



# Refugees or Border Residents from Myanmar? The Status of Displaced Ethnic Kachins and Kokangs in Yunnan Province, China

Lili Song\*

## ABSTRACT

Since 2009, more than 100,000 ethnic Kachins and Kokangs have crossed into Yunnan Province, China, to escape armed conflict in Kachin State and Shan State, Myanmar. China insists that they are ‘border residents’, not refugees. This article considers the legal status of these displaced ethnic Kachins and Kokangs in both international law and Chinese law and evaluates China’s treatment of them. It argues that they merit refugee status under the Refugee Convention and Protocol and that many of them also qualify as border residents under the 1997 bilateral border management treaty between China and Myanmar and the 1990 Yunnan provincial rules governing border residents from Myanmar. It suggests that refugee status and border resident status are not mutually exclusive and that those who simultaneously qualify for both should be entitled to the rights attached to each status. Therefore, China’s forced repatriation of displaced Kachins and restrictions on both groups’ freedom of movement in China amount to violation of its obligations under the Refugee Convention and Protocol.

## 1. INTRODUCTION

The People’s Republic of China (China) has long been a major source of refugees and asylum seekers.<sup>1</sup> It has rarely been considered a refugee-receiving country. However, with significant growth in its economy in recent decades, China is emerging as a

\* Lecturer, School of Law, University of the South Pacific, Vanuatu. The author would like to thank Professor James Hathaway and members of the University of Michigan China Reading Group, in particular Professor Mary Gallagher and Patricia Chen, for their encouragement and valuable comments on earlier drafts of this article. The author also thanks the anonymous reviewers and the editors for their comments that greatly contributed to improving the final version of the article.

<sup>1</sup> For the purposes of this article, ‘China’ refers to the mainland of the People’s Republic of China, excluding Hong Kong, Macau, and Taiwan.

destination and transit country for refugees.<sup>2</sup> Over the past 20 years, China has experienced at least four mass influxes of displaced foreigners from neighbouring countries, namely the continuous inflow of North Korean escapees since the mid-1990s,<sup>3</sup> the influxes of ethnic Kokangs from Myanmar in August 2009 and then from February 2015 to the present,<sup>4</sup> and the ongoing arrivals of ethnic Kachins from Myanmar since June 2011.<sup>5</sup> Chinese authorities declare that these groups are not refugees and bar the United Nations High Commissioner for Refugees (UNHCR) from accessing them.<sup>6</sup>

Despite the scale and frequency of such influxes of displaced foreigners into China, China's treatment of them is generally understudied. While a number of authors have discussed the legal status of displaced North Koreans in China,<sup>7</sup> there are very few discussions about the legal status of displaced Kachins and Kokangs in China.

This article considers the legal status of displaced Kachins and Kokangs in China under the 1951 Convention relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol (collectively the Refugee Convention and Protocol) and Chinese law, and evaluates China's treatment of these two groups in light of its legal obligations towards them. Part 2 describes China's treatment of the two groups, drawing upon the author's fieldwork in Yunnan Province, China, and Kachin State, Myanmar, in April

<sup>2</sup> United Nations High Commissioner for Refugees (UNHCR), '2013 Regional Operations Profile – East Asia and the Pacific' <<http://www.unhcr.org/pages/49e45b276.html>> accessed 14 July 2013.

<sup>3</sup> Estimates of the number of North Korean refugees in China range from 5,000 to 100,000. See Stephan Haggard and Marcus Noland, *Witness to Transformation: Refugee Insights into North Korea* (Peterson Institute for International Economics 2011) 2.

<sup>4</sup> Estimated numbers of Kokang refugees in the 2009 and 2015 influxes are about 37,000 and 60,000 respectively. Drew Thompson, 'Border Burdens: China's Response to the Myanmar Refugee Crisis' (2009) 5 *China Security* 11, 11; 'The Han that Rock the Cradle' (*The Economist*, 14 March 2015) <<http://www.economist.com/news/asia/21646248-kokang-conflict-causes-problems-china-too-han-rock-cradle>> accessed 20 June 2016.

<sup>5</sup> Estimates of displaced Kachins range from 7,000 to 25,000. Human Rights Watch (HRW), *Isolated in Yunnan: Displaced Kachins from Burma in China's Yunnan Province* (HRW June 2012) 36; Chenggang Fan and Shiwei Shao, 'dao zhongguo qu: zhongmian bianjingxianshang de shiwan keqin nanmin' ['Go to China: The 100,000 Displaced Kachins on the Chinese–Myanmar Border'] *Southern Weekly* (Guangzhou, 17 January 2012) <<http://www.infzm.com/content/85250>> accessed 18 June 2016.

<sup>6</sup> For example, UNHCR, 'UNHCR Seeks Access to North Koreans Detained in China' (21 January 2003) <<http://www.unhcr.org/3e2d81b94.html>> accessed 14 July 2013; UNHCR, 'China: UNHCR Calls for Access to Myanmar Refugees' (4 September 2009) <<http://www.unhcr.org/4aa108159.html>> accessed 14 July 2013; UNHCR, 'UNHCR Reaches Kachins Sent Back from China' (7 September 2012) <<http://www.unhcr.org/S049cdba9.html>> accessed 19 November 2012.

<sup>7</sup> See eg Elim Chan and Andreas Schloenhardt, 'North Korean Refugees and International Refugee Law' (2007) 19 *International Journal of Refugee Law* 215; UN Human Rights Council, *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, UN doc A/HRC/25/63 (7 February 2014) para 43; Roberta Cohen, 'North Koreans in China in Need of International Protection' (1 December 2012) <<https://www.brookings.edu/articles/north-koreans-in-china-in-need-of-international-protection/>> accessed 2 January 2017.

2013 and December 2014.<sup>8</sup> Part 3 considers the status of the two groups under the Refugee Convention and Protocol. Part 4 discusses their status under the bilateral border management treaty between China and Myanmar and under domestic Chinese law. Part 5 evaluates China's treatment of the two groups against China's legal obligations towards them.

