between administrative and fiscal decentralization and the enforcement of national reforms to promote social equality.¹⁵⁹ Enhancing the incentives of local administrations to align with governmental guidelines would be decisive. In this sense, a key feature of future reforms could be improving local administration's revenues (for instance, through the tax system).

Migrants' rights in China depend to a certain extent on the technical ability and political willingness to reconceive decentralization in ways that will foster social equality rather than just economic growth. This issue can only be effectively confronted bearing in mind the indivisibility of all human rights—civil, political, economic, social and cultural. The firm determination to reform the *hukou* system on the basis of solidarity can lead China to better uphold its founding principle of equality and alleviate the sufferings of the uprooted.

¹⁵⁹ The importance of fiscal reforms has been highlighted by the UN Special Rapporteur on the right to food in his report after his visit to China: *Report on the Right to Food*, *supra* note 149 at para 17.