

**THE ENTRY OF EUROPEAN REFUGEES REGULATION 1939: ITS RELATIONSHIP WITH INTERNATIONAL LAW AND CHINESE SOVEREIGNTY IN THE CONTEXT OF THE INTERNATIONAL SETTLEMENT OF SHANGHAI (1863-1941)**

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**Abstract**

*The purpose of this paper is to analyse the Entry of European Refugees Regulation (EERR) introduced in 1939 in order to stem the uncontrolled influx of Jewish refugees entering the International Settlement of Shanghai (in existence from 1863-1941). The Settlement's executive organ-the Shanghai Municipal Council- could exercise border controls on the Settlement's territory through this regulation. Since controlling borders is part of the territorial rights reserved to a sovereign state, the question this paper addresses is whether the EERR had a legal basis flowing from the treaties formed between western powers and China that lead to the creation of the International Settlement, the so-called Unequal Treaties and the Land Regulations being focused on in particular.*

*First of all, an introduction and explanation of the International Settlement's relation with the aforementioned treaties is. Next, a legal basis for the EERR is searched for in the Land Regulations, because it was the basis for most of the Municipal Council's competences, including limited adjudicative powers. The conclusion made is that the Regulation did not provide the Council competence to introduce or enforce the EERR. After this, whether the EERR was in conflict with Chinese national law is determined. Due to China being in the midst of multiple chaotic power struggles at the time, the author concludes that determining what constituted a valid legal source goes beyond the scope of the paper. Therefore, this*

**Intisari**

*Tujuan dari artikel ini adalah untuk menganalisa European Refugee Regulation (EERR) yang diperkenalkan pada tahun 1939 untuk membendung masuknya pengungsi Yahudi yang tidak terkendali memasuki Pemukiman Internasional Shanghai (yang ada sejak 1863-1941). Dewan Kota Shanghai - dapat melakukan kontrol perbatasan di wilayah Penyelesaian melalui peraturan ini. Karena mengendalikan perbatasan adalah bagian dari hak teritorial yang dimiliki oleh negara berdaulat, pertanyaan yang dibahas dalam artikel ini adalah apakah EERR memiliki dasar hukum yang mengalir dari perjanjian yang dibentuk antara kekuatan barat dan China yang mengarah pada penciptaan Penyelesaian Internasional, sehingga - menyebutkan Perjanjian Tidak Merata dan Peraturan Tanah yang difokuskan pada khususnya.*

*Pertama-tama, pengantar dan penjelasan tentang hubungan Penyelesaian Internasional dengan perjanjian-perjanjian tersebut adalah. Selanjutnya, dasar hukum untuk EERR dicari dalam Peraturan Pertanahan, karena itu adalah dasar untuk sebagian besar kompetensi Dewan Kota, termasuk kekuatan ajudikatif terbatas. Kesimpulan yang dibuat adalah bahwa Peraturan tersebut tidak memberikan kompetensi Dewan untuk memperkenalkan atau menegakkan EERR. Setelah ini, apakah EERR bertentangan dengan hukum nasional Tiongkok ditentukan. Karena Cina berada di tengah-tengah*

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issue remains not entirely conclusive.

Finally, the essay goes beyond the *lex specialis* of the Settlement to the *lex generalis* found in the case law of the Permanent Court of International Justice. Two aspects are considered. Firstly, whether the International Settlement was a sovereign entity independent from China. The essay argues that the Settlement was not independent, because Chinese sovereign rights permeated the constitutional documents of the Settlement. Secondly, if the high level of independence the Chinese informally allowed the Settlement to enjoy constituted rights the Settlement could claim under customary international law. The conclusion reached is that no such rights could be claimed, because the situation did not satisfy the requirements required by the Court.

berbagai perebutan kekuasaan yang kacau pada saat itu, penulis menyimpulkan bahwa menentukan apa yang merupakan sumber hukum yang sah melampaui lingkup makalah ini. Karenanya, masalah ini tetap tidak sepenuhnya konklusif.

Akhirnya, artikel melampaui *lex specialis* Penyelesaian ke *lex generalis* yang ditemukan dalam hukum kasus Pengadilan Permanen Keadilan Internasional. Dua aspek dipertimbangkan. Pertama, apakah Penyelesaian Internasional adalah entitas berdaulat yang independen dari Cina. Esai berpendapat bahwa Penyelesaian ini tidak independen, karena hak-hak kedaulatan Cina meresapi dokumen konstitusional Penyelesaian ini. Kedua, jika tingkat independensi yang tinggi, orang China secara informal mengizinkan Penyelesaian untuk menikmati hak-hak yang merupakan Penyelesaian yang dapat diklaim berdasarkan hukum kebiasaan internasional. Kesimpulan yang dicapai adalah bahwa tidak ada hak yang dapat diklaim, karena situasinya tidak memenuhi persyaratan yang dipersyaratkan oleh Pengadilan.

