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## The Refugee Convention and the Convention Against Torture: Failures of China and the United States

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# THE REFUGEE CONVENTION AND THE CONVENTION AGAINST TORTURE: FAILURES OF CHINA AND THE UNITED STATES

## INTRODUCTION

In mid-August, 2012, Chinese officials systematically forced Kachin refugees back across the border to Myanmar and back to the conflict, abuse, and lack of basic resources that they had fled.<sup>1</sup> The Chinese government reportedly contacted the ethnic Kachin government, or Kachin Independence Organization (“KIO”), to request that officials on the border assist in transporting refugees.<sup>2</sup> The refugees were loaded on buses and transported back across the border to Myanmar and their makeshift camps and temporary homes were destroyed.<sup>3</sup> Once in Myanmar, the refugees could not simply return to their old homes because Burmese government troops now occupied the areas from which the refugees fled.<sup>4</sup> Once again the refugees tried to make a new home in a place that lacked basic resources by living in makeshift camps with thousands of internally displaced people.<sup>5</sup> Despite recent human rights developments in Myanmar,

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1. Luisetta Mudie, *Refugee Repatriation Confirmed*, RADIO FREE ASIA (Aug. 28, 2012), <http://www.rfa.org/english/news/burma/kachin-08282012142614.html> (translating a report by Qiao Long). Chinese officials denied rights groups access to the refugee camps, but some nongovernment and religious aid groups were allowed in to the refugee camps. *Id.* Rights groups estimate that 7000-10,000 people fled the Kachin province for Yunnan. *Id.*

2. *Id.* Calls to Chinese officials were unanswered, and official media out of Beijing denied allegations of forced repatriation. *Id.* But Kachin officials report that “[t]he Chinese came to our government and said they [Kachin refugees] should all go back now, because there was no longer any sound of gunfire, and that the fighting had stopped. They were adamant that [our people] should leave.” *Id.* The Kachin Independence Organization (“KIO”) was founded in 1961 and operates much like an independent government with departments of health, education, and justice, among others. Since the founding of the KIO there has been armed conflict between the Burmese government and the Kachin Independence Army (“KIA”). A ceasefire between KIO and the Burmese government signed on February 24, 1994, granted KIO autonomy over a region of the Kachin State, with other territories controlled by the Burmese government and others under shared control. HUMAN RIGHTS WATCH, “UNTOLD MISERIES”: WARTIME ABUSES AND FORCED DISPLACEMENT IN KACHIN STATE 23–24 (2012), available at [http://www.hrw.org/sites/default/files/reports/burma0312ForUpload\\_1.pdf](http://www.hrw.org/sites/default/files/reports/burma0312ForUpload_1.pdf). The ceasefire did not end the rights abuses by either party. *Id.* at 25. Although, in 2010, elections took place in Myanmar for the first time in 20 years, they were “neither free nor fair.” *Id.* at 27. On June 9, 2011, the Burmese government ended the ceasefire and began a military offensive in Kachin State. *Id.* at 28. For more detail and history of the human rights abuses of the Burmese government and army, see U.S. DEP’T ST., 31 ANN. HUM. RTS. REP. 673 (2007), and U.S. DEP’T ST., 33 ANN. HUM. RTS. REP. 801 (2010).

3. Mudie, *supra* note 1.

4. *Id.* The troops took everything of value to the people when they occupied an area. *Id.*

5. *Id.* A Kachin government official said, “[m]ost of them, after they arrived back in Burma, went to areas that are under our control. The conditions there are very difficult, as everything is very

the internally displaced Kachin people still face serious restrictions on their freedoms.<sup>6</sup>

Several international treaties pertain to the treatment of refugees. The most extensive are the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”)<sup>7</sup> and the 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture”).<sup>8</sup> Under the Refugee Convention, party states, including China, are prohibited from expelling or “*refoul-ing*”<sup>9</sup> a refugee where their life or freedom may be threatened.<sup>10</sup> The Convention

scarce. It’s not easy for them to find somewhere to live or food to eat.” *Id.* Refugees were given the option to return to KIO- or Burmese government-controlled territory, but not the option to stay in China. *China: Refugees Forcibly Returned to Burma*, HUMAN RIGHTS WATCH (Oct. 25, 2012, 11:15 AM), <http://www.hrw.org/news/2012/08/24/china-refugees-forcibly-returned-burma>. The KIO is setting up camps in its territory for internally displaced people, including the refugees that have been forcibly returned, however these camps are seriously inadequate. *Id.* HRW reported that,

There are over 85 camps of internally displaced people in Kachin State, housing an estimated 75,000 people who lack adequate humanitarian aid. Approximately 16 of the camps, in KIO-controlled areas, are already home to at least 55,000 Kachin, and there are food shortages at some of those sites. All camps in KIO territory are inaccessible to UN agencies because of restrictions imposed by President Thein Sein’s office under the pretense of security concerns. Local Kachin-led organizations have attempted to fill the gap, providing food, clothing, shelter, and medicine despite limited resources. Assistance from UN agencies and other humanitarian organizations is provided regularly to displaced Kachin in 70 locations in government-controlled areas, but that too remains inadequate due to limited resources and the blockage of assistance.

*Id.*

6. HUMAN RIGHTS WATCH, *supra* note 2, at 18. In a recent HRW report, it warned, It is essential that support for recent reforms not lead to international complacency about the serious human rights violations still plaguing Burma. Legal and political changes are only beginning to make headway and there is a long way to go before all Burmese benefit from them. Among those who have seen little improvement to date are many ethnic minority populations, with conditions considerably worsening in Kachin State. As long as ethnic minority populations continue to suffer abuses, Burma’s prospects for reconciliation and development will be stifled.

