Glasius, Marlies (2017): "Extraterritorial authoritarian practices: a framework" G*lobalizations*, 15:2, pp. 179-197.
Greiçevci, Labinot (2011): "EU Actorness in International Affairs: The Case of EULEX Mission in Kosovo" *Perspectives on European Politics and Society* 12:3, pp. 283-303.
Hasani, Enver (): *From UNMIK to EULEX: An Outline of the Key Aspects of Governance, Cooperation and Confidence-Building Under the Conditions of International Supervision,* available at http://www.bundesheer.at/pdf_pool/publikationen/10_pfp16_120.pdf accessed 22 January 2022.
International Court of Justice (2010): *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*. ICJ General List No. 141.
Kaminskij, Konstantin and Friess, Nina (2019): "Inside Out Identities: Eurasianism and the Russian World" in Konstantin Kaminskij and Nina Friess (eds.): *Resignification of Borders: Eurasianism and the Russian World*. Berlin: Frank&Timme, pp. 7-20.
Kosovo Specialist Chambers & Specialist Prosecutor's Office (2022): *Special Investigative Task Force,* available at https://www.scp-ks.org/en/spo/special-investigative-task-force accessed 22 January 2022.
Mahr, Ewa (2018): "Local contestation against the European Union Rule of Law Mission in Kosovo" *Contemporary Security Policy* 39:1, pp. 72-94.
Mészáros, Edina Lilla (2018): "How the Security Dimension Triggered the Modifications of the European/EU Borders and what were the Subsequent Consequences? An ex-post 100 years Perspective," in Ioan Horga and István Süli-Zakar (eds.): "The European Borders at Hundred Years after the First World War" *Eurolimes* Vol. 26.
Muharremi, Robert (2010): "The European Union Rule of Law Mission in Kosovo (EULEX) from the Perspective of Kosovo Constitutional Law" *ZaöRV* 70, pp, 357-379.
Muharremi, Robert (2021): *The Washington Agreement between Kosovo and Serbia*, available at https://www.asil.org/insights/volume/25/issue/4/washington-agreement-between-kosovo-and-serbia accessed 22 January 2022.
Papadimitriou, Dimitris and Petrov, Petar (2012): "Whose Rule, Whose Law? Contested Statehood, External Leverage and the European Union's Rule of Law Missionin Kosovo" *JCMS* Vol 50 Number 5, pp. 746-763.
Radin, Andrew (2014): "Analysis of current events: 'towards the rule of law in Kosovo: EULEX should go'" *Nationalities Papers: The Journal of Nationalism and Ethnicity* 42:2, pp. 181-194.
Schimmelfennig, Frank (2010): "Europeanisation Beyond the Member States" *Zeitschrift für Staats- und Europawissenschaften (ZSE) / Journal for Comparative eGovernment and European Policy*, Vol. 8, No. 3, pp. 319-339.
Scott, Joanne (2014): "Extraterritoriality and Territorial Extension in EU Law" *The American Journal of Comparative Law* Vol. 62, No. 1, pp. 87-125.
United Nations (1999): *UN Security Council Resolution 1244*, S/RES/1244.
United Nations (2019): *UNMIK Mandate,* available at https://unmik.unmissions.org/mandate accessed 22 January 2022.
Whytock, Christopher (2018): "From International Law and International Relations to Law and World Politics" No. 2018-29, *Legal Studies Research Paper Series*, pp. 1-48.
Zupančič, Rok / Pejič, Nina / Grilj, Blaž / Peen Rodt, Annemarie (2018): "The European Union Rule of Law Mission in Kosovo: An Effective Conflict Prevention and Peacebuilding Mission?" *Journal of Balkan and Near Eastern Studies* 20:6, pp. 599-617.

Door-Knocking: Extra-Territorial Jurisdiction for In-Transit Forcibly Displaced Persons

Wenjun Yan and Lin Shang

Jurisdiction could be the first obstacle for forcibly displaced persons to enter their countries of destination. Endeavouring to reach a balance between obligations of general public international law and international human rights law, extraterritorial jurisdiction has been recognized both in judicial practice and academic debates to support those forcibly displaced persons in need. With the deepening reform and opening up of China's economy, it is expected that increasing numbers of migrants, including forcibly displaced persons, will choose China as their country of destination. For China to honour its international law obligations, (under both general public international law and international human rights law), this article discusses when and how China shall exercise its extraterritorial jurisdiction when it comes to forcibly displaced persons.

***Keywords*:** Forcibly Displaced Persons, Extra-territorial Jurisdiction, Chinese Perspective, Refugee

Introduction

Jurisdiction could be the first problem encountered by forcibly displaced persons during the process of leaving their homeland and entering the country of destination (i.e. when they are in transit). Under general public international law, jurisdiction, as a core element of state sovereignty, has generally been regarded as territorial: once a person has entered – lawfully or unlawfully – the territory of a state, he/she is under the jurisdiction of that state. Thus, when it comes to the recognition and discharge of human rights obligations extra-territorially, jurisdiction has served notoriously as a doctrinal bar. A state is not obliged to perform its duties under human rights related treaties if it determines that forcibly displaced persons have not entered its jurisdiction.

Efforts have been made from both theoretical and practical aspects to protect in-transit forcibly displaced persons. In theory, the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* were proposed in 2011 by 40 international law experts all over the world, aiming to bridge the gap caused by jurisdiction on the protection of in-transit forcibly displaced persons. Scholars advocate that jurisdiction of a state could be established when it has effective control or could bring about foreseeable effects on the in-transit persons. In practice, the International Court of Justice (ICJ), the UN Human Rights Committee (UNHRC), and the Inter-American Commission on Human Rights (INCHR), have all suggested that jurisdiction of states may sometimes be exercised outside the national territory.