**Keywords:** Shanghai, International Settlement, Hongkew, Municipal Council, Jewish Refugees, Land Regulations, Unequal Treaties, Chinese Sovereignty, International Customary Law, PCIJ Case Law.

**Kata Kunci:** Shanghai, Penyelesaian Sengketa Internasional, Hongkew, Pengungsi Yahudi, Hukum Pertanahan, Kedaulatan Tiongkok, Hukum Kebiasaan Internasional, Kasus-Kasus PCIJ.

## A. Introduction

### a. Context

In the hyper-modern metropolis that is today's Shanghai, one can still find remnants of an era that is largely forgotten. North of Suzhou Creek lies the historic district of Hongkew. There one can still find rows of two-storey lane houses with wooden foundations that have a musky, earthy smell during Shanghai's humid summer months. Today, these houses are left abandoned with 拆 (to be demolished) painted in red over their walls. Yet, during the first half of the 20<sup>th</sup> century, Hongkew had been the nerve-centre of a vibrant community of Russian, German, Austrian, and Polish-Lithuanian Jewish refugees escaping the horrors of social unrest and anti-Semitism sweeping across Europe at the time. The International Settlement of Shanghai (the international settlement), an 1863 merger of the British and the American enclaves in Shanghai, was one of the few places in the world without any migration restrictions.<sup>1</sup> Naturally, an uncontrolled wave of Jewish refugees entering the port occurred in 1938. In 1939, the international settlement's governing body, the Shanghai Municipal Council (SMC or the council) in cooperation with the Japanese Army responded by introducing a restrictive migration policy called the Entry of European Refugees Regulation (EERR or refugee regulation). These refugee regulations played a role in drastically reducing the influx of Jews entering Shanghai, bringing the number from 15,000-16,000 in December of 1938 down to 2,000-2,500 a mere few months later.<sup>2</sup>

This leads to the research question at hand: to what extent did the Entry of European Refugees Regulation of 1939 have a legal basis under international law, particularly under the Land Regulations first issued in 1854 (also referred to as the Regulations) and case law of the Permanent Court of International Justice (PCIJ)? The legal perspective is sorely missed in the rich academic debate on the story of the international settlement's Jewish community. This text aims to contribute a legal analysis on this issue.

### b. Scope of Research

In 1938, greater Shanghai consisted of four parts: the Shanghai International Settlement (the international settlement), the Shanghai French Concession, Japanese Hongkew with its 30 000 Japanese residents, and the old Chinese city of Shanghai.<sup>3</sup> Despite this, the international settlement and its governing council (SMC) will be this essay's focal point, because the SMC's jurisdiction covered the ports where most refugees arrived<sup>4</sup>, and the SMC was arguably the most influential governing authority in the area. Consequently, the Shanghai French Concession's *Conseil d'Administration Municipale* and the Chinese governing structure of Shanghai city will not be covered. After the Battle of Shanghai in 1937, the Japanese military controlled Hongkew. Consequently, it is worthy to note that they played a significant political

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<sup>1</sup> Avraham Altman & Irene Eber. (2000). Flight to Shanghai, 1938-1940: The Larger Setting. *Yad Vashem Studies* 28, p. 12.

<sup>2</sup> David Kranzler. (1974). Restrictions against German-Jewish Refugee Immigration to Shanghai in 1939. *Jewish Social Studies* 36 (1), pp. 51 & 56-58.

<sup>3</sup> Note: The French concession and international settlement were located north and outside the walls of the old Chinese city of Shanghai which did not permit foreign residents within its walls.