*Id.*

7. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]; supplemented by Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

8. United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

9. A principle known by its French nomenclature *non-refoulement*.

10. Refugee Convention, *supra* note 7, at 6. The Refugee Convention states, “[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” *Id.* art. 33(1). The only exception to the non-refoulement principle is found in article 33(2) which states,

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is,

against Torture prohibits return of a person to another state when there are substantial grounds to believe they would be in danger of torture.<sup>11</sup>

Despite Chinese officials' insistence that conflict in Myanmar has subsided, human rights groups on the ground in Myanmar report a very different situation. Reports indicate that there is continued violent conflict between the Burmese government and the ethnic Kachin government, resulting in thousands of internally displaced people living in inadequate makeshift camps.<sup>12</sup> China has fallen short on its international obligations with regard to refugees prior to the present Kachin situation. In 2002, China labeled North Koreans that fled to China as "economic migrants" or "illegal immigrants," instead of "refugees," thus not affording them the protections refugees are entitled to under international law.<sup>13</sup>

or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

*Id.* art. 33(2).

11. Convention Against Torture, *supra* note 8. Article 3 states,

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

*Id.* art. 3.

12. *See China: Refugees Forcibly Returned to Burma*, *supra* note 5. HRW refers to those who have fled Kachin as refugees and believes China has violated its non-refoulement obligation, because "all have fled armed conflict and rights abuses in Kachin State and would face serious threats to their lives if returned to Kachin State." *Id.* In June 2011, a seventeen-year ceasefire between Burma and the KIO ended and hostilities began. HRW has documented that, "since June 2011 the Burmese army has attacked Kachin villages, razed homes, and pillaged properties. Burmese soldiers have threatened and tortured civilians during interrogations, raped Kachin women, used antipersonnel mines, and conscripted forced laborers on the front lines, including children as young as 14." *Id.* *See also* Letter from Sophie Richardson, HRW China Director, & Bill Frelick, HRW Refugee Program Director, to Yang Jiechi, Minister of Foreign Affairs, People's Republic of China (Sept. 5, 2012) [hereinafter HRW China Letter] (available at [http://www.hrw.org/sites/default/files/related\\_material/Kachin%20pushbacks%20letter%20to%20Chinese%20FM%20August%202012%20Final%20SR\\_0.pdf](http://www.hrw.org/sites/default/files/related_material/Kachin%20pushbacks%20letter%20to%20Chinese%20FM%20August%202012%20Final%20SR_0.pdf)). For a more in-depth discussion, see HUMAN RIGHTS WATCH, *supra* note 2.

13. Yeo Hoon Julie Park, *China's "Way Out" of the North Korean Refugee Crisis: Developing a Legal Framework for the Deportation of North Korean Migrants*, 25 GEO. IMMIGR. L.J. 515, 516 (2011). By not labeling the North Korean migrants as refugees, China was not legally required to afford them the protections refugees are entitled to under international law. There is a difference between an economic migrant and a refugee; however, in some circumstances, an economic migrant may also be a refugee. As the *Handbook on Procedures and Criteria for Determining Refugee Status*, published by the UNHCR, says,

The distinction between an economic migrant and a refugee is, however, sometimes blurred in the same way as the distinction between economic and political measures in an applicant's country of origin is not always clear. Behind economic measures affecting a person's livelihood there may be racial, religious or political aims or intentions directed against a

This Note will focus specifically on China's violations of the non-refoulement principle and its failure to carry out proper refugee status determinations ("RSD"). It will also consider the practices of the United States, which has also been criticized as violating the non-refoulement principle. Part I will discuss the background of China's refugee policy, including China's treatment of the North Korean refugees in 2002. Part II will discuss the current treaty obligations that China is failing to meet with its forced repatriation of the Kachin refugees and the international response to its actions. Part III will discuss similar failings of the United States of the non-refoulement principle and RSD requirement, in addition to the international response to it. Finally, Part IV will discuss suggested remedies, including the possibility of establishing a third-country asylum system.

### I. PAST REFUGEE CRISES IN CHINA

This is not the first time China has failed to satisfy its non-refoulement obligations under international law.<sup>14</sup> In 2002, China refused to recognize North Koreans who fled across the border as refugees and forcibly repatriated them. The North Korean government considered all of those who fled "traitors."<sup>15</sup> Those forcibly repatriated faced imprisonment and torture upon return to North Korea.<sup>16</sup> Even if the North Koreans did not leave because of fear of persecution, but rather for economic reasons, they became refugees after they left North Korea, or *refugees sur place*, because of the risk of persecution upon return to their home country.<sup>17</sup>

By refusing to recognize the North Korean defectors as refugees, China sidestepped its obligation under the Refugee Convention to protect those

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particular group. Where economic measures destroy the economic existence of a particular section of the population (e.g. withdrawal of trading rights, or discriminatory or excessive taxation of, a specific ethnic or religious group), the victims may according to the circumstances become refugees on leaving the country.

U.N. High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 63, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992) [hereinafter *Handbook*].

14. See Alyce S. Ahn, *Prosecution or Persecution: Contradictions Between U.S. Foreign Policy & the Adjudication of Asylum Claims Involving the Harboring of North Korean Refugees*, 25 GEO. IMMIGR. L.J. 311 (2010); see, e.g., Park, *supra* note 13.