In an era of deepening globalization, migration touches all states and people more than ever before. In the year 2015, there were 65 million forcibly displaced persons, including over 21 million refugees, 3 million asylum seekers and over 40 million internally displaced persons (IOM, 2018, p. 1). Although China acceded to the *United Nations Convention relating to the Status of Refugees* and the *Protocol relating to the Status of Refugees* (collectively, the "Refugee

Convention"), it has long been criticized for failure to effectively implement obligations under the Refugee Convention. With the deepening reform and opening up of China's economy, the growing trend of people emigrating to and from China prompted the Chinese government to set up the State Immigration Administration in 2018. The State Immigration Administration coordinates immigration policies and their implementation. The establishment of this Administration will lead to an overhaul of Chinese policies on forcibly displaced persons. If it is the case, regulation on the extra-territorial effect of jurisdiction could be a good place to start.

This article (1) discusses the rights of in-transit forcibly displaced persons during the entry process under international laws and theories; (2) analyses the actual practice of international organizations/entities when dealing with extra-territorial jurisdiction; (3) briefly summarizes the current legal framework in China during the entry process; and (4) proposes possible solutions to streamline the forced placed persons' entry process and to better protect their human rights in China.

Entry of Forcibly Displaced Persons: International Laws and Theories

Categorization of Migrants: Who are Forcibly Displaced Persons?

Migration is a term that encompasses a wide variety of movements and situations involving people of all walks of life and backgrounds (IOM, 2018, p. 1). While migration occurs in voluntary circumstances, providing enormous benefit and opportunities for states, businesses and communities, there are "forced placed" populations who leave or flee from their homes due to conflict, violence, persecution and human rights violations (World Bank, 2019). It is commonly acknowledged that people in search of opportunities for economic betterment belong to the category of "voluntary migrants", while those fleeing from peril for their lives belong to the category of "refugees" defined under the 1951 Refugee Convention. Voluntary migrants typically move for economic reasons, such as work, family reasons, study, and so on (IOM, 2018, p. 7). With respect to forced displaced persons, their categories proposed by United Nations High Commissioner for Refugees (UNHCR) include but are not limited to the following:

1. Refugees: individuals who are granted complementary forms of protection and enjoy temporary protection (CSR, 1951; PCSR, 1967; OAUCGSARPA, 1969).
2. Asylum-seekers (with „pending cases"): refugees whose requests for sanctuary have yet to be processed. These groups are often called "prima facie" refugees (UNHCR, 2019a).
3. Internally displaced persons (IDP): people or groups of people who have been forced to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights, natural or man-made disasters, and who have not crossed an international border (Landau, 2017, p. 61).
4. Returned refugees (returnees): former refugees who have returned to their countries of origin, either spontaneously or in an organized fashion (Landau, 2017, p. 61). Such returns would ideally take place only under conditions of safety and dignity, and UNHCR has managed numerous voluntary repatriation programs that have brought millions of forcibly displaced people home over the years (UNHCR, 2020a).
5. Stateless people: people who are denied a nationality. At present, at least 10 million people around the world are stateless people, having difficulty accessing basic rights such as education, healthcare, employment and freedom of movement (UNHCR, 2019b). Thus, jurisdiction issues may be faced by forcibly displaced persons in all five categories.

Obligations of States with respect to Forcibly Displaced Persons

Migrants are protected by international human rights law and international refugee law. Under the universal framework of international human rights law, migrants do not acquire human rights because they are citizens, workers, or have any other status. Rather, migrants enjoy basic human rights simply because they are human beings. As affirmed by the *Universal Declaration of Human Right*s (UDHR), *"all human beings"* are born free and equal in dignity and rights (*emphasis added*). Specifically, the UDHR, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and the *International Covenant on Civil and Political Rights* (ICCPR), constitute the general legal framework applicable to all human beings. Rights provided in ICESCR and ICCPR are supplemented by regional human rights instruments such as the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), its Protocols and the Revised European Social Charter (ESCr) in the Council of Europe system (ICJ, 2014).

Specialized human right treaties address more detailed and specific human rights. At a global level, international refugee law is embodied in the Refugee Convention, which are supplemented by regional instruments and standards. According to the legal instruments above, states are obliged to protect the human rights of forcibly displaced person. The next section will delineate the boundary as to where states' human right obligations need to be honored.

Jurisdiction: When are States Obliged to Honor Human Rights Obligations?

As a general international law principle, a state is entitled to exercise its own discretion when determining whether or not to grant entry to its territory to non-nationals. Nevertheless, a state is obliged to act in compliance with its international human rights obligations when exercising control over their borders (ICJ, 2014; Kamto, 2007). As a result, it is not easy for a state to simply say "no" to forcibly displaced persons.

When a state does decide to fulfil their human rights obligations, it raises a question: is the displaced person subject to the state's jurisdiction? That is, when can a state exercise its authority over a forcibly displaced person and therefore becomes internationally responsible? The following section (i) discusses the definition of jurisdiction under general public international law and human rights theories; (ii) summarizes arguments for and against the theory of extraterritorial obligations; and (iii) examines how jurisdiction is determined in actual cases.

Definition of Jurisdiction: Under Public International Law and Human Rights Theories

Jurisdiction is essentially an application of state power, or authority to act, pursuant to or as an expression of sovereignty. Jurisdiction may be divided into two general types, territorial and extraterritorial (Estey, 1997, p. 177). It should be noted that the definition of jurisdiction is slightly different under general public international law and human rights theories. Under general public international law, jurisdiction, as a core element of state sovereignty, has been regarded as being "closely related to the national territory" (Shaw, 2003, pp. 572-3; Lawson, 2004, pp. 83-7). In other words, jurisdiction is primarily territorial (ECHR, 2001); once a person has entered – lawfully or unlawfully – the territory of a state, he/she is under the jurisdiction of that state (Tzevelekos, 2017).