<sup>4</sup> Office of Shanghai Chronicles. (2001). 境域变迁. [Website]. <http://www.shtong.gov.cn/newsite/node2/node4/node2249/node4418/node20195/node20313/node62840/userobject1ai8138.html>

role in the creation of the EERR.<sup>5</sup> The Jews covered here primarily came from Germany and Austria. The story of Jews fleeing from the Soviet Union will not be considered, as that is a separate issue.

c. **Research Method**

The essay structure and research method follows: firstly, the legal relationship, under the Treaties of Nanjing and Wangxia, between Qing China and the United Kingdom (UK) and United States (US) will be described (section B). This is to provide a legal context surrounding the origins of the international settlement. A great portion of the rest of the essay is a doctrinal analysis of the EERR in different legal settings (sections C-E). The research method utilised follows a bottom-up approach and can consequently be divided into two parts: the first part concerns the *lex specialis* written specifically with the settlement in mind (section C). Thus, the Land Regulations are focused on here, since they established the Shanghai Municipal Council (SMC), outlined its administrative structure, and defined its legislating competences. The author will look for a legal basis for the EERR in the Land Regulations, and in doing so will determine whether these regulations directly provided the SMC with mechanisms to exercise border-control on the international settlement or alternatively, with the competence to create legislation restricting migration.

The second part concerns the *lex generalis* written to apply with a broader jurisdiction. Consequently, the text will briefly look at whether Chinese immigration law played a role in relation to the validity of the EERR (section D).

Furthermore, the text will explore the EERR's legal validity under public international law embodied within the case law of the PCIJ. Since public international law was not as developed as it is today, the author considers the PCIJ to be the authority whose judgements were most widely accepted regarding what constituted public international law, taking into account the wide-ranging membership of the League of Nations.<sup>6</sup> Even so, the short life-span of the PCIJ means that certain concepts, such as customary international law, were not as fleshed out as they are today. As a result, the author chose to compare judgments and opinions relating to cases with similar circumstances to the situation at hand. In relation to this, two possible arguments in favour of the EERR's validity are considered: firstly, the argument that the settlement was a sovereign entity, therefore it had territorial rights to exercise border controls and the EERR is merely an embodiment of these rights. Secondly, the argument that due to the Chinese central-government informally providing the settlement wide-ranging autonomy the settlement could claim sovereign rights, including the right to control borders, under customary international law, because this *laissez-faire* attitude of the Chinese constituted a customary practice.

The core issue that runs throughout this paper is as follows: *de facto*, the international settlement was run autonomously from the rest of China. This makes the settlement in appearance a ceded territory, similar to the British colony of Hong Kong. Whether this is also the case *de jure* must be determined, because it shows the extent of Chinese sovereign rights

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<sup>5</sup> David Kranzler. (1976). *Japanese, Nazis & Jews: The Jewish refugee community of Shanghai, 1938-1945*. New York: Yeshiva University Press, chp. 7 & 8 (pp. 169-267) goes in great depth on the politics surrounding the EERR's creation and the Japanese Army's role.

<sup>6</sup> International Court of Justice. (2019). *Permanent Court of International Justice*. [Website]. Retrieved from <https://www.icj-cij.org/en/pcij>

applicable to the settlement, the extent of the SMC's rights, and the place the EERR occupied in this legal relationship.

**B. The International Settlement and its Basis under International Law**

The Treaty of Nanjing signed by Britain and Qing China in 1842 ended the first Opium War and forcefully opened China to trade with Britain through the establishment of five treaty ports where British merchants could freely trade with all Chinese traders.<sup>7</sup> One of these free-trade ports was the town of Shanghai.<sup>8</sup> In 1843, the Treaty of Humen was signed into force as a supplement to the Nanjing Treaty. It included providing British nationals with rights to rent or purchase land in the five ports and the acceptance of the British government's extraterritorial jurisdiction over their nationals.<sup>9</sup> Comparable rights were granted to US and French nationals via unilateral agreements with China, namely, the Treaty of Wangxia and the Treaty of Huangpu, both signed in 1844.<sup>10</sup> These rights were, through similar treaties, extended to other foreign powers in the coming century.

As more foreign settlers entered Shanghai, the British consul and Chinese authorities agreed, in 1845, on the first of many versions of the Land Regulations, containing the boundaries of the British Concession of Shanghai, competences of the British consul to levy taxes on non-British nationals within the Shanghai area, as well as basic administrative structures for managing infrastructure.