## 2. INFLUXES OF DISPLACED ETHNIC KACHINS AND KOKANGS AND CHINA'S RESPONSE

### 2.1 Influxes of displaced ethnic Kokangs

In August 2009, approximately 37,000 civilians arrived in the town of Nansan in Yunnan Province, China, from Laukkai, the capital of the Kokang Region in Shan State, Myanmar, as a result of a military standoff and clashes between Myanmar government troops (the Tatmadaw) and the Myanmar National Democratic Alliance Army (MNDAA), an ethnic Kokang military group that had exercised control of the Kokang Region for decades.<sup>9</sup> The Chinese authorities quickly set up seven camps to accommodate more than 10,000 displaced ethnic Kokangs, and provided them with food, blankets, drinking water, medicine, and even a small daily cash allowance.<sup>10</sup> The displaced Kokangs were allowed to move around freely within Nansan but were not allowed to travel beyond its boundaries.<sup>11</sup> As the conflict in the Kokang Region eased in early September 2009, the displaced Kokangs were voluntarily repatriated and the camps were removed.<sup>12</sup>

<sup>8</sup> With the help of humanitarian groups and individuals helping the displaced Kachins and internally displaced Kachins along the Chinese–Myanmar border, the author visited five towns in that area (Nabang, Zhangfeng, and Nongdao in Yunnan Province, China, and Laiza and Mai Ja Yang in Kachin State, Myanmar) and conducted semi-structured interviews with 16 interviewees, including 10 displaced Kachins who fled to Yunnan in 2011 and 2012, four humanitarian workers and international organization employees, and two Kachin officials. The author also had conversations with internally displaced Kachins at Laiza and Ma Ja Yang, individuals helping displaced Kachins in Yunnan Province and Kachin State, and residents of the border towns she visited. The aim of the fieldwork was to find out how the Chinese authorities treated displaced Kachins on the ground in Yunnan Province.

<sup>9</sup> State Council Information Office of the People's Republic of China (SCIO), 'Yunnan Sheng zhengfu jiu dangqian zhongmian bianjing jushi juxing xinwen fabuhui' ['Yunnan Government Holds Press Conference on Situation on China–Myanmar Border'] (31 August 2009) <<http://www.scio.gov.cn/xwfbh/gssxwfbh/xwfbh/yunnan/200908/t398584.htm>> accessed 14 September 2011. The figure includes both Myanmar nationals of Kokang ethnicity and Chinese nationals returning home due to the conflict.

<sup>10</sup> *ibid*; 'Kokang Capital Falls: "Not Shoot First" Policy under Fire' (*Shan Herald Agency for News*, 26 August 2009) <[http://www.shanland.org/index.php?option=com\\_content&view=article&id=2695:kokang-capital-falls-not-shoot-first-policy-under-fire&catid=86:war&Itemid=284](http://www.shanland.org/index.php?option=com_content&view=article&id=2695:kokang-capital-falls-not-shoot-first-policy-under-fire&catid=86:war&Itemid=284)> accessed 14 September 2011.

<sup>11</sup> Xiong Zhang, 'guogan nanmin zai zhongguo' ['Kokang Refugees in China'] (*Qzone*, 8 September 2009) <<http://qzone.qq.com/blog/622006396-1252371403>> accessed 3 February 2017.

<sup>12</sup> Jun Liu, '30,000 ming guogan nanmin tashang miandian guitu' [30,000 Kokang Refugees on Their Way Home'] (*China Weekly*, 16 September 2009) <<http://www.chinaweekly.cn/bencandy>>

In February 2015, when armed conflict resumed between the MNDAA and the Tatmadaw, more than 60,000 civilians again fled to Yunnan Province from Laukkai.<sup>13</sup> The Chinese authorities set up 15 camps and thousands of makeshift tents to host the displaced Kokangs in Zhenkang, Gengma, and Cangyuan counties in Yunnan Province.<sup>14</sup> Food, water, clothing, blankets, and medical services were provided to the displaced Kokangs in these camps.<sup>15</sup>

However, the camps set up by the Chinese authorities hosted less than a quarter of the 60,000 displaced Kokangs in Yunnan.<sup>16</sup> Those not admitted to the camps did not generally receive assistance from the Chinese authorities and had to rely on their own resources, support from non-governmental organizations (NGOs), and private donations.<sup>17</sup> As at March 2017, many of the displaced Kokangs remained in Yunnan,<sup>18</sup> with little assistance from Chinese authorities or the international community.<sup>19</sup>

---

[php?fid=60&id=4491](http://www.asianews.it/news-zh/%E5%8C%97%E4%BA%AC%E6%8B%86%E9%99%A4%E8%90%A5%E5%9C%B0%E9%81%A3%E8%BF%94%E6%9E%9C%E6%95%A2%E9%9A%BE%E6%B0%91-16205.html) accessed 14 September 2011; Shan Nan, 'Beijing chaichu yingdi qianfan fuogan nanmin' ['Beijing Removed Camps and Repatriated Kokang Refugees'] (*Asian News*, 1 September 2009) <<http://www.asianews.it/news-zh/%E5%8C%97%E4%BA%AC%E6%8B%86%E9%99%A4%E8%90%A5%E5%9C%B0%E9%81%A3%E8%BF%94%E6%9E%9C%E6%95%A2%E9%9A%BE%E6%B0%91-16205.html>> accessed 13 September 2011.

<sup>13</sup> Khin Oo Tha, 'China Reportedly Urging Kokang Refugees to Return' (*Irrawaddy*, 9 March 2015) <<https://www.irrawaddy.com/news/burma/china-reportedly-urging-kokang-refugees-to-return.html>> accessed 8 February 2017.

<sup>14</sup> 'Paodan luoru 10 tianlai zhongguo zhengfu ruhe yingdui' ['How the Chinese Government Has Responded since the Bombs Fell Ten Days Ago'] *Beijing Youth Daily* (Beijing, 23 March 2015) <[http://epaper.ynet.com/html/2015-03/23/content\\_123031.htm?div=-1](http://epaper.ynet.com/html/2015-03/23/content_123031.htm?div=-1)> accessed 7 February 2017.

<sup>15</sup> *ibid.*

<sup>16</sup> Xinhua, '14,000 Myanmar Border Residents Flocking to China Relocated' *China Daily* (3 March 2015) <[http://usa.chinadaily.com.cn/world/2015-03/03/content\\_19701937.htm](http://usa.chinadaily.com.cn/world/2015-03/03/content_19701937.htm)> accessed 10 February 2017.

<sup>17</sup> Nang Noom, 'China Restricts Border Access as Kokang Exodus Continues' (2 March 2015) <<http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=52fc6fbd5&id=54f56b385>> accessed 9 February 2017; Ann Wang, 'Myanmar Refugees in China Caught between Political Fault Lines' (*IRIN*, 16 March 2016) <<http://www.irinnews.org/feature/2016/03/16/myanmar-refugees-china-caught-between-political-fault-lines>> accessed 20 May 2016.