Two components of jurisdiction are recognized under general public international law: prescriptive and enforcement jurisdiction (Shaw, 2008, pp. 645-6). Prescriptive jurisdiction refers to the state's capacity to make law, whether by legislative, executive or judicial action, while enforcement jurisdiction is the capacity to ensure compliance with such law, whether by

executive action or through the courts. Nevertheless, it is generally acknowledged that, although jurisdiction may be based on other grounds, enforcement is restricted by territorial factors (Shaw, 2008, pp. 645-6). However, under human rights law, it has been argued that the concept of jurisdiction found under human rights law should be distinguished from that under general international law (Kim, 2017, p. 51). Some propose that traditional state jurisdiction is used to delineate the spheres of different sovereign states, enabling them to respect the sovereignty of other states; nevertheless, the jurisdiction under human rights law defines the applicability of human rights obligations, and thus opens the possibility to assess state responsibility (Klug, 2010, p. 98). Further, it is pointed out that human rights law jurisdiction does not deal with a state's rights, but with its responsibilities and obligations to which it has committed through accession to an international treaty (Mallory, 2012, p. 309). Thus, some scholars suggest that in international human rights law, jurisdiction may be established by factual control (over territory or person), *de jure* jurisdiction, or "a personal link' (Klug, 2010, pp. 76-88; IACHR,1999). Further details are explained in the following section of Extraterritorial obligations (ETOs).

Extraterritorial Obligations (ETOs): Academic Theories

In the majority of circumstances, it is clear that a person enters the jurisdiction of a state when he/she accesses the territory of a state. It is also well established that a person accesses the jurisdiction of a state when he/she is present in an "international zone". In *Amuur v. France*, the ECHR noted that, when holding the refugee applicants in the *international airport* of Paris, they became subject to French law (ECHR,1996, pp. 52-3). Although jurisdiction based on territory is well settled, extraterritorial obligations are still under heated discussion. The sections below will briefly summarize the academic debates on ETOs.

Arguments for ETOs: Maastricht Principles

As mentioned above, if the protection of forced migrants is confined within the territory of a state, there would be a gap with respect to human rights protections. For instance, the human rights of a forcibly displaced person could easily be undermined if a state simply prohibited him/her from entering its territory. In view of the challenges posed by such gaps, the "Maastricht Principles" were proposed on 28 September 2011 by 40 international law experts from all regions of the world, including current and former members of international human rights treaty bodies, regional human rights bodies, as well as former and current Special Rapporteurs of the United Nations Human Rights Council (Maastricht Principles, 2012, p. 3). Principal 9 (*Scope of jurisdiction*) of the Maastricht Principles defines three distinct situations for extension of ETOs (De Schutter, 2012, p. 15):

(1) Principal 9 (a) deals with situations where a state has effective control over the territory and/or persons, or otherwise exercises state authority. It focuses on the element of "effective control."
(2) Principal 9 (b) brings in the element of foreseeability. It provides that ETOs arise when state acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory. This element excludes the situation where a state may be held liable for all consequences that result from its conduct, no matter how remote (De Schutter, 2012, p. 17);
(3) Principal 9 (c) takes into account the situation where a state is obliged to support the realization of human rights outside its national territory, especially for the fulfilment of economic, social and cultural rights (Maastricht Principles, 2012, p. 3);

As an international expert opinion, the Maastricht Principles do not purport to establish new elements of human rights law. Instead, it aims to clarify the extraterritorial obligations of states on the basis of standing within international law (Maastricht Principles, 2012, p. 3). In "Introduction" of the Maastricht Principles, international law experts call for the application of the Maastricht Principles as an integral part of any human rights analysis and policy-making to ensure the universal protection of human rights (Maastricht Principles, 2012, p. 3). Admittedly, the Maastricht Principles could serve as a feasible means to close the "gap" during the entry process of forcibly displaced persons.

Arguments against ETOs

Application of ETOs fails to win the support of other scholars; they point out that, to a certain extent, the meaning(s) of ETOs have to be within a general framework of "jurisdictional" analysis in public international law. Although some of the disciplines applicable to Maastricht Principles/ ETO theories affect aspects of law, they are akin to philosophy or ethics (McGoldrick, 2004, p. 42). Moreover, there is also a problem of "potential clashes with foreign territorial jurisdictions" (Ghráinne, 2013, p. 112), i.e. the overlap of jurisdictions of multiple states due to ETOs. For instance, in *Amnesty International Canada v. Canada (Canadian Forces)* observed that, "a 'control of the person' test would be problematic in the context of a multinational military effort… Indeed, it would result in a patch work of different national legal norms in relation to detained Afghan citizens in different parts of Afghanistan, on a purely random-chance basis" (Canadian Forces, 2008, p. 274). Thus, in the context of academic discussion, it is hard for scholars to reach consensus on the application of ETOs. The following sections will explain how international judicial bodies have been handling issues regarding ETOs.

Extraterritorial Obligations (ETOs): Actual Practice

Admittedly, the *Vienna Convention on the Law of Treaties* (VCLT) establishes a presumption that treaties are binding on States in respect of their national territory (VCLT, 1969). However, treaties dealing with human rights specifically shed a different light on the issue of jurisdiction. As argued by the Maastricht Principles, extending jurisdiction extraterritorially may provide better protection to forcibly displaced persons. In practice, international and regional judicial bodies have decided that states shall exercise jurisdiction extraterritorially. Once ETOs are exercised by states, nevertheless, there is a possibility of "clashes with foreign territorial jurisdictions." The section below examines how ETOs are dealt with when double jurisdiction does or does not exist.