In 1854, due to an influx of Chinese refugees escaping from the violence of the Taiping Rebellion in old Shanghai city, the jurisdiction of the Land Regulations expanded over the American and French Concessions as well. A reason for this was to ensure orderly governance within the European settlements via a common executive organ: the Shanghai Municipal Council.<sup>11</sup> The council was granted power to initiate "bye-laws" to further the goals of the Land Regulations, which upon agreement from a majority of consuls established in Shanghai, and a special meeting consisting of landowners and businesspeople, would be promulgated as law (art. 11, the Regulations). While the SMC's authority and competences were limited on paper, from its establishment it strived aggressively to expand its authority: it established its own municipal police force, established its own militia, pushed for territorial expansion beyond what was agreed within the treaties, refused to accept Chinese members until 1928, and resisted Chinese jurisdictional control.<sup>12</sup>

In 1849, the French parted ways with the British and Americans and set up the *concession française*. In 1863, through the amalgamation of the British and American settlements, the international settlement was formally established.<sup>13</sup> Over time a complex web of different jurisdictions developed. States exercising extraterritorial rights in Shanghai, some until after

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<sup>7</sup> Nanjing Treaty 1842, art. 5.

<sup>8</sup> Nanjing Treaty 1842, art. 2.

<sup>9</sup> Humen Treaty 1842, artt. 7 & 9.

<sup>10</sup> Treaty of Wangxia 1844, artt. 3, 21, & 17 opened the same five ports to US merchants, enforced extraterritoriality on US citizens, and gave US nationals right to purchase land.

<sup>11</sup> Hosea Ballou Morse, LL.D. (1910). *International Relations of the Chinese Empire, volume II*. London: Longmans, Green & Co., pp.120-124.

<sup>12</sup> Robert Bickers. (1998) *Shanghaianders: The Formation and Identity of the British Settler Community in Shanghai 1843-1937. Past & Present, 159*, pp.169 & 172-174.

<sup>13</sup> Hosea Ballou Morse, LL.D. (1910). *International Relations of the Chinese Empire, volume I*. London: Longmans, Green & Co., pp.348-350.

World War II, included: Belgium, Luxembourg, Canada, the Netherlands, Norway, Portugal, Sweden, and Switzerland.<sup>14</sup> In 1906, the US Congress established, in Shanghai, the United States Court for China, where appeals had to be taken to the Court of Appeals for the Ninth Circuit in San Francisco.<sup>15</sup> The SMC itself did not answer to any one state, unlike how the Governor of Hong Kong answered to the UK parliament in London.<sup>16</sup> This granted them a degree of autonomy from western powers when it came to running the international settlement.

Almost 100 years later, in August 1939, the SMC imposed a blanket ban on all migration from Europe into the international settlement. Shortly afterwards, the EERR was published in the Municipal Gazette on October 2<sup>nd</sup>, 1939 and represented a slight relaxation of this blanket ban. It is a very short piece of legislation, simply stipulating the four categories of persons admitted entry into Shanghai, which were: persons able to provide a deposit of 400 USD; persons with immediate family residing in Shanghai; persons with a contract for employment in Shanghai; and finally, persons intending to become the spouse of a resident in Shanghai.<sup>17</sup>

### **C. Legal Basis of the EERR under the Land Regulations**

#### **a. *Explicit legal basis***

First, the question to be answered is whether the Land Regulations have provisions that explicitly give the SMC competence to exercise border controls on the international settlement. Upon consideration of each provision of the Land Regulations and its annexed bye-laws, the conclusion to be reached is that the SMC was provided authority on merely municipal matters.<sup>18</sup> Broadly speaking, the first half of the Land Regulations is related to the purchase and use of land by private owners, while the second half relates to the institutional structure of the international settlement, primarily regulating the setup of the SMC. The annexed bye-laws contain elaborate provisions on technical matters, such as wastewater management, trash collection, and the repairing of roads. There is no provision that allows the SMC to control the borders of the settlement. For that reason, the SMC would not be able to cite a provision of the Land Regulations to directly justify the EERR.

#### **b. *Implicit legal basis***

The second question is whether the Land Regulations have provisions that give the SMC competence to promulgate the EERR. Under Art. 11 of the Land Regulations, the SMC has some level of authority to create its own laws however, the provision requires that any new bye-laws must be created to further the objectives of the Land Regulations. As previously explained, these regulations purely contain provisions concerning technical matters. The objective to be derived from the regulations cannot, therefore, be anything but ensuring the smooth running of the international settlement's administration and infrastructure. Consequently, any bye-laws created by the SMC should only be to facilitate its administrative duties. Protecting the settlement's borders with the SMC's police department and *de facto* migration department did

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<sup>14</sup> Committee on the Judiciary of the US Senate. (1954). *Shanghai Municipal Council Report No. 1466, Calendar No. 1458*: Washington DC, p. 3.

<sup>15</sup> Act Creating a United States Court for China 1906, s. 3.