<sup>18</sup> '20,000 Refugees Flee Myanmar's Kokang Conflict across the Border into China' (*Radio Free Asia*, 8 March 2017) <<http://www.rfa.org/english/news/myanmar/20000-refugees-flee-myanmars-kokang-conflict-across-the-border-into-china-03082017142216.html>> accessed 18 March 2017; see also 'shipai mianbei zhanhuopang de zhongguo xiaozhen: zhaoyang chifan' ['Scenes from a Small Chinese Town Close to War: Eating and Sleeping as Usual'] (25 November 2016) <[http://www.wenxuecity.com/news/2016/11/25/gossip-127663\\_print.html](http://www.wenxuecity.com/news/2016/11/25/gossip-127663_print.html)> accessed 2 February 2017; Shan Human Rights Foundation, 'Ghost Villages Await the Return of Kokang Refugees' (*Refugees Deeply*, 12 May 2016) <<https://www.newsdeeply.com/refugees/articles/2016/05/12/ghost-villages-await-the-return-of-kokang-refugees>> accessed 7 February 2017. Since UNHCR and other international organizations have no access to displaced Kokangs in Yunnan and the Chinese government has not provided relevant statistics, the number of displaced Kokangs assisted by the Chinese authorities in 2017 is not available.

<sup>19</sup> Shan Human Rights Foundation (n 18).

In 2009, and again from 2015 to the present, the Chinese authorities referred to the displaced Kokangs in Yunnan as ‘border residents’ (*bianmin*) and denied that they were refugees.<sup>20</sup> Despite the desperate need of the displaced Kokangs in Yunnan, UNHCR and other international organizations have been blocked by the Chinese authorities from accessing them.<sup>21</sup>

## 2.2 Influxes of displaced ethnic Kachins

On 9 June 2011, armed conflict resumed between the Tatmadaw and the Kachin Independence Army (KIA), an ethnic Kachin military group that exercises control in many areas in Kachin State, Myanmar, forcing tens of thousands of ethnic Kachins to flee towards the Myanmar–Chinese border.<sup>22</sup> Many of the displaced Kachins crossed into neighbouring Yunnan Province in China. By late June 2011, about 10,000 displaced Kachins had entered Yunnan.<sup>23</sup>

The Chinese authorities denied that the displaced Kachins in Yunnan were refugees, asserting that they were ‘border residents’ who came to China to live with their friends and relatives temporarily.<sup>24</sup> Although the Chinese authorities claimed that they provided ‘necessary assistance in conformity with common practices on the basis of humanitarianism’,<sup>25</sup> there is no evidence that they did so adequately. On the contrary, various reports confirmed that Chinese authorities provided almost no humanitarian assistance to the displaced Kachins in Yunnan.<sup>26</sup> The majority of displaced Kachins in Yunnan stayed in self-established camps where they lived in empty warehouses or makeshift huts built with plastic sheets and bamboo; others stayed in relatives’ homes or rented rooms.<sup>27</sup> All of the displaced Kachins interviewed by the author stayed in

<sup>20</sup> Chinese Ministry of Foreign Affairs press conference, Beijing (1 September 2009); SCIO (n 9); Xinhua (n 16).

<sup>21</sup> UNHCR (2009) (n 6); Wang (n 17).

<sup>22</sup> ‘Kachin IDPs Reach Over 40,000 Due to Civil War in Northern Burma’ (*Kachin News*, 2 September 2011) <<http://www.kachinnews.com/news/2040-kachin-idps-reach-over-40000-due-to-civil-war-in-northern-burma.html>> accessed 28 April 2014.

<sup>23</sup> ‘Kachin Refugees in China in Need’ (*IRIN*, 27 June 2012) <<http://www.irinnews.org/news/2012/06/27>> accessed 17 June 2016. This figure was provided by the IDPs and Refugees Relief Committee based in Laiza. HRW estimated that 7,000–10,000 displaced Kachins entered China’s Yunnan Province: HRW (n 5) 36. Others estimated that between 20,000 and 25,000 displaced Kachins fled to Yunnan: Fan and Shao (n 5).

<sup>24</sup> Chinese Ministry of Foreign Affairs press conference, Beijing (16 June 2011).

<sup>25</sup> *ibid.*

<sup>26</sup> HRW (n 5) 6; IRIN (n 23); Chinese Christian Journalists Association, ‘keqin nanmin jiuozhu: keqin chongtu lishi beijing fenxi’ [‘Assistance for Displaced Kachins: Historical Analysis of the Kachin Conflict’] (9 April 2012) <[http://www.chinaaid.net/2012/04/blog-post\\_9.html](http://www.chinaaid.net/2012/04/blog-post_9.html)> accessed 2 June 2016.

<sup>27</sup> Interviews (April 2013 and December 2014); ‘War Snowballs: Kachin Refugees Influx to China Border’ (*Kachin News Group*, 24 June 2011) <<http://www.kachinnews.com/news/1955-war-snowballs-kachin-refugees-influx-to-china-border.html>> accessed 9 January 2012.

self-established camps. Most of them said that they or their family members received only occasional medical assistance (such as vaccinations or medical treatment for skin diseases) from medical teams dispatched to the camps by the local municipal/county-level Chinese authorities, while others said that they did not receive any assistance from the Chinese authorities.<sup>28</sup>

Chinese authorities have not allowed UNHCR or other international organizations to access the displaced Kachins in Yunnan.<sup>29</sup> Displaced Kachins in the self-established camps relied mainly on donations from local residents and a small number of non-governmental charities.<sup>30</sup> They were not allowed to travel outside the boundaries of the Chinese border towns in which they stayed.<sup>31</sup>

In late August and early September 2012, China forced more than 5,000 displaced Kachins who were staying in self-established camps to return to Myanmar.<sup>32</sup> Those living with relatives or friends or in rented rooms were allowed to stay.<sup>33</sup> As clashes between the Tatmadaw and the KIA continued, displaced Kachins continued to flee to Yunnan – as recently as January 2017.<sup>34</sup> Concerns about the forced repatriation of displaced Kachins in Yunnan by the Chinese authorities remain.