No possibility of double jurisdiction

Double jurisdiction happens when a state decides to exercise jurisdiction or perform its human rights obligations on the territory of another state. When a state exercises jurisdiction over a territory that is *not* part of another states' jurisdiction, there is no possibility of double jurisdiction. This is the case when a state exercises its extraterritorial jurisdiction on public areas such as the high seas. Ships on the high seas are, as a general rule, subject to the exclusive jurisdiction and authority of the state whose flag they lawfully fly (PCIJ, 1927; Reuland, 1989, p. 1164). This principle is codified in the 1982 Convention on the Law of the Sea (UNCLOS, 1982). Conversely, since the peaceful use of the high seas is based on the nationalities of ships, stateless vessels are anathema upon the high seas (Reuland,1989, p. 1164). Stateless vessels on the high seas are restricted from the bundle of rights and freedoms that ordinarily attach to ships associated with nations (UNCLOS, 1982). For example, under Article 110 of the UNCLOS, when a warship

encounters a ship on the high seas without nationality, the warship is justified in boarding it (UNCLOS, 1982). When discussing at-sea interception of forcibly displaced persons, it is useful to examine the *United States Alien Migrant Interdiction Operation* (AMIO). Thousands of Haitians escaped from their country on stateless, overcrowded and generally unseaworthy boats (Jacobson, 1991, p. 815). While on their way to Florida, the United States Coast Guard intercepts these boats on the high seas under AMIO. The people on board will normally be transferred to a Coast Guard cutter, where they will be interviewed for preliminary determination of legitimate refugee claims (Jacobson,1991, p. 815). By intercepting the boats of Haitian forcibly misplaced persons, the United States has legitimately exercised jurisdiction over the stateless vessels (UNCLOS, 1982).

By proactively taking effective control over the Haitian forcibly displaced persons, the US consequently exercises jurisdiction over them and should honor its international human rights obligations. In reality, tens of thousands of forcibly displaced people were sent back to Haiti for failure to meet refugee criteria, and even the people who succeeded in passing the preliminary status interviews were interviewed at sea, on board military ships and surrounded by uniformed officers (Jacobson, 1991, p. 816). Being frightened and exhausted, it is fair to say that the human rights of forcibly displaced persons are not duly taken care of, after the US has proactively exercised jurisdiction over them.

Besides the interception of Haitian migrants by the United States, in recent years, Australia has been intercepting boats on high seas with the "Pacific Patrol Boats Program." Europe engages in similar interception programs, especially now that the EU's border agency Frontex has taken on a coordinating role in some of these operations. Similar to the situation in the US, it should be noted that by proactively taking control of the forcibly displaced persons, these countries need to correspondingly honor their international human rights law obligations.

Possibility of Double Jurisdiction

Since double jurisdiction happens when a state decides to exercise jurisdiction or perform its human rights obligations on the territory of another state. It is common for international judicial bodies to find that human rights law may extend extraterritorially for core human rights instruments. Cases including the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and the *Democratic Republic of the Congo v. Uganda* involve the application of such extraterritorial jurisdiction. In particular, in the context of the *International Covenant on Civil and Political Rights* (ICCPR), jurisdiction constitutes a basis for the permissive or even prescriptive exercise of extraterritorial conduct in the interpretation (De Schutter, 2012, p. 15).

The *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (the "Israeli Wall Advisory Opinion") case concerns the legal question of the Israeli West Bank barrier built by Israel. The ICJ discussed whether Israel has jurisdiction over its occupied territories, which are situated between the Green Line and the former eastern boundary of Palestine. The ICJ observed in this case that "…while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the ICCPR, it would seem natural that, even when such is the case (i.e. outside the national territory), States parties to the Covenant should be bound to comply with its provisions (ICJ, 2004, p. 109)." Therefore, although Israel's occupied territories are not within its jurisdiction, the ICJ still supported the position that the ICCPR is applicable there (ICJ, 2004, pp. 106-109). The ICJ's opinion that "the State party's obligations under the Covenant apply to all territories and populations under its *effective control*" (ICJ, 2004, p. 112, emphasis added).

The position of the ICJ in the Israeli Wall Advisory Opinion was reiterated in *Democratic Republic of the Congo v. Uganda*, where the ICJ decided that human rights law may extend extraterritorially for core human rights instruments (ICJ, 2005, pp. 178-217). Beside the opinion of the ICJ, the UN Human Rights Committee (HRC) has consistently found that the ICCPR is applicable where the State exercises its jurisdiction on foreign territory. For instance, extraterritorial jurisdiction is recognized in *López Burgos v. Uruguay*, *Lilian Celiherti de Cusariego v. Uruguay* (Imbrie, 2006, p. 23) and *Montero v. Uruguay* (UNHRC, 1983). For instance, *López Burgos v. Uruguay* concerned the revocation of passports by Uruguayan policemen in Argentina and Brazil. HRC applied the ICCPR extraterritorially and condemned the actions to be breaches of the Covenant (UN, 1979).