<sup>16</sup> Land Regulations 1907, art. 27 provided the only way through which the SMC could be held accountable. The SMC could be tried by a court of foreign consuls established each year by all treaty consuls in Shanghai.

<sup>17</sup> Entry of European Refugees Regulation 1939.

<sup>18</sup> Christopher Finlay Fraser. (1939). The Status of the International Settlement at Shanghai. *Journal of Comparative Legislation and International Law*, 21 (1), p. 45.

not flow from these rules.<sup>19</sup> The EERR was promulgated with the excuse that the refugees placed strain on the resources and infrastructure of the settlement, which, the SMC could argue, was preventing them from achieving the objectives of the regulations. However, this seems far-fetched. Moreover, the rightful authority to exercise border controls was the Chinese government. The SMC should have turned to them rather than taking the initiative and controlling the borders itself. This can be derived from Art. 1 of the regulations which details the settlement's boundaries. The SMC could have argued this article obliged it to uphold these boundaries, which in turn could justify the EERR. But, according to the same article, the settlement's borders had to be confirmed by the viceroy of Nanking and Shanghai district magistrate, both officials of the central Chinese government. Even in something as fundamental as the provision establishing the border of the settlement, Chinese consent was indispensable. This provision, among others, shows how Chinese sovereignty was ingrained in the constitutional document of the settlement, meaning the fundamental rights of the Chinese state to control its borders had not been given up in the regulations, and therefore that the SMC lacked the competence to regulate on this matter.

Art. 35 of the bye-laws might also be a provision the SMC could rely on to promulgate the EERR. It concerns persons causing a disturbance who may be punished by the SMC. There are five categories of offenders, the last and broadest of which is of interest here. It concerns those who commit acts that "legitimately come within the meaning of the term nuisance". The definition of nuisance must be derived from English tort law<sup>20</sup>. The influx of Jewish refugees arguably adversely affected the community of the international settlement, thereby falling within the ambit of public nuisance.<sup>21</sup> Yet, the SMC could not argue the EERR was created to tackle this issue, because nuisance-causers were only liable for the payment of a ten-dollar fine. Therefore, even in a worst-case scenario, where a tortfeasor refused to pay such a fine, they would only be susceptible to arrest by SMC officers to be brought before their consul.<sup>22</sup> In other words, even if Jewish refugees were causing a nuisance, the SMC would, at most, only have the competence under the Regulations to bring these refugees to be adjudicated before their consuls.

**c. Conflict between the EERR and the Land Regulations**

A final point to be made here is that where a person violated the regulations and bye-laws of the council, this person was to be brought before the consul of his or her nationality who acted as judge and determined culpability and punishment.<sup>23</sup>

Strictly speaking, Jewish refugees who did not fall within the four categories of the EERR, should have been brought before their consul. Even for refugees left stateless as a result of anti-Semitic laws, such as the Nuremberg Laws of 1935, the situation was largely the same. For them to be punished, an application of one or more consuls had to be lodged to the

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<sup>19</sup> David Kranzler. (1976). *Japanese, Nazis & Jews: The Jewish refugee community of Shanghai, 1938-1945*. New York: Yeshiva University Press, p. 274.

<sup>20</sup> Land Regulations 1907, art. 40.

<sup>21</sup> Right hon. Earl of Halsbury (Hardinge Stanley Giffard) et al., (Eds.). (1912). *The Laws of England (1<sup>st</sup> edition)*. London: Butterworth, pp. 505-506, s. 843 & pp. 511-512, ss. 855-858. The author considers public negligence to be most relevant here, and has therefore ignored private negligence.

<sup>22</sup> Land Regulations 1907, annexed bye-laws art. 38.

<sup>23</sup> Land Regulations 1907, art. 17; annexed bye-laws, art. 38.

council, who then could choose to lodge the case to the Chinese chief authority.<sup>24</sup> By enforcing the EERR through not permitting the entry of Jewish refugees into Shanghai, the SMC would be violating its obligation to bring these refugees before the competent courts. It must be noted, however, that there is no evidence that the SMC refused entry of refugees without adequate paperwork at the port. When the blanket ban came into place, ships with refugees on the high seas were still permitted to continue their journeys to Shanghai.<sup>25</sup> Refugees were only allowed to embark from a European port once their situation had been assessed by the SMC, so incidents of refugees arriving in Shanghai without correct paperwork were unlikely to occur.