15. Ahn, *supra* note 14, at 316 (2010).

16. *Id.*

17. HUMAN RIGHTS WATCH, THE INVISIBLE EXODUS: NORTH KOREANS IN THE PEOPLE'S REPUBLIC OF CHINA (2002), available at <http://www.hrw.org/reports/2002/northkorea/norkor1102.pdf>. Since North Korea has criminal prohibitions against citizens leaving without the government's permission, it considers those that left "traitors" and upon return they face severe restrictions to their freedoms and even death. Ahn, *supra* note 14, at 316.

that fled from North Korea.<sup>18</sup> This action brought condemnation from international organizations and human rights activists.<sup>19</sup> Simple urging to come into compliance by international organizations has been “unproductive and impractical in bringing any real change to China’s policy [toward refugees].”<sup>20</sup> No concrete action was taken against China for its violations of the Refugee Convention and the Convention Against Torture.

## II. CURRENT OBLIGATIONS AND KACHIN REFUGEES

### A. *Refugees and the China/Myanmar Situation*

Once again, there are outcries of China violating human rights and international treaties. On August 19, 2012, China began mass evictions of refugees from the Kachin province of Myanmar.<sup>21</sup> This caused Human Rights Watch<sup>22</sup> (“HRW”) to send a letter expressing concern about the Chinese government violating several international treaties, including the Refugee Convention<sup>23</sup> and the Convention Against Torture,<sup>24</sup> both of which have been ratified by China. HRW reminded China that “refugees cannot be returned to a place where lives or freedom would be threatened

18. HUMAN RIGHTS WATCH, *supra* note 17.

19. Park, *supra* note 13, at 516 (2011). As in the most recent incident, international organizations urged China to come into compliance with international law but made no threats of legal action. *Id.* at 516–17. In addition to drawing criticism from the international press and the UNHCR, China’s refusal to protect North Koreans as refugees led to disputes with other neighboring countries. In at least two incidents Chinese police entered the South Korean and Japanese consulates in China to obtain North Koreans who had fled there for protection. Diplomats and security at both consulates attempted to resist. Japan filed a formal complaint requesting the individuals removed be returned and a detailed explanation be provided. *Id.* at 525. These incidents also sparked accusations of China violating the Vienna Convention’s territorial protection of foreign consulates. *Id.*; Vienna Convention on Consular Relations art. 31, Mar. 19, 1967, 21 U.S.T. 77, 596 U.N.T.S. 261.

20. Park, *supra* note 13, at 516.

21. *See, e.g., China: Refugees Forcibly Returned to Burma*, *supra* note 5. In that one week, Chinese officials forcibly repatriated at least 1000 Kachin refugees to Myanmar. China has plans of deporting an additional 4000 Kachin refugees. *Id.* Similar to when China refused to recognize North Koreans as refugees in part to avoid antagonizing North Korea, China also has policy considerations in the current situation based on its relationship with Myanmar. In 2011 China became the largest foreign direct investor in Myanmar, investing in energy and natural resource extractions projects. Some of these projects have resulted in forced displacement and other human rights abuses in the Kachin State. HUMAN RIGHTS WATCH, ISOLATED IN YUNNAN: KACHIN REFUGEES FROM BURMA IN CHINA’S YUNAN PROVINCE 19 (2012), available at [http://www.hrw.org/sites/default/files/reports/china0612\\_forinsert\\_forUpload.pdf](http://www.hrw.org/sites/default/files/reports/china0612_forinsert_forUpload.pdf).

22. HRW China Letter, *supra* note 12.

23. Refugee Convention, *supra* note 7.

24. Convention Against Torture, *supra* note 8.

and that no person can be returned to a place where they would face the prospect of being tortured.”<sup>25</sup>

An individual seeking asylum cannot be forcibly returned to the country they fled unless a fair and impartial RSD finds that the principles of non-refoulement will not be violated (a requirement of the Refugee Convention) and the person will not face the threat of torture (a requirement of the Convention Against Torture).<sup>26</sup> China, however, does not have a RSD procedure in place. Countries that do not have their own RSD procedure typically allow the United Nations High Commissioner for Refugees (“UNHCR”) into the country to perform the RSD.<sup>27</sup> There is no evidence that a proper RSD was done before the Kachin refugees were forcibly returned to Myanmar.<sup>28</sup>

#### B. Requirements of an RSD Procedure

The Refugee Convention defines a “refugee” as someone who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>29</sup>

25. HRW China Letter, *supra* note 12, at 2.

26. *Id.* The RSD procedure is used to determine whether the person would face the risks of a threat to his or her life or freedom, or the chance of being tortured if he or she were returned to his or her home country. *Id.*

27. *Id.* Since there is no evidence of an RSD procedure in place in China, there is no legal basis for the Chinese officials claims that the persons from the Kachin Province of Myanmar are not refugees and do not deserve protection as such.

28. *Id.* There is evidence to support a belief that the Kachin refugees’ lives and freedoms would be threatened if they returned to Myanmar. Since the conflict resumed in June 2011, the Burmese army has committed various human rights violations including killing civilians, committing torture and rape, using antipersonnel landmines, and conscripting child soldiers. HUMAN RIGHTS WATCH, *supra* note 2, at 36.

29. Refugee Convention, *supra* note 7, art. 1(A)(2). The January 1, 1951, date is only relevant in a small number of cases. The *Handbook* explains,

With the passage of time and the emergence of new refugee situations, the need was increasingly felt to make the provisions of the 1951 Convention applicable to such new refugees. As a result, a Protocol relating to the Status of Refugees was prepared. After consideration by the General Assembly of the United Nations, it was opened for accession on 31 January 1967 and entered into force on 4 October 1967. By accession to the 1967

According to the *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (“*Handbook*”), subjective fear of persecution is required to be the primary inquiry in determining refugee status.<sup>30</sup> The *Handbook* also makes clear that implementation is up to the governments of the party states.<sup>31</sup> While the *Handbook* provides some guidance, there is still much debate over how to interpret specific terms.<sup>32</sup> There are also a wide variety of procedures used, since it is up to each party state to establish their own RSD procedure.<sup>33</sup>

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Protocol, States undertake to apply the substantive provisions of the 1951 Convention to refugees as defined in the Convention, but without the 1951 dateline. Although related to the Convention in this way, the Protocol is an independent accession to which is not limited to States parties to the Convention.