Double jurisdiction also exists when a state exercises extraterritorial jurisdiction on the high seas by intercepting a boat that is flying the flag of another state. For instance, in *Medvedyev and Others v. France*, the French authorities intercepted a Cambodian vessel suspected of drug smuggling near Cape Verde; those aboard were confined during the 13-day voyage into a French port (ECHR, 2010). The Grand Chamber of the ECHR established that exercising coercive law-enforcement jurisdiction over a foreign vessel on the high seas will bring it within ECHR jurisdiction. While keeping the essentially territorial notion of jurisdiction, the ECHR decided that "the acts of the Contracting States performed or producing effects, outside their territories can constitute an exercise of jurisdiction" (ECHR, 2010, p. 64). Similar rational was applied in *Hirsi Jamaa and Others v. Italy*, which concerns Somali and Eritrean migrants travelling from Libya who had been intercepted at sea by the Italian authorities and sent back to Libya (ECHR, 2012). The Grand Chamber of the ECHR held that measures of interception of boats on the high seas attract the jurisdiction of the state implementing the interception. That is, all the persons on the boat fall within the jurisdiction of the intercepting state from the moment the state takes effective control of the boat (ECHR, 2012, pp. 77-82; UN, 1979, pp. 62-7).

In summary, "effective control" over forcibly displaced persons are an important element for international judicial bodies to decide whether or not a state has exercised its extraterritorial jurisdiction and thus shall perform its human rights obligations. Nevertheless, it shall be noted that the protection of human rights with extraterritorial jurisdiction may be in conflict with principles of general public international law, i.e. one state's sovereignty is infringed upon by another state exercising jurisdiction extraterritorially. It is possible that international judicial bodies have checked and balanced the pros and cons of extraterritorial jurisdiction before choosing the "effective control" test. After all, even when there is "double" jurisdiction, the state having "effective control" over the forcibly displaced persons may be the only place where those people could obtain protection and support.

Jurisdiction Determination: Chinese Perspective

Policies to reform and open China initiated in 1978 accelerated Chinese emigration and internal migration. Due to the rapid economic development during the past three decades, China's place in the global migration order has also been substantially transformed (Østbø Haugen, 2015): in 1978, only 229,600 foreigners entered China (National Bureau of Statistics of China, 2001), while at the end of 2018, there were 30.54 million inbound foreign visitors (MCT, 2019). The drastic change on the number of foreigners entering China is reflective of the tightened bond between China and the rest of the world. Despite the increase on the number of visitors entering into mainland China,

numbers of migrants and asylums remain low. Easier access to mainland China does not mean a more convenient way to obtain resident or asylum status in China. In 2015, the estimated number of foreign migrants residing in China is estimated at 978,046 (UN Department of Economic and Social Affairs, 2015). Moreover, there were 668 asylum-seekers and 162 recognized refugees awaiting a durable solution in China in 2016 (UNHCR, 2013). The total number of forced displaced persons in China by the end of 2018 reached 322,359, which includes 321,756 refugees and 603 asylum-seekers (UNHCR, 2020b).

In view of the rising entries of migrants, the *Exit-Entry Administration Law of China* (EEAL) was promulgated in 2012 and the National Immigration Administration (NIA) was established in 2018. While the EEAL and the NIA mark a systematic overhaul of the international migration system in China (Lan, 2013, p. 618), neither of them address the issue of refugees in detail, let alone the jurisdiction determination for refugees. The following section (i) briefly introduces the impact/function of the EEAL and the NIA and (ii) discusses how entry of forcibly displaced persons could be addressed under the current Chinese legal and administrative system.

Primary Source of Law: The Exit-Entry Administration Law of China

The EEAL was enacted on 30 June 2012 after ten years of research and review. The EEAL is regarded as a major step by China towards developing a more comprehensive regulatory regime for dealing with the rising flow of migrants, especially focusing on combating the so-called "three-illegalities" (Zou, 2016). It replaced both the Law of the P.R.C. on Control of the Entry and Exit of Aliens and the Law of the P.R.C. on Control of the Exit and Entry of Citizens (1985). The EEAL serves as a key legal instrument in China for regulating international migration of aliens and Chinese citizens, including residents in the mainland of China, Hong Kong SAR, Macau SAR, and Taiwan regions (EEAL, 2012).

Compared to its predecessors, the EEAL tightens control of illegal migration by (i) imposing stricter visa regulations (EEAL, 2012); (ii) providing detailed regulations of the entry, stay and residence of aliens(EEAL, 2012); and (iii) ensuring effective application of the law by measures such as interrogation and repatriation (EEAL, 2012). It is reported that over 20,000 illegal aliens were identified by the exit and entry administration agencies of public security organs throughout China, 80% of whom engaged in illegal employment (Hailin Zhang, 2012, p. 10). Regarding refugees, Lan and Shi (2013) reveals that Article 46 of the EEAL briefly mentions that:

> Foreigners applying for refugee status may, during the screening process, stay in China on the strength of temporary identity certificates issued by public security organs; foreigners who are recognized as refugees may stay or reside in China on the strength of refugee identity certificates issued by public security organs (p.633).

It does not specify the circumstances, criteria and procedures concerning the treatment of refugees, nor does it mention the authority taking charge of refugee issues. On 27 February 2020, in order to solicit public opinions, the Ministry of Justice of People's Republic of China (MOJ) published draft rules on foreigners' permanent residence in China (the "Draft P.R. Law").

The Draft P.R. Law is formulated according to the EEAL, intending to further China's opening up to the outside world, standardizing the administration of permanent residence of foreigners in China, and safeguarding the lawful rights and interests of foreigners who have obtained permanent residence (MOJ, 2020). While the issues on refugees are not directly touched upon in this Draft P.R. Law, Chapter III of the Draft P.R. Laws provides detailed approval and management procedures for foreigners to apply for permanent residency status in China. For instance, according to Article 22, the maximum period for examining and approving alien's status

of permanent residence is 120 days and the time waiting for quotas is not included in the approval period (MOJ, 2020). If this Draft P.R. Law goes through the consultation period, and does come into effect in the future, there is the possibility that procedures on entry of refugees, including jurisdiction for protecting refugees, will take reference of the future China's P.R. Law.