#### **D. Legal Basis of the EERR under Chinese Law**

Having concluded that the Land Regulations did not provide the SMC with a legal basis to create the EERR, the question arises whether the EERR can find legitimacy in a law legislated by the Chinese state on restricting migration. This is hard to say because the Chinese political situation was incredibly volatile throughout the first half of the 20th century. To determine which legal sources applied to Shanghai is not easy since the region was subject to several regime changes. First, it was under the Qing Empire, which collapsed in 1912 after 300 years of rule. Next, Shanghai fell under the authority of the Republic of China. Between 1916 and 1927, various warlords of the Anhui Faction ruled. After this, Chiang Kai Shek's nationalist government ruled from Nanjing. Finally, Shanghai fell within territory controlled by the Reformed Government of the Republic of China from 1938 until 1940, which itself was a Japanese puppet-government.

Trying to establish valid legal sources during this chaotic period is a topic entirely of its own.<sup>26</sup> The question of whether there was a border restriction law from a Chinese perspective is therefore beyond the scope of this essay. As a result, the question of whether the EERR of 1939 was illegitimate due to conflicting with Chinese national law cannot be ruled out, although due to political reasons this seems unlikely. This is relevant to the research question, because it illustrates the difficulty in determining where the scope of the international law of the treaties and the Regulations ended and where the scope of Chinese law began within the multi-jurisdictional setup of the settlement. It also gives an indication as to why the SMC took on the role of legislating in areas where it lacked explicit competence, as was seemingly the case for the EERR.

#### **E. The EERR's Legitimacy under General International Law**

##### **a. The Product of a State Entity Exercising Sovereign Rights?**

Was the international settlement a sovereign entity separate from China under public international law? If so, the EERR would then be the product of a legitimate exercise of sovereign rights by the SMC. From the mid-19<sup>th</sup> century already, the SMC strove expansion of its authority in many fields, epitomised in the case of the External Roads Area.<sup>27</sup> This was for several reasons: rapid population growth, great industrial and economic growth, and a lack of

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<sup>24</sup> Land Regulations 1907, art. 37.

<sup>25</sup> David Kranzler. (1974) Restrictions against German-Jewish Refugee Immigration to Shanghai in 1939. *Jewish Social Studies*, 36 (1), pp. 57-60.

<sup>26</sup> Meredith Perry Gilpatrick. (1950). The Status of Law and Lawmaking Procedure under the Kuomintang 1925-46. *The Far Eastern Quarterly*, 10 (1), pp. 44-53.

<sup>27</sup> William Wirt Lockwood, Jr. (1934). The International Settlement at Shanghai, 1924-34. *The American Political Science Review*, 28 (6), pp. 1036-1037.



Chinese governmental support in areas, such as securing the settlement's borders.<sup>28</sup> Consequently, the international status of the settlement was called into question.

Despite this ambiguity, there is consensus among academics that the overall authority exercised by the SMC lacked a legal basis, and that the settlement was under Chinese sovereignty.<sup>29</sup> Art. 2 of the Nanjing treaty clearly only aimed to open Shanghai up to trade, without Chinese sovereignty over Shanghai being transferred to the UK. Looking at the Land Regulations, while it is true the SMC had some legislative and fiscal competences, at the same time Chinese sovereignty is clearly affirmed by these same Regulations. Under Art. 2 of the regulations, foreigners purchasing land within the settlement were required to send the deeds to the Chinese authorities to be sealed. Under Art. 8, foreigners were subject to land tax levied by the Chinese government. Finally, revising the contents of the regulations required confirmation by foreign representatives and the central government in Beijing under Art. 28. This demonstrates that the Chinese retained fundamental sovereign powers over the international settlement. Moreover, any powers conferred to the SMC were the result of bilateral agreements between the Chinese and foreign powers, the SMC did not have a legal role to play in these negotiations and was thus subordinate to the rules of the treaties. These documents alone, therefore, prove that the settlement's status was not entirely independent from China.