*Handbook*, *supra* note 13, ¶¶ 8–9. Therefore, only in states that are party to the 1951 Refugee Convention but not the 1967 Protocol is the January 1951 date relevant. See HANDBOOK at Part One, Chapter II B(35).

30. *Handbook*, *supra* note 13, ¶ 37. The *Handbook* states:

The phrase ‘well-founded fear of being prosecuted’ is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by categories (i.e. person of a certain origin not enjoying the protection of their country) by the general concept of ‘fear’ for a relevant method. Since fear is subjective, the definition involved a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant’s statements rather than a judgment on the situation prevailing in his country of origin.

*Id.* The subjective fear refers to individuals who have actually been persecuted and those that feel they risk persecution in the future. *Id.* ¶ 45. Events need to be considered in the cumulative. The *Handbook* explains:

[A]pplicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on “cumulative grounds.” Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim of refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.

*Id.* ¶ 53. See also William Sanchez Adalsinda Lomangino, *Political Asylum and Other Forms of Relief*, 66 FLA. B.J., May 1992, at 18, 20 (1992).

31. “[T]he determination of refugee status under the 1951 Convention and the 1967 Protocol, is incumbent upon the Contracting State in whose territory the refugee applies for recognition of refugee status.” *Handbook*, *supra* note 13, at Foreword.

32. Stacy Huber, *Refugees in the U.S.: Protected From Persecution, or Vulnerable to Unjust Removal?*, 20 ST. JOHN’S J. LEGAL COMMENT. 199, 207 (2005).

33. The *Handbook* states only that, “Determination of refugee status is a process which takes place in two stages. Firstly, it is necessary to ascertain the relevant facts of the case. Secondly, the definitions of the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained.” *Handbook*, *supra* note 13, ¶ 29.

Neither the Refugee Convention nor the Convention Against Torture mentions credibility of the refugee as something to be considered during the RSD procedure.<sup>34</sup> However, a majority of refugee status rejections, including RSDs conducted by the UNHCR, occur because it was determined that the applicant lacked credibility.<sup>35</sup> Even though credibility is not a part of the definition of a refugee, the confusion within the UNHCR itself has created another loophole utilized by countries to reject refugee applications while still claiming to be honoring their international commitments.<sup>36</sup> On the other hand, some party states specifically clarify that someone cannot be rejected as a refugee because he or she lacks credibility.<sup>37</sup> “Benefit of the doubt” is a frequently used phrase in refugee law, but many UNHCR agents and party states appear to not actually give refugees the benefit of the doubt.<sup>38</sup>

34. Michael Kagan, *Is Truth in The Eye of The Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 368 (2003).

35. *Id.* A study of ten weeks in 2002 at the UNHCR field office in Cairo, Egypt—the field office with the largest RSD caseload—showed that 77% of rejections of refugee status were attributed to a lack of credibility of the applicant. *Id.* at 369. For more information see Michael Kagan, *Assessment of Refugee Status Determination Procedure at UNHCR’s Cairo Office 2001–2002* (Am. Univ. in Cairo Forced Migration and Refugee Studies Working Paper, 2003), available at <http://www.aucegypt.edu/GAPP/cmrs/reports/Documents/RSDReport.pdf>. With RSD procedures conducted by individual party states also a majority, or at least plurality, or rejections also are because of a lack of credibility. Kagan, *supra* note 34, at 368.

36. “There is no exclusion clause in the Refugee Convention for people who fabricate testimony or who commit perjury.” Kagan, *supra* note 34, at 367.

37. The New Zealand Refugee Status Appeals Authority clarified that lack of credibility does not lead to a rejection.

A lack of credibility might not allow a meaningful finding of facts to be made with regard to incidents of the history or past persecution mentioned by an applicant. However, some aspects of the claim can still remain intact, such as (on the facts of the case) the fact that the three applicants were of Tamil racial background and the principle claimant belonged to a group made of young Tamil males living in the Northern Province of Sri Lanka. Those facts were not tainted by the lack of credibility. The determination of a well-founded fear of persecution had to be made by reference to the “untainted” facts.

*Refugee Appeal Re SA* (unreported) NZ Refugee Status Appeals Authority at Auckland No. 1/92 at Assessment of Credibility, 23 January 1992 (N.Z.).

38. As Kagan said:

UNHCR recognized that people who flee persecution are not likely to arrive with documents to corroborate every central aspect of their claims. In order to prevent people in danger of persecution from being refused protection because they cannot access evidence, the benefit of the doubt rule establishes that uncorroborated testimony by refugee claimants can be enough to prove that they meet the refugee definition.

Kagan, *supra* note 34, at 371–72.