Unified Migration Control Agency: National Immigration Administration

Since the enactment of the EEAL, the number of foreigners working and living in China has increased, which raises new requirements on immigration administration and services. The National Immigration Administration **(**NIA) was established in 2018; it is responsible for coordinating and formulating immigration policies and their implementation, border control, administering foreigners' stay, management of refugees and nationality, leading the coordination of the administering of foreigners who illegally enter, stay or are employed in China, and the repatriation of illegal immigrants. Until now, no detailed regulations concerning refugees have been put forward by the NIA. Nevertheless, with the facilitation of the NIA, residing in China is not as difficult as it was before. China's "green card" is said to be the green card most difficult to obtain around the world (King, 2019). On 17 July 2019, the Ministry of Public Security of China announced that 12 policies on immigration and exit-entry facilitation that had been piloted in some areas of 16 provinces and cities would be promoted and implemented nationwide beginning 1 August 2019. Benefiting from these policies and with the facilitation from NIA, it will be easier for foreigners to (i) apply for permanent residence in China; (ii) apply for work-type residence permits within the 5-year validity period; and (iii) benefit from resident permits, and the visas of foreign students.

The new policies grant favourable treatment to high-level foreign talents, which will in turn trigger their enthusiasm for working in China. These policies constitute a summary and adjustment of the policies in the pilot areas. Although regulations on refugees have not been put forward, the series of new policies may well serve as a pilot for China's new approach to regulate migrants. Moreover, it can be seen from the Draft P.R. Law that the "national immigration administration department" will take the lead in administrating China's permanent residency of foreigners in the future (MOJ, 2020). Points-based system will be established by the national immigration administration authority together with Science and Technology, Human Resources and Social Security Department. Entry and Exit Administration of Public Security Unit will take part in the management of permanent residents in China, such as collecting passport information, application materials, taking interviews and obtaining identification information such as fingerprints. Although the "Draft P.R. Law" does not specifically point out the name of the "national immigration administration department," it is very likely that the NIA will take the lead in administering permanent residency, and most likely, in the future, the administration of refugees. Given that none of the legal instruments in China addresses extraterritorial jurisdiction, the NIA may well make reference to established jurisprudence. As shown in the following section, different approaches shall be followed with respect to different situations.

Possible Reforms of China's Refugee Regulation on Jurisdiction: The Presumption of Territorial Jurisdiction

As discussed above, under general public international law and human right law, jurisdiction has different meanings and serves different purposes. On the one hand, human rights are declared to be universal; on the other, human rights are part and parcel of the larger framework of international law, and as such, must pay homage to its underlying principles in order to remain law

(Gammeltoft-Hansen, 2011, p. 24). Since the principle of territoriality is central to general public international law, it usually limits the extraterritorial application of universal human rights laws (De Boer, 2014, p. 124). As such, when performing its human rights obligations under international law, China shall follow the presumption of territoriality, i.e., it only exercises extraterritorial jurisdiction in exceptional cases. According to the Submission of the UNHCR, there are three distinct groups of persons that are of particular concern in China (UNHCR, 2013):

(i) the first group consists of asylum-seekers and refugees;
(ii) the second group consists of Indo-Chinese refugees, who came to China in the early 1980s from Vietnam, Laos, and Cambodia. They were granted refugee status on a *prima facie* basis by the UNHCR;
(iii) the third group consists of citizens from the Democratic People's Republic of Korea who are in China and may need international protection.

With respect to the second group, although these individuals remain in the statistics, the UNHCR is no longer concerned with this group of people as they have *de facto* integrated into China and have access to the same rights as citizens. This group is mainly of Chinese ethnic origin and has settled mostly in rural areas within six of China's southern provinces. There are an estimated 317,000 Indo-Chinese refugees, mainly from Vietnam. At the current stage, given that quite a few forcibly displaced persons have already entered the territory of China, the Chinese government shall exercise its territorial jurisdiction over them with respect to international human rights law obligations. After all, the ultimate goal for the protection of forcibly displaced persons is not to allow them to cross the border, but to settle them, which enables them to live a normal life as nationals of the host countries.

Exercising Extraterritorial Jurisdiction Without Double Jurisdiction

The establishment of the NIA showcases China's ambition and determination to "coordinating immigration policies and their implementation". As increasing numbers of countries are carrying out interceptions on the high seas (as discussed above), it is likely that China will exercise its human rights obligations extraterritorially as well. Besides, when forcibly displaced persons approach China via crowded boats, China may be under international law obligations to intervene in order to save lives. By performing extraterritorial jurisdiction when there is no double jurisdiction, China could on the one hand, proactively perform its obligations under international law and international human rights law; and on the other hand, avoid the problems caused by interfering with other states' sovereignty.

Exercising Extraterritorial Jurisdiction with Exceptions: Using Double Jurisdiction

Exercising jurisdiction extraterritorially when there is double jurisdiction is more problematic. While China may perform its human rights law obligations extraterritorially, those obligations may be in conflict with China's public international law duties, such as the duty to respect the sovereignty and territory of another state. Thus, extraterritorial jurisdiction involving double jurisdiction shall only be exercised in very exceptional cases. China needs to balance human rights and general public international law obligations before deciding whether or not to exercise extraterritorial jurisdiction in these circumstances. In particular, the criteria proposed in the *Maastricht Principles* may be of reference (please see Principal 9, *Scope of jurisdict*ion discussed above for details). For instance, when one of China's neighbouring countries is at war and a group of forcibly displaced persons gather outside the border of China, their country of origin is unlikely to support or help them. In this circumstance, China's acts may bring about "foreseeable effects" on this group of people. In this case, China has jurisdiction over those people and shall honour its obligations to protect their economic, social and cultural rights under the *Maastricht Principles*.