For the sake of argument, the *Greenland* case will be considered<sup>30</sup>. The PCIJ analysed the conflicting territorial claims of Denmark and Norway over Greenland and concluded the case in favour of Denmark. The Court established Danish sovereignty over Greenland relying on two grounds: firstly, that a peaceful and continuous display of state authority over the territory was present, and secondly, that other relevant countries recognised Danish sovereignty over the region. The same criteria can roughly be used to establish Chinese sovereignty over the international settlement as well. Regarding the first ground, through simply applying the aforementioned provisions in the Regulations, the Chinese maintained a peaceful and continuous display of exercising their state authority with the intention to act as the sovereign.<sup>31</sup> The first ground is, thus, established. Regarding the second ground, the PCIJ found that a statement by the Norwegian foreign minister bound Norway to recognise Danish sovereignty over Greenland.<sup>32</sup> Likewise, the foreign consuls in Shanghai explicitly recognised Chinese sovereignty on several occasions. One example being, when the British consul in 1862 responded to the SMC's proposal to make Shanghai a protectorate, he noted: "...the plan proposed is one which the land-renters cannot legitimately adopt, seeing that the territory belongs to the emperor of China, who merely accords to the foreign powers [extraterritoriality]...but retains authority over his own territory and subjects."<sup>33</sup> While consul is not of the same rank as foreign minister, its seniority certainly provides the above statement with some weight under international law. Under the *Greenland* criteria, China certainly has

<sup>28</sup> Hosea Ballou Morse, LL.D. (1910). *International Relations of the Chinese Empire, volume II*. London: Longmans, Green & Co., pp. 123-124.

<sup>29</sup> Fraser 1939, pp. 51-53; Johnstone 1937, p. 946; Lockwood 1934, p. 1033; Report of Feetham 1931 pt. v, c. iv. Please see the bibliography for the full citations.

<sup>30</sup> Legal Status of Eastern Greenland (Norway v. Denmark) (Judgement) [1933] Permanent Court of International Justice Series A/B, No. 53, ICGJ 303. Henceforth written as *Greenland case 1933*.

<sup>31</sup> *Greenland case 1933*, para. 95 & 97.

<sup>32</sup> *Greenland case 1933*, para. 176-186.

<sup>33</sup> Walter Henry Medhurst. *Mr. Medhurst to the Municipal Council, 15<sup>th</sup> July 1862* [Private Letter]. Published in the *North-China Herald* on 7<sup>th</sup> August 1862.

grounds to establish a stronger title of sovereignty over the settlement than the SMC. Meaning, the SMC would not be able to argue the EERR was a result of them exercising sovereign rights they legitimately acquired by being part of an autonomous sovereign entity.

**b. The Product of Rights Procured through Custom?**

From its establishment, the Chinese followed a hands-off approach regarding the internal matters of the international settlement.<sup>34</sup> During conflicts between Chinese in the Shanghai region, the borders of the settlement were always protected by western treaty powers or the SMC's militia e.g. the Taiping Rebellion, the Boxer Rebellion, and conflicts during the Warlord era. The Chinese tolerated this, and these conflicts did not intentionally spill into the settlement.<sup>35</sup>

Could such acceptance of the SMC exercising Chinese sovereign rights in place of the Chinese central government mean they gained a right to control the settlement's borders overtime under customary international law? The requirement for establishing customary law was as follows: "immemorial usage consisting both of an uninterrupted recurrence of accomplished facts in the sphere of international relations and of ideas of justice common to the participating States and based upon the mutual conviction that the recurrence of these facts is the result of a compulsory rule".<sup>36</sup> Applied here, toleration would not bring forth rights for the SMC, because a span of 100 years is too short to fulfil the requirement that a custom must be immemorial. Besides, the ideas of justice between the SMC and Chinese were certainly not common. For this condition to be fulfilled, the SMC must have closed the settlement's borders believing it acted under a compulsory rule, meanwhile China must have shown recognition of the SMC exercising its right to border control as lawful, through external action or constant abstentions.<sup>37</sup> Looking at the extensive proceedings leading to the creation of the EERR, the overall impression to be had is that the decision to promulgate the regulation was not so much based on a rule requiring the SMC to act, as it was based on political pressure from various interest groups, in particular the local Sephardi Jewish community and Japanese community, for the SMC to uphold this restriction.<sup>38</sup> The same applies to the SMC's actions during other conflicts. Regarding China's reactions, there is no evidence that they expressly recognised these actions as lawful. Arguably, consistent practice of abstentions by the Chinese in exercising their territorial right to border-control is present. This, however, does not influence the conclusion that the SMC did not derive territorial rights through customary law.<sup>39</sup>

**F. Conclusion**

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<sup>34</sup> Christopher Finlay Fraser. (1939). The Status of the International Settlement at Shanghai. *Journal of Comparative Legislation and International Law*, 21 (1), pp. 45-46.

<sup>35</sup> Hosea Ballou Morse, LL.D. (1910). *International Relations of the Chinese Empire, volume II*. London: Longmans, Green & Co., p. 128.