### 1. *China's Non-Compliance with the RSD Requirement*

In June 2011, fighting renewed in the Kachin state of Myanmar between the Burmese military and the Kachin Independent Army (“KIA”).<sup>39</sup> HRW estimates that 75,000 Kachin people have been forced from their homes.<sup>40</sup> Approximately 10,000 fled across the border to the Yunnan Province in China.<sup>41</sup> China has no RSD procedure and did not allow the UNHCR access to conduct refugee status determinations.<sup>42</sup> HRW broadly defines Kachin people who have fled to China since June 2011 as refugees because “all have fled armed conflict and rights abuses in Kachin State and would face serious threats to their lives if returned to Kachin State.”<sup>43</sup> The absence of a formal refugee determination does not have any legal effect of negating their status as refugees under international law.<sup>44</sup> By forcibly repatriating the Kachin refugees without a fair and impartial RSD, China is violating the non-refoulement provisions of the Refugee Convention and the Convention Against Torture.<sup>45</sup>

39. For an overview and history of the conflict see HUMAN RIGHTS WATCH, “UNTOLD MISERIES”: WARTIME ABUSES AND FORCED DISPLACEMENT IN KACHIN STATE (2012). Myanmar is one of the most ethnically diverse countries and political and ethnic disputes began when the country was seeking independence from Britain in 1946. *Id.* at 22. The original independence agreement brokered, the Panglong Agreement, guaranteed a federal union and autonomous ethnic states. *Id.* at 22–23. However, the guarantees of the Panglong Agreement were never realized and civil conflict began. *Id.* at 23. The government ended a seventeen-year ceasefire in June, 2011, when it began a major military offensive in the Kachin State. *Id.* at 28. Leading up to the military offensive, the KIA detained three Burmese soldiers in early June, 2011. The following day the Burmese military attacked the KIA and detained KIA soldier Chang Ying. *Id.* A prisoner exchange agreement was reached; however the Burmese military only handed over Chang Ying’s personal effects, not his person. The next day, Chang Ying’s body was handed over; the government claimed he died from wounds sustained during battle. *Id.* The KIA claimed Chang Ying was taken from an office, not during the battle, and that his body showed signs of torture. After this incident the conflict again escalated quickly. *Id.*

40. *Isolated in Yunnan*, *supra* note 21, at 4.

41. *Id.* The military in Myanmar has been attacking Kachin villages, killing and raping Kachins, and utilizing forced labor. *Id.*

42. *Id.* at 7.

43. *Id.*

44. *Id.* The *Handbook* clarifies that a refugee determination is merely a formality. It says:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. *Recognition of his refugee status does not therefore make him a refugee but declares him to be one.* He does not become a refugee because of recognition but is recognized because he is a refugee.

*Handbook*, *supra* note 13, ¶ 28 (emphasis added).

45. China’s treatment of the refugees has also violated international law in other ways. In addition to the forced deportation, China has not provided government assistance or allowed international humanitarian agencies into China to provide food and other resources to the refugees. The refugees have been living in makeshift, unrecognized refugee camps. Most child refugees do not

### C. *International Response to China's Violations*

The letter from HRW both criticized the lack of an RSD procedure and asserted that Chinese officials' claims that fighting in the Kachin Province was subsiding did not accurately reflect the situation.<sup>46</sup> The HRW letter urged China to come into compliance with international law. However, it made no threats of legal international action if China did not.

In addition to international organizations and human rights activists criticizing China's past and current treatment of refugees, the United States has also been critical of Chinese practices.<sup>47</sup> However, the United States has been much more forgiving of China's violations of international obligations for policy reasons.<sup>48</sup>

A report prepared for the U.S. Congress about the North Korean refugee situation in China pointed out that by forcibly deporting persons that are arguably refugees, China may have violated the non-refoulement

have access to school and must work to help provide for their families. This has led to many employer abuses of the refugees. HUMAN RIGHTS WATCH, *supra* note 21, at 6–8. Several of the recommendations HRW has made for China to come into compliance with their obligations under international law are:

Institute a temporary protection regime for Kachin refugees in view of ongoing armed conflict and widespread human rights violations in northern Burma. The temporary protection regime should grant Kachin refugees a time-bound but renewable status that protects them against refoulement, allows them to remain in China, and permits them to work and to receive humanitarian assistance as needed. Chinese authorities should conduct periodic and transparent assessments of conditions in Burma and renew the temporary protection regime until conditions in Burma allow the Kachin to return to their homes in safety and dignity. . . . Provide humanitarian assistance to meet the basic needs of the Kachin refugee population in Yunnan Province, including adequate shelter, food, potable water, sanitation, basic health care, and education for children. Allow unhindered access to nongovernmental and community-based organizations to provide humanitarian assistance to the refugee population in Yunnan Province. Allow the United Nations High Commissioner for Refugees full and unfettered access to all refugees in Yunnan Province. Investigate allegations of refoulement of Kachin refugees from Chinese territory and at the border back to Burma. . . . Ensure that refugee children in Yunnan Province obtain free primary education as well as access to other education as provided in international law. . . . Ensure that future returns of refugees to Burma take place in accordance with international standards on a voluntary basis with attention to the safety and dignity of the returning population.

*Id.* at 14–15.

46. HRW China Letter, *supra* note 12, at 2. Residents of the Kachin Province and aid workers in the area reported to HRW that the fighting between the Burmese army and the rebel Kachin Independence Army was continuing and thousands more people were being displaced. *Id.*

47. *See, e.g.,* RHODA MARGESSON, EMMA CHANLETT-AVERY, ANDORRA BRUNO, CONG. RESEARCH SERV., RL34189, NORTH KOREAN REFUGEES IN CHINA AND HUMAN RIGHTS ISSUES: INTERNATIONAL RESPONSE AND U.S. POLICY OPTIONS 25 (2007).

48. *Id.* at 12. The United States contrasts China's violations with its role in maintaining the stability in the region and exerting leverage over North Korea. *Id.*

principle of the Refugee Convention.<sup>49</sup> The report indicated that even if a person may not properly be a refugee when they leave a country, they become a refugee *sur place* if they face the risk of persecution if returned.<sup>50</sup>

The United States also considered the policy reasons why China was not treating the North Korean migrants as refugees.<sup>51</sup> While pointing out China's violations of its international obligations, the report for Congress hinted that it may be best to excuse China from their violations of international law for policy reasons, such as allowing China to ensure North Korea is not antagonized.<sup>52</sup> The idea that foreign policy and political diplomacy supersede international legal obligations is one reason for the United States' lack of action in response to China's violations of international law.