In practice, based on the analysis above, it is advisable for the Chinese regulatory authorities to enact administrative acts on extraterritorial jurisdiction and apply them to several pilot areas. The enactment of administrative acts under Chinese law involves less red tape, they are much more flexible and could be quickly applied to particular areas. After trial in the pilot areas, the administrative acts could be modified accordingly. Also, given that special refugee laws still do not exist in China, it is not likely for the Chinese authorities to put forward judicial interpretations to protect forcibly displaced persons, which could be handled as flexible as administrative acts. As China is increasingly open to the world for migrants, it is transforming from the country of origin to the country of destination, thus, it can reasonably be expected that regulations or acts focusing on the protection and entry of forcibly displaced persons will be enacted soon.

REFERENCES

Canadian Forces (2008): *Amnesty International Canada v. Canada* , 2008 FC 336, para. 274, [2008] F.C.J. No. 356.

CSR (1951): *Convention relating to the Status of Refugees*.

De Boer, T. (2014): "Closing legal black holes: The role of extraterritorial jurisdiction in refugee rights protection" *Journal of Refugee Studies*, *28*(1), pp. 118-134.

De Schutter, O., Eide, A., Khalfan, A., & Orellana, M. (2012): "Commentary to the Maastricht principles on extraterritorial obligations of states in the area of economic, social and cultural rights" *Human Rights Quarterly*, *34*, 1084.

ECHR (20 May 1996): *Amuur v. France*, Case No. 17/1995/523/609, Judgment.

ECHR (12 December 2001): *Banković and others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, Application. No. 52207/99, para. 59.

ECHR (29 March 2010): *Medvedyev and Others v. France*, Application No. 3394/03, Council of Europe.

ECHR (2012): *ECHR-Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Headnote, available at Database of Asylum Law https://www.asylumlawdatabase.eu/en/content/ecthr-hirsi-jamaa-and-others-v-italy-gc-application-no-2776509, accessed 27 October 2021.

EEAL (2012): *Exit-Entry Administration Law of China.*

Estey, W. (1997): "The five bases of extraterritorial jurisdiction and the failure of the presumption against extraterritoriality" *Hastings International & Comparative Law Review*, 21.

Gammeltoft-Hansen, T. (2011): *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Vol. 77), Cambridge University Press.

Ghráinne, B. N. (2013): "Book Review: Thomas Gammeltoft-Hansen: Access to Asylum: International Refugee Law and the Globalisation of Migration Control" *Leiden Journal of International Law*, *26*(1), pp. 234-238.

Imbrie, A. (2006): "Restitution and Renewal" *Expose*.

IACHR (29 September 1999): *Alejandre Jr., et al. v. Cuba*, Report No. 86/99, Case 11.589.

IOM (2018): *International Organization for Migration: World Migration Report 2018*, , available at https://publications.iom.int/system/files/pdf/wmr_2018_en.pdf, accessed 5 October 2021.

ICJ (9 July 2004): *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, UN Doc A/RES/ES-10/15.

ICJ (19 December 2005): *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment.

ICJ (2014): *Migration and International Human Rights Law: A Practitioners' Guide* (Updated Edition).

Jacobson, J. L. (1991): "At-Sea Interception of Alien Migrants: International Law Issues" *Willamette Law Review.*, 28, pp. 815-6.

Kim, S. (2017): "Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context" *Leiden Journal of International Law*, 30(1), pp. 49-70.

King & Wood Mallesons; Liang, Linda; & Zhao, Qiuyang (8 August 2019): "'Residing in China' Is No Longer Difficult" *China Law Insight*, available at https://www.chinalawinsight.com/2019/08/articles/permanent-residencepermanent-residence/residing-in-china-is-no-longer-difficult/, accessed 18 December 2021.

Klug, A., & Howe, T. (2010): "The concept of state jurisdiction and the applicability of the non-refoulement principle to extraterritorial interception measures" *Extraterritorial Immigration Control.* Brill Nijhoff, pp. 65-99.

Landau, L. B., & Achiume, E. T. (2017): "Global trends: forced displacement in 2015" *Development and Change*, 48(5), pp. 1182-95.

Lan, L., & Shi, X. (2013):"Reflection on the latest progress in Chinese legislation on international migration" *Frontiers L. China*, 8.

Lawson, R. A. (2004): "Life after Bankovic-On the Extraterritorial Application of the European Convention on Human Rights" *Extraterritorial Application of Human Rights Treaties*, Antwerpen: Intersentia, pp. 83 - 123.

Maastricht Principles (29 February 2012): *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,* available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/Maastricht-ETO-Principles-ENG-booklet.pdf. accessed 18 January 2022.

Mallory, C. (2012): "I. European Court of Human Rights Al-Skeini and Others v. United Kingdom (Application no 55721/07) Judgment of 7 July 2011" *International & Comparative Law Quarterly*, 61(1), pp. 301-312.

Kamto, Maurice (19 April 2007): *UN Special Rapporteur of the International Law Commission, Third report on the expulsion of aliens*, UN Doc. A/CN.4/581 ("ILC Third Report").

McGoldrick, D. (2004): "Extraterritorial Application of the International Covenant on Civil and Political Rights" *Extraterritorial application of human Rights Treaties*, 1.