### 3. THE STATUS OF DISPLACED ETHNIC KACHINS AND KOKANGS IN YUNNAN UNDER INTERNATIONAL LAW

Article 1A(2) of the Refugee Convention, when read together with its 1967 Protocol, defines a refugee as any person who:

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>28</sup> Interviews (n 27).

<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.* See also ‘The Kachin Dilemma’ (*The Economist*, 2 February 2013) <<http://www.economist.com/news/asia/21571189-over-border-kachin-conflict-causes-headaches-china-kachin-dilemma>> accessed 17 June 2016; Fan and Shao (n 5).

<sup>31</sup> Interviews (April 2013).

<sup>32</sup> UNHCR (2012) (n 6); *ibid.*

<sup>33</sup> Interviews (n 31). For example, *ad hoc* checkpoints were set up outside the town of Nabang in Yingjiang County, Yunnan Province, to control travel to and from Nabang.

<sup>34</sup> See eg ‘Kachin IDPs Flee Fighting in Southern Kachin and Northern Shan State’ (*Kachinland News*, 22 September 2015) <<http://kachinlandnews.com/?p=26274>> accessed 17 June 2016; ‘China: Protect Ethnic Displaced Kachins Fleeing War in Northern Myanmar’ (*Fortify Rights*, 13 January 2017) <<http://www.fortifyrights.org/publication-20170113.html>> accessed 3 February 2017.

It is widely accepted that recognition of refugee status in accordance with the Convention is not necessarily premised on individual assessment, but can be based on readily apparent, objectively verifiable circumstances in the country of origin (often described as ‘*prima facie*’ recognition).<sup>35</sup> This approach is usually used in situations where individual status determination is impractical, impossible, or unnecessary.<sup>36</sup> Since the Chinese authorities do not process refugee claims and have not allowed UNHCR to access the displaced Kachins and Kokangs in Yunnan, individual determination of their status under the Convention has been impossible. This part of the article considers the objective circumstances in Kachin State and Shan State to analyse whether these two groups qualify for refugee status.

The displaced ethnic Kachins and Kokangs in Yunnan are Myanmar nationals; they therefore meet the requirement of being outside their country of nationality. As for ‘well-founded fear of being persecuted’, there is no definition of ‘persecution’ in the Refugee Convention and Protocol or any other international instrument.<sup>37</sup> However, it is well accepted that severe violations of basic human rights may amount to persecution.<sup>38</sup> As noted by Goodwin-Gill and McAdam:

Persecution within the [Refugee] Convention comprehends measures ... which threaten deprivation of life and liberty; torture or cruel, inhuman, or degrading treatment; subjection to slavery or servitude; non-recognition as a person; and oppression, discrimination, or harassment of a person in his or her private, home, or family life.<sup>39</sup>

Severe human rights abuses against ethnic minorities in Kachin State and northern Shan State during times of armed conflict as well as in peaceful times are recorded in

<sup>35</sup> See eg Bonaventure Rutinwa, ‘Prima Facie Status and Refugee Protection’ (2001) UNHCR New Issues in Refugee Research, Working Paper No 69; Matthew Albert, ‘Governance and *Prima Facie* Refugee Status Determination: Clarifying the Boundaries of Temporary Protection, Group Determination, and Mass Influx’ (2010) 29 *Refugee Survey Quarterly* 61; Jean-François Durieux, ‘The Many Faces of “Prima Facie”: Group-Based Evidence in Refugee Status Determination’ (2010) 25 *Refugee* 151.

<sup>36</sup> UNHCR, ‘Guidelines on International Protection No 11: Prima Facie Recognition of Refugee Status’, UN doc HCR/GIP/15/11 (5 June 2015).

<sup>37</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 90.

<sup>38</sup> See eg Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), art 9; James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014) 193–208; Goodwin-Gill and McAdam (n 37) 90–93; UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN doc HCR/IP/4/ENG/REV.3 (reissued 2011) para 51.

<sup>39</sup> Goodwin-Gill and McAdam (n 37) 93.

many reports produced by a variety of reputable organizations.<sup>40</sup> For example, the UN High Commissioner for Human Rights has noted that rape and sexual slavery were particularly prevalent in conflict-affected areas in Myanmar, such as Kachin State and Shan State:

Cases of sexual and gender-based violence against women of ethnic minority communities perpetrated by Myanmar security forces have been documented for many years. Such violence ... is particularly prevalent in conflict-affected areas, such as Kachin and Shan States, with credible reports of rape, sexual slavery, and forced and servile marriages. According to reports, victims include women and men, girls and boys, including children as young as 7 years of age ...<sup>41</sup>

The UN High Commissioner for Human Rights further noted that 'for many years the Christian communities in Myanmar have faced restrictions in their freedom of religion or belief, especially in Chin, Kachin, Kayin and Kayah States.'<sup>42</sup> Other documented widespread human rights abuses against ethnic Kachin and Kokang civilians include fatal shootings, beheadings, torture, forced labour, and home invasions.<sup>43</sup> Such measures of deprivation of life and liberty (fatal shootings, beheadings, and forced labour), torture and inhuman and degrading treatment (rape and sexual slavery),<sup>44</sup> and harassment of one's private life (home invasions) would seem sufficient to constitute persecution under the Refugee Convention.<sup>45</sup> In light of the prevalence of the above-mentioned

<sup>40</sup> For example, Special Rapporteur on the Situation of Human Rights in Myanmar, 'Situation of Human Rights in Myanmar', UN doc A/70/412 (6 October 2015) para 50; Amnesty International, 'Myanmar: Investigate Alleged Rape and Killing of Two Kachin Women' (22 January 2015) <<https://www.amnesty.org/en/documents/asa16/0006/2015/en/>> accessed 10 February 2017; Hanna Hindstrom, 'Burma's Transition to Civilian Rule Hasn't Stopped the Abuses of Its Ethnic Wars' (*Time*, 1 April 2016) <<http://time.com/4277328/burma-myanmar-su-kyi-ethnic-wars/>> accessed 17 June 2016; Shan Human Rights Foundation, 'Killing, Beheading and Disappearance of Villagers Instill Fear of Return among Kokang Refugees' (11 May 2015) <<http://www.shanhumanrights.org/index.php/news-updates/212-killing-beheading-and-disappearance-of-villagers-instill-fear-of-return-among-kokang-refugees>> accessed 9 February 2017.

<sup>41</sup> UN High Commissioner for Human Rights, 'Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar: Report of the United Nations High Commissioner for Human Rights', UN doc A/HRC/32/18 (28 June 2016) para 60.