### III. A COMPARISON TO THE UNITED STATES

#### A. *The United States' Shortcomings*

According to U.S. law, the United States may circumvent its obligations under international law by removing a refugee to a third country if that country agrees to provide protection.<sup>53</sup> In keeping with its

49. *Id.* Non-refoulement prohibits return of a refugee if his life or freedom would be threatened, unless the refugee poses a significant security threat to the country or has been convicted of a serious crime. *Id.*

50. *Id.* at 11. A proper refugee status determination does not only consider whether the person would be classified as a refugee at the time they left a country, but also if they have become a refugee *sur place* because of possible repercussions of them leaving. *Id.*

51. *Id.* at 12. Since China is a formal ally of North Korea, it had an incentive to not act against the wishes of the North Korean government. China had an incentive to avoid any political or economic changes that could destabilize the region. Due to North Korea's nuclear weapons program, China wanted to be careful not to antagonize it. *Id.*

52. *Id.*

53. According to the Immigration and Nationality Act, an alien may not apply for asylum if:

[T]he Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection. . . .

8 U.S.C. § 1158(a)(2)(A). There is nothing in the Refugee Convention or the Convention against Torture that authorizes this third country exception. Arguably, it violates the burden-sharing responsibilities set out in the Refugee Convention, the Convention Against Torture and the United Nations Charter. See Susan Musarat-Akram, *The World Refugee Regime in Crisis: A Failure to Fulfill the Burden-Sharing and Humanitarian Requirement of the 1951 Refugee Convention*, 93 AM. SOC'Y

usual practice, when the United States ratifies international laws and treaties, which it often does not, the ratification is conditioned on the supremacy of the U.S. Constitution.<sup>54</sup> By declaring that United States laws concerning refugees and asylum are supreme, the United States attempts to justify its noncompliance with its international obligations by relying on the idea that international rights are not self-executing.<sup>55</sup>

Other common law party states look to the top courts of other party states when making decisions about refugee rights. However, prior to the 1999 decision in *INS v. Aguirre-Aguirre* the United States Supreme Court never made any reference to the practices of other party states.<sup>56</sup> In *Aguirre-Aguirre*, the Court referred to both the *Handbook* and a decision from the House of Lords.<sup>57</sup> It is still far from common for U.S. courts to refer to international law in their decisions.<sup>58</sup>

### *B. The United States' Contradictory Policies with Regard to North Korean Refugees*

The United States has condemned China's treatment of North Korean refugees, yet has denied asylum to those fleeing China because of persecution for aiding the North Korean refugees in China.<sup>59</sup> The denial of

INT'L L. PROC. 213 (1999); Michelle Foster, *Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State*, 28 MICH. J. INT'L L. 223 (2007).

54. James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 481 (2000). The International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 187, and the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 are all international instruments that the United States has refused to ratify. Hathaway & Cusick, *supra*; see also U.N. Secretary-General, Multilateral Treaties Deposited with the Secretary-General, ch. IV, <https://treaties.un.org/pages/ParticipationStatus.aspx> (last visited Apr. 7, 2014). The United States' practice of ratifying international laws conditional to its constitution is viewed by most of the world as not an actual substantive ratification. Hathaway & Cusick, *supra*.

55. Hathaway & Cusick, *supra* note 54, at 482; S. EXEC. REPT. NO. 101-30, at 31 (1990) (declaring articles 1–16 of the Convention Against Torture non-self-executing).

56. 526 U.S. 415 (1999). See Hathaway & Cusick, *supra* note 54, at 483–84.

57. *Aguirre-Aguirre*, 526 U.S. at 427–28.

58. See, e.g., Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 Wash. U. Global Stud. L. Rev. 345, 381 (2005) (noting the merely occasional use of foreign law in U.S. courts prior to recent years).

59. See Ahn, *supra* note 14. The North Korean Human Rights Act of 2004 and the North Korean Human Rights Reauthorization Act of 2008 express the United States' concern for North Korean refugees and criticize China's treatment of North Korean refugees and people who provide aid and assistance to the North Korean refugees. *Id.* at 311. See North Korean Human Rights Act of 2004, 22 U.S.C. §§ 7801–7845 (2012) [hereinafter NKHRA 2004]; North Korean Human Rights Reauthorization Act of 2008, Pub. L. No. 110-346, 122 Stat. 3939 (2008) [hereinafter NKHRA 2008]. In NKHRA 2008, Congress found:

The Government of China is conducting an increasingly aggressive campaign to locate and forcibly return border-crossers to North Korea, where they routinely face torture and

asylum protection to those who aided North Korean refugees has not been widely criticized internationally. However, it highlights a contradiction in the United States' policy.

*C. International Response to the United States' Noncompliance with the Refugee Convention and the Convention Against Torture*

The international response to violations of the Refugee Convention and the Convention Against Torture by world powers, such as China and the United States, has not been effective in creating any policy changes in those countries. International organizations such as HRW have sent letters

imprisonment, and sometimes execution. According to recent reports, the Chinese Government is shutting down Christian churches and imprisoning people who help North Korean defectors and has increased the bounty paid for turning in North Korean refugees.