MCT (2019): *Ministry of Culture and Tourism of the People's Republic of China: Basics of Tourism in 2018*, available at http://www.gov.cn/xinwen/2019-02/13/content_5365248.htm, accessed 14 October 2021.

MOJ (2020): *Regulation of the People's Republic of China on Administration of Permanent Residence of Foreigners (draft version)*.

Østbø Haugen, Heidi (2015): *Destination China: The Country Adjusts to its New Migration Reality*, available at https://www.migrationpolicy.org/article/destination-china-country-adjusts-its-new-migration-reality, accessed 13 October 2021.

OAUCGSARPA (1969): *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.*

Permanent Court of International Justice (PCIJ, 27 September, 1927): *Case of the S.S. Lotus* (Fr. V. Turk., ser. A) No. 9.

PCSR (1967): *Protocol to the 1951 Convention relating to the Status of Refugees*.

Reuland, R. C. (1989): "Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction" *Vand. J. Transnational Law*, 22.

Shaw, M. N. (2003): *International Law*, 2nd. Grotius Publication Ltd., Llyndysul, Dyfed.

Shaw, M. N. (2008). *International Law,* 6ed. Cambridge University Press Textbooks

Tzevelekos, Vassilis and Katselli, Dr Elena (2017): "Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?" *Nordic Journal of International Law*, 86.

UN (6 June 1979): "*Sergio Euben Lopez Burgos v Uruguay*", Communication No. R 12/52, UN Doc. Supp. No. 40 (A/36/40) § 12.1.

UNCLOS (10 December 1982): *United Nations Convention on the Law of the Sea,* U.N. Doc. A/CONF. 62/122.

UN Department of Economic and Social Affairs (2015): I*nternational migration report.*

UNHCR (2013): *The United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 3rd Cycle, 31st Session People's Republic of China and the Special Administrative Regions of Hong Kong and Macao*.

UNHCR (2019a): *An asylum-seeker is someone whose request for sanctuary has yet to be processed. Every year, around one million people seek asylum,* available at https://www.unhcr.org/asylum-seekers.html. accessed 11 February 2021.

UNHCR (2019b): *Ending Statelessness*, available at https://www.unhcr.org/stateless-people.html, accessed 11 February 2021.

UNHCR (2020a): *Returnees,* available at https://www.unhcr.org/returnees.html, accessed 20 October 2021.

UNHCR (2020b): *UNHCR Statistics: China*, available at http://popstats.unhcr.org/en/overview#_ga=2.138865520.274064521.1571070371-1071579438.1571070371, accessed 15 October 2021.

UNHRC (29th March 1983): "*Montero v Uruguay*," Merits, UN Doc. CCPR/C/18/D/106/1981, Communication No 106/1981, IHRL 2549.

VCLT (23 May 1969): *Vienna Convention on the Law of Treaties*, entered into force 27 January 1980, 1155 UNTS 331.

World Bank (2019): "Forced Displacement: 'A Growing Global Crisis FAQs'", available at http://www.worldbank.org/en/topic/fragilityconflictviolence/brief/forced-displacement-a-growing-global-crisis-faqs, accessed 5 February 2020.

Zhang, Hailin (24 June 2012): 三非"外国人清理档案" *(A File on Clearing-Up of Illegal Entry, Residence, and Work)* 今晚报 *(Tonight News)*.

Zou, M. (2016): *Regulating "Illegal Work" in China, a*vailable at SSRN 2811301.

Aut dedere aut iudicare: an enabling principle of universal jurisdiction

Irene Vázquez Serrano

In international law, States have mechanisms for international judicial cooperation that, with the objective of protecting the highest values and principles of the International Community, are aimed at combating impunity for the most serious crimes against international law. Among these mechanisms is the principle of universal jurisdiction, so that the right (or obligation, if applicable), which can enable a State to exercise the universal principle is not only considered in the various international treaties or customary rules but also in that of the aut dedere aut iudicare principle. However, the principle of universal jurisdiction and the principle aut dedere aut iudicare are not the same and must not be confused. While both have a common goal (the fight against impunity), the aut dedere aut iudicare principle is one of the means through which the universal principle can be expressed.

***Keywords*:** International judicial cooperation, universal jurisdiction, aut dedere aut iudicare, impunity

Introduction

The need to activate mechanisms for the protection of persons before the commission of international crimes and the persecution and punishment of those who committed them arose particularly after World War II yet increased significantly after the 1990s. Much progress has been made since the obligation of *aut dedere aut iudicare* (seek, arrest and prosecute or, where appropriate, extradite), with more than 100 States currently adopting the necessary legislation to exercise universal jurisdiction regarding various criminal offences, fundamentally, war crimes, crimes against humanity and genocide, as well as those provided for in certain international treaties. Despite its expansion and gradual acceptance, the principle of *aut dedere aut iudicare* has not been without controversy. Not even the International Court of Justice (ICJ) has been able to shed light on this principle and to unmistakably advocate for its defense (as is demonstrated in the case related to the arrest warrant of April 11 2000, or confirmed, although indirectly, in the 2012 jurisdictional immunities case, among others). States, for their part, have also shown some concern about the institution of universal jurisdiction, especially due to its diffuse contours and the intrusions that, according to some, entails regarding the principle of non-interference (art. 2.7 UN Charter). In this respect, the idea that it is necessary to place limits on the exercise of universal jurisdiction and to link it to the existence of certain connections within the State whose courts aim to exercise it, has become widespread. Such a position has, in fact, been embraced by Spanish and Belgian legislatures, who seem very generous with the jurisdiction principle.

Therefore, clarifying the principle of universal jurisdiction under international law is essential to shed light on a mechanism whose ultimate goal is to protect human rights and to guarantee compensation for victims of international crimes.