<sup>42</sup> *ibid* para 63.

<sup>43</sup> HRW, 'Untold Miseries: Wartime Abuses and Forced Displacement in Burma's Kachin State' (March 2012) <<https://www.hrw.org/report/2012/03/20/untold-miseries/wartime-abuses-and-forced-displacement-burmas-kachin-state>> accessed 20 June 2016; Shan Human Rights Foundation (n 40); UN High Commissioner for Human Rights (n 41) para 60.

<sup>44</sup> Peter Danchin, 'The Universal Declaration of Human Rights Article 5: Subsequent Development' <[http://ccnmtl.columbia.edu/projects/mmt/udhr/article\\_5/development\\_2.html](http://ccnmtl.columbia.edu/projects/mmt/udhr/article_5/development_2.html)> accessed 2 February 2017.

<sup>45</sup> As noted by Hathaway and Foster, in assessment of fear for persecution, the number of people affected is irrelevant; the issues at stake are the seriousness of the harm and its causal connection to the Convention grounds: Hathaway and Foster (n 38) 177.



severe violations of basic human rights, it is reasonable to believe that the displaced Kachins and Kokangs in Yunnan would face a real chance of persecution upon return to Myanmar.

As noted by Goodwin-Gill and McAdam, although decision makers too often perceive the existence of civil conflicts as ‘giving rise to the situations of general insecurity that somehow exclude the possibility of persecution’, close examination of the background to the conflict and the way it is fought will often establish a link to the Refugee Convention.<sup>46</sup> UNHCR also noted that:

In accordance with the ordinary meaning to be given to the terms and in light of the context as well as the object and purpose of the 1951 Convention, Article 1A(2) applies to persons fleeing situations of armed conflict and violence. In fact, the 1951 Convention definition of a refugee makes no distinction between refugees fleeing peacetime or ‘wartime’ persecution.<sup>47</sup>

It is well recognized that the armed conflicts displacing the Kachins and Kokangs, and the severe human rights abuses against the Kachins and Kokangs, are rooted in Myanmar’s systematic and systemic discrimination and marginalization of ethnic minorities as well as the consequential tension between ethnic minorities and the majority Burmese.<sup>48</sup> There is therefore a link between the persecution feared and their ethnicity.<sup>49</sup> Victims of religion- and/or gender-based abuses during the armed conflict may also establish a nexus between the persecution feared and the Convention grounds of religion and/or membership of a particular social group.<sup>50</sup>

<sup>46</sup> Goodwin-Gill and McAdam (n 37) 126.

<sup>47</sup> UNHCR, ‘Guidelines on International Protection No 12: Claims for Refugee Status related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions’, UN doc HCR/GIP/16/12 (2 December 2016) para 10.

<sup>48</sup> UN High Commissioner for Human Rights (n 41) para 65; Matthew Walton, ‘Ethnicity, Conflict, and History in Myanmar: The Myths of Panglong’ (2008) XLVIII Asian Survey 889; Mekong Network Project MAJE, ‘The North War: A Kachin Conflict Compilation Report’, (2011) <[http://www.projectmaje.org/kachin\\_2011.htm](http://www.projectmaje.org/kachin_2011.htm)> accessed 3 June 2016; ‘Myanmar’s Ethnic Problems’ (IRIN, 29 March 2012) <<http://www.irinnews.org/report/95195/briefing-myanmar%E2%80%99s-ethnic-problems>> accessed 20 June 2016; CS Kuppawamy, ‘Challenging the Reconciliation Process: Myanmar’s Ethnic Divide and Conflicts’ (*Institute of Peace and Conflict Studies*, June 2013) <<http://www.ipcs.org/issue-brief/southeast-asia/challenging-the-reconciliation-process-myanmars-ethnic-divide-and-conflicts-221.html>> accessed 20 June 2016; ‘Patterns of State Abuse’ (*Burma Link*, 27 October 2014) <<http://www.burmalink.org/background/burma/human-rights-violations/patterns-of-state-abuse/>> accessed 20 June 2016.

<sup>49</sup> It is commonly accepted that the term ‘race’ in the Convention definition encompasses ethnicity. See eg Goodwin-Gill and McAdam (n 37) 70; Hathaway and Foster (n 38) 394.

<sup>50</sup> It is widely recognized that gender may constitute a particular social group for the purposes of refugee law: Hathaway and Foster (n 38) 437.

In light of the above, displaced ethnic Kachins and Kokangs in Yunnan *prima facie* meet the criteria for refugee status under the Refugee Convention and Protocol. It is widely accepted that refugee status is declaratory.<sup>51</sup> When a person fulfils the criteria for refugee status, he or she is a refugee, regardless of recognition from a State. As long as displaced ethnic Kachins and Kokangs in Yunnan meet the criteria for refugee status under the Refugee Convention, they are refugees, even though the Chinese authorities refuse to recognize them as such.

#### 4. THE STATUS OF DISPLACED ETHNIC KACHINS AND KOKANGS IN CHINA

##### 4.1 Refugee status and refugee status determination in China

China acceded to the Refugee Convention and Protocol in September 1982.<sup>52</sup> However, China has incorporated very few provisions of the Refugee Convention and Protocol into its domestic law and has not established a national mechanism for refugee status determination (RSD). The Chinese Constitution is silent on the legal status of international treaties ratified by China within the Chinese domestic legal system;<sup>53</sup> no consensus has emerged among jurists and scholars on the subject.<sup>54</sup> According to Judge Xue of the International Court of Justice, writing with Jin, strictly speaking, treaties ratified by China do not automatically become part of Chinese domestic law and therefore do not automatically become enforceable in China.<sup>55</sup> Generally speaking,<sup>56</sup> a treaty can only be enforced domestically in China after the adoption of a Chinese law that transforms the treaty into domestic Chinese law or authorizes the direct application of the treaty in China.<sup>57</sup> Since very few provisions of the Refugee Convention and Protocol have been incorporated into Chinese law and direct application of these two instruments has not been authorized by any Chinese law, the Refugee Convention and Protocol are

<sup>51</sup> See eg UNHCR (n 38) para 28; Hathaway and Foster (n 38) 1, with further references.

<sup>52</sup> UN, 'Status as of 26 01 2017: Convention relating to the Status of Refugees' <[https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V-2&chapter=5&Temp=mtdsg2&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en)> accessed 26 January 2017.