<sup>36</sup> Note: the author chose to use the criteria mentioned in Judge Negulesco's dissenting opinion of the Jurisdiction of the European Commission advisory opinion (1927). This is because the case tackles a similar situation where a non-state entity with its own legislative and executive powers potentially infringed upon the sovereignty of Romania.

<sup>37</sup> Jurisdiction of the European Commission of the Danube between Galatz and Braila (France and others v Romania) (Opinion) [1927] Permanent Court of International Justice Series B, No. 14, ICGJ 281, p. 36.

<sup>38</sup> David Kranzler. (1976). *Japanese, Nazis & Jews: The Jewish refugee community of Shanghai, 1938-1945*. New York: Yeshiva University Press, chp. 7 & 8 (pp. 169-267)

<sup>39</sup> Jurisdiction of the European Commission of the Danube between Galatz and Braila (France and others v Romania) (Opinion) [1927] Permanent Court of International Justice Series B, No. 14, ICGJ 281, Judge Negulesco dissenting opinion, p. 105.

a. **Addressing the Research Question**

The research question addressed in this article is as follows: to what extent did the Entry of European Refugees Regulation of 1939 have a legal basis under international law, in particular the Land Regulations and case law of the PCIJ? Looking at the Land Regulations, no legal basis could be found giving the SMC direct competence to control the borders of the international settlement. The provision giving the SMC competence to create legislation was too narrow to use for justifying the creation of the EERR. The EERR, therefore, lacked legal basis within the Land Regulations. Moreover, through enforcing the EERR the SMC was potentially violating the Land Regulations by not bringing refugees before their own consular courts. Whether the EERR was invalid due to conflicting with Chinese immigration law is difficult to assess due to the ambiguity surrounding what constituted valid legal sources in China.

In relation to the PCIJ's case law, the next question posed was whether the international settlement was a sovereign entity giving the SMC territorial rights to control borders, thereby justifying the EERR. Under the *Greenland* criteria, Chinese sovereignty was strongly established within the settlement's legal fabric, meaning the SMC could not claim such rights since China rightfully held onto them.

The final question asked, was whether the Chinese practice of tolerance in relation to the SMC exercising sovereign territorial rights could amount to the SMC being able to claim these rights under customary international law. The conclusion was that the timeline within which the practice was conducted was too short and that the SMC lacked *opinio juris*. Instead, it acted often more out of practical necessity or political pressure. Consequently, the SMC could not derive customary rights under this practice. With the research question in mind, the conclusion is that the EERR lacked any proper legal basis and was thus not enforceable by the SMC under international law.

b. **Lessons to be Learnt**

Generally it is important to understand the historic relationship between Asia and Europe at the height of colonialism. Not only did the existence of the international settlement coincide with the apex of European imperialism between the mid-19th and mid-20th centuries, the settlement was also under the shared-control of the largest colonial powers of the time. Therefore, the settlement acts as a petri dish representing the ruling methods of colonial powers across the world in one small area. The EERR epitomises how these methods sometimes emphasised practicality over legal certainty, efficiency over justice, centralised-governance over checks and balances. While it is important to acknowledge the suffering and injustice the EERR may have caused to Shanghai's Jewish refugees, it is also important to place the EERR in a bigger picture of Western dominance over a vulnerable China.. If former colonial powers genuinely wish to build bonds with former Asian colonies in general, and with China in particular, it is perhaps wise to meditate and communicate together on this increasingly hidden away and ignored past. Only by doing so can the long journey of healing and restoring trust commence.

To conclude, this author wishes to call to action scholars and researchers from the east and the west to start a dialogue. In these turbulent times of change on a global scale it is important to form new partnerships that are productive and meaningful for all parties involved. This essay's role is to provide a first step within the legal academic community towards this dialogue.

Additionally, within the diplomatic community strong ties are being formed as exemplified by the agreements finalised by the European Union with certain Asian partners such as Vietnam, Singapore, South-Korea, and Japan.<sup>40</sup> The author hopes such relations to expand further to include, for example China and other ASEAN countries including Indonesia. The author also hopes for these ties to deepen as well, to not only cover matters related to trade and economics, but also cover matters related to culture and society as a whole. For this to occur, dialogue of the past is essential and has the potential to open up many new possibilities within the legal realm and beyond on a regional and international scale.

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<sup>40</sup> European Commission. (2019). *Negotiations and agreements*. [Website]. Retrieved from [https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#\\_in-place](https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_in-place)

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