*Id.* § 2(1). In response to that finding, the NKHRA of 2008 states,

[B]ecause there are genuine refugees among North Koreans fleeing into China who face severe punishments upon their forcible return, the United States should urge the Government of China to—(A) immediately halt its forcible repatriation of North Koreans; (B) fulfill its obligations pursuant to the 1951 United Nations Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, and the 1995 Agreement on the Upgrading of the UNHCR Mission in the People's Republic of China to UNHCR Branch Office in the People's Republic of China; and (C) allow the United Nations High Commissioner for Refugees (UNHCR) unimpeded access to North Koreans inside China to determine whether they are refugees and whether they require assistance.

*Id.* § 3(5). The NKHRA of 2008 also makes it a goal for the United States to take a more proactive approach to solve the North Korean refugee problem and to “process North Korean refugees overseas for resettlement in the United States, through a persistent diplomacy by senior officials of the United States,” and to expedite the “screening, processing, and resettlement” of North Korean refugees. *Id.* §§ 3(1)-(2). However, the United States has denied applications for asylum sought by those persecuted for aiding North Korean refugees. Ahn, *supra* note 14, at 311–12. There is a split in how the circuits treat the persecution and prosecution of Chinese citizens that provided aid to North Korean refugees. Compare *Guang Jin v. Mukasey*, 293 Fed. App. 74, 75 (2d Cir. 2008) (finding that Jin was prosecuted for violating applicable laws prohibiting the harboring of undocumented migrants, not persecuted for expressing his political views by housing North Korean refugees), with *Xun Li v. Holder*, 559 F.3d 1096, 1111 (9th Cir. 2009) (relying on the finding that there is no law in China that criminalizes providing humanitarian aid to refugees to hold that Li was not merely subject to legitimate criminal prosecution but subject to persecution for not complying with China's unofficial policy toward refugees). Of note, to obtain refugee status because of persecution of political opinion, an individual need not actually have suffered persecution while in the country they fled. The *Handbook* states,

An applicant claiming fear of persecution because of political opinion need not show that the authorities of his country of origin knew of his opinions before he left the country. He may have concealed his political opinion and never have suffered any discrimination or persecution. However, the mere fact of refusing to avail himself of the protection of his Government, or a refusal to return, may disclose the applicant's true state of mind and give rise to fear of persecution. In such circumstances the test of well-founded fear would be based on an assessment of the consequences that an applicant having certain political dispositions would have to face if he returned. This applies particularly to the so-called refugees “sur place.”

*Handbook*, *supra* note 13, ¶ 83.

to China demanding it come into compliance with its international obligations.<sup>60</sup> However, the response to violations by the United States has been minimal, with only individual scholars and journalists criticizing the United States' treatment of refugees.<sup>61</sup> Larger international policy decisions and other human rights claims may explain why the international community is often more critical of China's violations than those of the United States.<sup>62</sup>

#### IV. FURTHER SUGGESTIONS

Besides the ineffective condemnation of violations of international law, and urging countries to come into compliance, not much else has been done to ensure refugees receive the protections to which they are entitled under international law. One alternative that has been gaining attention in the international community is allowing countries to deport refugees to a third country, one that is willing to accept and protect them as refugees.<sup>63</sup> This approach, however, has also been met with intense criticism and is not grounded in current international refugee laws.<sup>64</sup>

Critics see this third country protection system as a way for world powers to avoid the burden-sharing obligations that are central to the

60. See HRW China Letter, *supra* note 12, at 2.

61. See, e.g., Samuel L. David, *A Foul Immigration Policy: U.S. Misinterpretation of the Non-Refoulement Obligation Under the Convention Against Torture*, 19 N.Y.L. SCH. J. HUM. RTS. 769 (2003); Kagan, *supra* note 34; Hathaway & Cusick, *supra* note 54; Huber *supra* note 32; and Courtney Schusheim, *Cruel Distinctions of the I.N.A.'s Material Support Bar*, 11 N.Y. CITY L. REV. 469 (2008).

62. More frequently people think of China as a violator of human rights than the United States, although arguments have been made that the United States, which has failed to ratify several main international human rights treaties, also violates human rights. Three main human rights treaties that the United States has failed to ratify are the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, the International Covenant on Economic, Social and Cultural Rights, *supra* note 54, and the American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 385 (1985).

63. See, e.g., Park, *supra* note 13; Foster, *supra* note 53. Some states only deport refugees to a country that they have transited through, while others will transfer refugees to a country the refugee has never been to. The United Kingdom has proposed a system where asylum seekers that arrive in the United Kingdom will be transferred to a "transit processing center" outside the European Union. *Unlawful and Unworkable: Amnesty International's Views on Proposals for Extra-Territorial Processing of Asylum Claims*, AMNESTY INT'L (June 17, 2003), <http://www.amnesty.org/en/library/info/IOR61/004/2003>.

64. "These practices have been controversial precisely because they are understood as an attempt to circumvent state obligations towards refugees. This is particularly so because the idea of requiring a refugee to seek protection elsewhere is not explicitly anchored in the test of the Refugee Convention." Foster, *supra* note 53, at 226 (2007).

Refugee Convention and the Convention Against Torture.<sup>65</sup> There is also criticism that nothing in the text of either the Refugee Convention or the Convention Against Torture establishes the practice of deportations to a third country.<sup>66</sup> Deportation to a third country system also minimizes a state's obligations to refugees, and thus threatens the rights established by the Refugee Convention and the Convention against Torture.<sup>67</sup> Additionally, transfer to a third country reduces the chance a person will receive refugee status because of the variation of practices among countries, despite the "unified" system of fair and independent RSD procedures.<sup>68</sup>

Because of policy considerations and the influence that world powers have on the international community, forcing countries like the United States and China into compliance with the current Refugee Convention and the Convention Against Torture may not be feasible. The United States has already adopted a policy of utilizing third country relocation for refugee protection. There is a possibility that, if properly executed, the third country relocation practice may in the end benefit refugees.<sup>69</sup>

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65. *Id.* Most of the refugees in the world are currently protected by countries that have the least resources to do so—70% of refugees are in either Asia or Africa, with the majority in sub-Saharan Africa. Only 0.5% of refugees are protected by developed Western states. Musarat-Akram, *supra* note 53, at 215. This disparity among countries affording refugee protection furthers the two-tiered system of the world and political tensions between major world powers and other countries.