<sup>53</sup> Constitution of the People's Republic of China (promulgated 4 December 1982, last amended 14 March 2004) <[http://www.npc.gov.cn/englishnpc/Constitution/node\\_2825.htm](http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm)> accessed 5 February 2017.

<sup>54</sup> For discussions on the domestic implementation of treaties in China, see eg Hanqin Xue and Qian Jin, 'International Treaties in the Chinese Domestic Legal System' (2009) 8 Chinese Journal of International Law 299, 300; Sanzhan Guo, 'Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects' (2009) 8 Chinese Journal of International Law 161; Yongwei Liu, 'guoji tiaoyue zai zhongguo shiyong xinlun' ['New Thoughts on the Application of International Treaties in China'] (2007) 2 Jurists Review 143.

<sup>55</sup> Xue and Jin (n 54) 322.

<sup>56</sup> The exceptions are bilateral cooperation agreements and memoranda of understanding between governments, which qualify as international treaties under Chinese law: Xue and Jin (n 54) 306.

<sup>57</sup> Xue and Jin (n 54) 322; Guoqing Jiang, 'guojifa yu guojitiaoyue de jigewenti' ['Several Issues of International Law and International Treaties'] (29 April 2000) <[http://www.npc.gov.cn/npc/xinwen/2000-04/29/content\\_1459914.htm](http://www.npc.gov.cn/npc/xinwen/2000-04/29/content_1459914.htm)> accessed 8 February 2017.

not directly enforceable in China. As a result, refugees are not able to bring a case to a Chinese court to enforce the provisions of the Refugee Convention and Protocol.

Very few Chinese laws mention refugees or asylum.<sup>58</sup> There is no provision in Chinese law on who qualifies as a refugee, which authorities are responsible for conducting RSD, or what the RSD procedures are. The only provisions in current Chinese law on asylum or the rights of refugees are article 32 of the Chinese Constitution and article 46 of the 2012 Exit and Entry Administration Law.<sup>59</sup> The former provides: 'China may grant asylum to foreigners who seek asylum for political reasons.'<sup>60</sup> The latter stipulates:

Foreigners applying for refugee status may, during the screening process, stay in China on the strength of temporary identity certificates issued by public security organs; foreigners who are recognized as refugees may stay or reside in China on the strength of refugee identity certificates issued by public security organs.<sup>61</sup>

Article 46 of the 2012 Exit and Entry Administration Law marks the first time that China included a provision regarding the treatment of refugees in Chinese law.<sup>62</sup> Article 46 only covers applicants for refugee status whose claims are being processed, and persons who have been recognized as refugees. As Chinese law currently stands, there is no clarity about the procedures for submitting an application for refugee status, what kind of application is considered valid, what constitutes a 'screening process', who qualifies

<sup>58</sup> For the purposes of this article, 'Chinese law' refers to the law of the mainland of the People's Republic of China, not including the law of the Hong Kong Special Administrative Region and the law of Macau Special Administrative Region.

<sup>59</sup> Another relevant document is an administrative regulation promulgated by the State Council, the 'National Emergency Plan on Sudden Incidents Involving Foreign Factors' (2005), and its counterparts at provincial, municipal, and county levels. These plans provide guidelines for dealing with emergencies involving foreigners. Local emergency plans in Yunnan Province were triggered in response to the influxes of Kachins and Kokangs. However, the plans focus on distribution of responsibilities among government bodies and do not generally deal with the treatment of the foreigners involved. For a more detailed discussion on these emergency plans, see Lili Song, 'The Door behind the Bamboo Curtain: Chinese Law and Policy on Refugee Status' (PhD thesis, Victoria University of Wellington 2014) <<http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/3705/thesis.pdf?sequence=>> accessed 6 February 2017.

<sup>60</sup> Constitution of the People's Republic of China, art 32.

<sup>61</sup> Exit and Entry Administration Law of the People's Republic of China (promulgated by the Standing Committee of the Eleventh National People's Congress 30 June 2012) art 46 <[http://english.gov.cn/archive/laws\\_regulations/2014/09/22/content\\_281474988553532.htm](http://english.gov.cn/archive/laws_regulations/2014/09/22/content_281474988553532.htm)> accessed 5 February 2017.

<sup>62</sup> UNHCR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: People's Republic of China' (March 2013) 1 <<http://www.refworld.org/pdfid/5135b0cb2.pdf>> accessed 28 April 2014.

as a refugee, which organizations are competent to recognize refugees, and what remedies are available for failed asylum seekers.<sup>63</sup>

In practice, UNHCR is the only organization that processes refugee claims in China. UNHCR established an office in Beijing in 1980 and has been processing refugee status claims in China since then.<sup>64</sup> The Chinese government acknowledges the status of refugees recognized by UNHCR, but has had little involvement in the RSD process itself.<sup>65</sup> According to the 1995 China–UNHCR 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,<sup>66</sup> UNHCR may, in consultation and cooperation with the Chinese government, have unimpeded access to refugees at any time.<sup>67</sup> The 1995 Agreement refers to article 35 of the Refugee Convention, which requires States to cooperate with UNHCR in the exercise of its functions, as a basis of cooperation between the Chinese government and UNHCR.<sup>68</sup> However, Chinese authorities have not allowed UNHCR to access the border areas in Yunnan where the displaced Kachins and Kokangs are.<sup>69</sup>

The UNHCR Beijing Office generally conducts RSD at its office located in central Beijing for asylum seekers who approach it.<sup>70</sup> Although officials of the UNHCR Beijing Office have travelled to areas outside Beijing to conduct RSD,<sup>71</sup> as noted above, they have not been allowed to travel to the border areas where the displaced Kachins and Kokangs are. On the other hand, as mentioned above, the displaced Kachins and Kokangs in Yunnan have not been allowed to travel beyond the border areas. Since

<sup>63</sup> The Implementing Regulations of the 2012 Exit and Entry Administration Law came into force on 1 September 2013, but contain no provisions with regard to art 46. The full text of the Implementing Regulations is available at: <<http://cs.mfa.gov.cn/wgrlh/flfg/t1060665.shtml>> accessed 19 July 2017.

<sup>64</sup> UNHCR, ‘UNHCR Regional Representation in China’ <<http://www.unhcr.org/hk/en/134-china.html>> accessed 6 February 2017.

<sup>65</sup> Yuanjun Wang, ‘guanyu jianli woguo nanmin baohu falv zhidu de jidian sikao’ [‘Thoughts on the Establishment of a Refugee Protection Mechanism in China’] (2005) 12 Public Security Research 46, 47; see also UNHCR, ‘Regional Representation for China and Mongolia: Fact Sheet’ (March 2014) <<http://www.unhcr.org/5000187d9.html>> accessed 28 April 2014.

<sup>66</sup> Concluded 1 December 1995, entered into force 1 December 1995 <<http://www.nkfreedom.org/UploadedDocuments/UNHCR-China1995Treaty.pdf>> accessed 21 June 2016.

<sup>67</sup> *ibid* art 3(5).

<sup>68</sup> *ibid* art 3(1).

<sup>69</sup> Adrian Edwards, ‘UNHCR Reaches Kachins Sent Back from China’ (UNHCR, 7 September 2012) <<http://www.unhcr.org/news/briefing/2012/9/5049cdba9/unhcr-reaches-kachins-sent-china.html>> accessed 20 June 2016.

<sup>70</sup> Jing Wan, ‘nanmin wenti yizhi zai fasheng, bushi zhe jiushi na’ [‘Refugee Problems Always Exist, Either Here or Elsewhere’] *Southern Weekly* (Guangzhou, 8 July 2011) <<http://www.infzm.com/content/61090>> accessed 8 August 2013. This article includes the transcript of an interview with Choosin Ngaotheppitak, who worked for four years in the UNHCR Beijing Office between 2003 and 2007.

<sup>71</sup> *ibid*.

UNHCR RSD procedures require applicants to attend interviews in person,<sup>72</sup> it has therefore not been possible for displaced Kachins and Kokangs in Yunnan to register with UNHCR or apply for refugee status through the UNHCR-administered RSD process.

As a result, although the displaced Kachins and Kokangs *prima facie* merit refugee status under the Refugee Convention, they have not been recognized as refugees in China and have not even had a chance to apply for refugee status in China. As such, they are unable to benefit from the rights to temporary stay or to reside in China under article 46 of the 2012 Exit and Entry Administration Law.

It may be worth mentioning that the Chinese authorities generally provide little money or social benefits for refugees whose status is recognized through the RSD procedures administered by UNHCR.<sup>73</sup> In general, UNHCR refugees are treated as foreigners who usually have no right to employment,<sup>74</sup> or access to public education,<sup>75</sup> and depend upon UNHCR for assistance in terms of food, healthcare, and accommodation.<sup>76</sup> They also need approval to travel in China.<sup>77</sup>

<sup>72</sup> Interview with officials of the UNHCR Beijing Office, August 2015; see also UNHCR, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate' (2003) 3–16 <<http://www.unhcr.org/4317223c9.html>> accessed 28 April 2014.

<sup>73</sup> The only refugees who enjoy socio-economic rights on a par with Chinese citizens are Indochinese refugees, most of whom arrived between 1978 and 1982. They were recognized by the Chinese government as refugees in August 1979, before China's accession to the Refugee Convention and Protocol. For discussions on the recognition of the refugee status of Indochinese refugees, see Michael Godley, 'A Summer Cruise to Nowhere: China and the Vietnamese Chinese in Perspective' (1980) 4 *The Australian Journal of Chinese Affairs* 35; Paomin Chang, 'The Sino-Vietnamese Dispute over the Ethnic Chinese' (1982) 90 *The China Quarterly* 195; Song (n 59) 98–106. For more information about the treatment of refugees in China, see UNHCR (n 64).

<sup>74</sup> UNHCR (n 64). See also Rules for the Administration of Employment of Foreigners in China, promulgated jointly by the Ministry of Labour, Ministry of Public Security, Ministry of Foreign Affairs, and Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China on 22 January 1996 <[http://www.gov.cn/english/2005-08/29/content\\_27366.htm](http://www.gov.cn/english/2005-08/29/content_27366.htm)> accessed 9 February 2017.

<sup>75</sup> In November 2012, the Chinese government began to allow children of UNHCR refugees in seven provinces to access public education in primary schools under the same conditions as local Chinese children: UNHCR (n 65).

<sup>76</sup> UNHCR (n 64).

<sup>77</sup> Meilian Lin, 'Home Away from Home' *Global Times* (Beijing, 22 December 2013) <<http://www.globaltimes.cn/content/833531.shtml>> accessed 7 February 2017.

#### 4.2 The status of 'border residents' under the 1997 Chinese–Myanmar Agreement

China has signed bilateral border management treaties with several neighbours, including Myanmar,<sup>78</sup> North Korea,<sup>79</sup> Vietnam,<sup>80</sup> Nepal,<sup>81</sup> Laos,<sup>82</sup> and Mongolia.<sup>83</sup> These treaties contain provisions relating to border residents and similarly define the term 'border residents' as nationals or residents of each State party or both States parties who habitually reside in the border areas.<sup>84</sup> Most of these treaties also contain special favourable border-crossing arrangements for qualified border residents, although the substance of the arrangements varies from one treaty to another.<sup>85</sup>

The 1997 Agreement on Chinese–Myanmar Border Management and Cooperation between China and Myanmar (1997 Chinese–Myanmar Agreement) defines 'border residents' as 'persons with habitual residence (*changzhu*) in border areas of each party'.<sup>86</sup> The Agreement further defines 'border areas' as the border counties/cities/towns (20 pairs of bordering areas) listed in Appendix I of the Agreement.<sup>87</sup>

<sup>78</sup> Agreement on Chinese–Myanmar Border Management and Cooperation between China and Myanmar (concluded 25 March 1997, entered into force 29 September 1997) <<http://www.lawinfochina.com/display.aspx?id=317&lib=tax&SearchKeyword=&SearchCKeyword=>> accessed 10 February 2017. The initial term of the Agreement was 10 years. Upon expiry, it automatically renews for another 10 years, unless one party notifies the other in writing six months prior to expiry that it wishes to terminate the Agreement. As at July 2017, neither China nor Myanmar has expressed in public an intention to terminate the Agreement.

<sup>79</sup> The Ministry of Public Security of the People's Republic of China and the Ministry of National Security of the Democratic People's Republic of Korea Protocol on Cooperation in the Work of Maintaining National Security and Social Order at Border Areas (concluded 8 July 1998) <<http://policy.mofcom.gov.cn/PDFView?id=TYCX000076&libcode=gjty>> accessed 6 April 2014.