66. Foster, *supra* note 53, at 226.

[T]he idea of requiring a refugee to seek protection elsewhere is not explicitly anchoring in the text of the Refugee Convention. Rather, these policies are founded on an implicit authorization—a form of reasoning based on the fact that the Refugee Convention does not provide a positive right to be granted asylum. The key protection in the Refugee Convention is non-refoulement (Article 33), the obligation on states not to return a refugee to a place in which he will face the risk of being persecuted. States reason that, as long as they do not violate this prohibition, they are not required to provide protection to refugees who reach their territory, but rather they are free to send refugees to other states, possibly even states that are not parties to the Refugee Convention.

*Id.*

67. *Id.* at 225.

68. *Id.* See also U.N. HIGH COMM'R FOR REFUGEES, 2005 GLOBAL REFUGEE TRENDS (2006), available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=4486ceb12&query=2005%20Global%20Refugee%20Trends>.

69. See, e.g., EUR. COUNCIL ON REFUGEES & EXILES, REPORT ON THE APPLICATION OF THE DUBLIN II REGULATION IN EUROPE (2006), available at [www.ecre.org/component/downloads/downloads/108.html](http://www.ecre.org/component/downloads/downloads/108.html). The European Council on Refugees and Exiles ("ECRE") proposes determining responsibility for a third country based on:

(1) the Member State where the asylum seeker has a family member is responsible, provided he or she agrees with a transfer to that state; or (2) the Member State where the asylum request was first lodged is responsible, unless there are compelling humanitarian considerations to preclude this.

However, since third country relocation is a fairly new concept, with no textual basis in either the Refugee Convention or the Convention Against Torture, this practice may cause several problems.<sup>70</sup> There is a risk that states will minimize their obligations to refugees to the extent that the rights set out in the Refugee Convention and the Convention Against Torture are not upheld.<sup>71</sup> Even within systems like the European Union, refugee status determination procedures and practices vary widely.<sup>72</sup> Because of this, third country relocation may reduce a refugee's chance of obtaining asylum status.<sup>73</sup>

Currently, there is no international consensus on what is needed in order to determine that a third country will provide "effective protection" to the refugee, thus authorizing transfer.<sup>74</sup> There is also no formal mechanism for financially supporting those countries that are willing to protect refugees, and thus no way to ensure the burden sharing principle that is central to the United Nations Charter and the Refugee Convention is realized.<sup>75</sup>

*Id.* at 171. Additionally, the ECRE recommends methods of supporting Member States that receive the largest number of asylum seekers, thus, helping to equalize the burden-sharing of responsibility for refugee protection. *Id.*

70. *See, e.g.*, Foster, *supra* note 53.

71. *Id.* at 224. One example is Australia's "Pacific Solution." By unilaterally transferring refugees to Nauru, Australia denies refugees protection under its Australian legal system, which guarantees "the right to independent merits review and rights of judicial review." *Id.* at 225.

72. *Id.*

73. *Id.* at 225–26 (citing a UNHCR report that found that if a Chechen refugee was transferred from Austria to Slovakia, their chances of getting protection as a refugee went from over 80% to zero).

74. *Id.* at 226–27. *See also* Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT'L J. REFUGEE L. 567, 573 (2003). Most guidelines on third party relocation only focus on non-refoulement and ignore other rights protected by the Refugee Convention. Foster, *supra* note 53. The United States allows transfer to a third country "in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection. . . ." Immigration and Nationality Act, 8 U.S.C. § 1158(a)(2)(A) (2012).

75. The Preamble of the Refugee Convention proclaims that, among other things, the convention is a result of party states,

Considering that the grant of asylum may place unduly heavy burdens on certain countries and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation. . .

Refugee Convention, *supra* note 7, at pmbl. This language in the preamble makes it clear that party states to the Refugee Convention have agreed that there should be burden-sharing among all party states and that there needs to be international agreement on the procedures used to protect refugees. Following this agreement, party states should also agree that there needs to be international law on third party relocation and that to fulfill the burden sharing principle, there must be a mechanism of support to those states accepting a disproportionate number of refugees.

Possibly the most effective option would be to establish a protocol to an existing treaty, or create a new international treaty on third country relocation of refugees. Either of these options would ensure that the standards, factors, and protections considered by all countries are consistent and that there is some mechanism of financial support to fulfill the burden sharing principle. Enforcing the current refugee laws is simply not feasible with the current dynamics of the world powers. To ensure refugees are protected, the refugee laws must be modified to be more realistically enforceable.

#### CONCLUSION

A quick review of human rights organizations reveals that violations of the Refugee Convention and the Convention Against Torture are clear and widespread. Yet there has been no substantive legal action taken against any of the violators. The principles and goals of the Refugee Convention and the Convention against Torture are idealistic, but the Conventions lack a concrete enforcement mechanism. The ideals of providing protection, basic education, access to jobs, and other resources to refugees can be maintained, but these ideals require a system with which states will more likely voluntarily comply and with more enforcement power. The third party relocation system may not be the final solution, but it is a starting point for the international community to look more critically at its refugee laws and to take more seriously consideration of the political and economic power structure of the world and how it interacts with international law.

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