<sup>80</sup> Agreement between the Government of the People's Republic of China and Vietnam on Management of Land Borders (concluded 18 November 2009) <[http://www.mfa.gov.cn/mfa\\_chn/ziliao\\_611306/tytj\\_611312/tyfg\\_611314/t812100.shtml](http://www.mfa.gov.cn/mfa_chn/ziliao_611306/tytj_611312/tyfg_611314/t812100.shtml)> accessed 9 February 2017.

<sup>81</sup> Agreement between the Government of the People's Republic of China and the Government of Nepal on Border Ports and Their Management (concluded 14 January 2012) <<http://np.chineseembassy.org/chn/zngxs/zywj/t1059642.htm>> accessed 9 February 2017.

<sup>82</sup> Treaty between the Government of the People's Republic of China and the Government of Lao People's Democratic Republic (concluded 3 December 1993) <[http://www.npc.gov.cn/wxzl/gongbao/2001-01/02/content\\_5003197.htm](http://www.npc.gov.cn/wxzl/gongbao/2001-01/02/content_5003197.htm)> accessed 8 February 2017.

<sup>83</sup> Treaty between the Government of the People's Republic of China and the Government of Mongolia on Border Management Mechanism (concluded 1 June 2010) <<http://www.mfa.gov.cn/chn/gxh/zlb/tyfg/t812099.htm>> accessed 9 February 2017.

<sup>84</sup> For example, 2012 Chinese–Nepalese Treaty (n 81) art 1(3); 2010 Chinese–Mongolian Treaty (n 83) art 1(8); 2009 Chinese–Vietnamese Treaty (n 80) art 1(9); 1993 Chinese–Lao Treaty (n 82) art 13(1).

<sup>85</sup> For example, 2009 Chinese–Vietnamese Treaty (n 80) art 22; 2012 Chinese–Nepalese Treaty (n 81) art 3(2) (referring to an earlier agreement); 1993 Chinese–Lao Treaty (n 82) art 13; Chinese–North Korean Treaty (n 79) art 3(3).

<sup>86</sup> 1997 Chinese–Myanmar Agreement, art 1.

<sup>87</sup> *ibid.* The 20 pairs of Chinese–Myanmar areas listed in Appendix I of the Agreement are: Chayu–Nagmung, Gongshan–Khawbude, Fugong–Sawlaw, Lushui–Chipwi, Tengchong–Waingmaw,

The list of border areas provided in the 1997 Chinese–Myanmar Agreement includes several Chinese counties/cities that received large numbers of displaced Kachins or Kokangs,<sup>88</sup> such as Yingjiang County, Longchuan County, Ruili City, Tengchong City, Zhenkang County, and Gengma County, and several Myanmar towns affected by the Kachin and Kokang conflicts,<sup>89</sup> such as Mansi, Waingmaw, Momauk, Nam Kham, Konkyan, Muse, and Laukkai. Specifically, Yingjiang County borders Mansi; Tengchong City borders Waingmaw; Longchuan County borders Nam Kham. Yingjiang, Tengchong, and Longchuan counties were all top destinations for displaced Kachins in Yunnan. In light of this, it is likely that a significant portion of the displaced Kachins in Yunnan were residents of Mansi, Waingmaw, and Nam Kham, although no authoritative statistics on the place of origin of all or most of the displaced Kachins have been published.<sup>90</sup> Displaced Kachins who were residents of Mansi, Waingmaw, and Nam Kham or other listed Myanmar border towns would qualify as border residents under the 1997 Chinese–Myanmar Agreement. In the case of the displaced Kokangs, the majority were residents of Laukkai, which is listed as a border town in the 1997 Chinese–Myanmar Agreement. The majority of displaced Kokangs fled to Zhenkang, Gengma, and Cangyuan counties,<sup>91</sup> which are also listed as border areas in the Agreement.

The 1997 Chinese–Myanmar Agreement allows border residents to cross the border with an exit–entry pass (*churujing tongxingzheng*),<sup>92</sup> exempting them from normal visa requirements.<sup>93</sup> China and Myanmar should respectively issue the exit–entry pass to their own nationals who qualify as border residents under the Agreement.<sup>94</sup> The exit–entry pass enables the holder to cross the border and travel within the border areas defined in the Agreement.<sup>95</sup> Displaced Kachins and Kokangs in Yunnan who qualify as border residents are eligible for a border pass that allows them to cross into and travel within the border areas listed in the 1997 Chinese–Myanmar Agreement in Yunnan. While many of the displaced Kachins in Yunnan did hold an exit–entry pass issued by Myanmar immigration authorities when they fled to Yunnan, many others did not.<sup>96</sup>

---

Longling–Momauk, Yingjiang–Mansi, Longchuan–Namkham, Wanding–Muse, Ruili–Konkyan, Luxi–Laukkai, Zhenkang–Kunlong, Gengma–Hopang, Cangyuan–Mongmao, Lancang–Pangwaum, Ximeng–Mampan, Menglian–Pangyang, Menghai–Mongyang, Jinghong–Kengtung, Mengla–Mongyaung.

<sup>88</sup> *Beijing Youth Daily* (n 14).

<sup>89</sup> Free Burma Rangers, ‘Burma Army Offensive in Waingmaw Township Continues’ (*Burma Link*, 4 October 2016) <<http://www.burmalink.org/burma-army-offensive-waingmaw-township-continues/>> accessed 6 January 2017.

<sup>90</sup> Many of the displaced Kachins who fled to Yingjiang County did have border passes that were issued to qualified border residents under the 1997 Chinese–Myanmar Agreement: Interviews (n 27).

<sup>91</sup> SCIO (n 9).

<sup>92</sup> 1997 Chinese–Myanmar Agreement, art 20(2).

<sup>93</sup> Normally, Myanmar nationals need a visa to enter China, and vice versa.

<sup>94</sup> 1997 Chinese–Myanmar Agreement, art 20(2)(iv).

<sup>95</sup> *ibid* art 20(2)(ii).

<sup>96</sup> Interviews (n 31).

The Agreement also provides that the exit–entry pass should specify the following information: (1) the name, gender, date of birth, and residential address of the holder; (2) the reasons for the border crossing; (3) the port of crossing; (4) the destination of travel; and (5) the duration of validity of the pass.<sup>97</sup> It states that China and Myanmar encourage the trade of goods between and among border residents and the development of economic, cultural, and sporting cooperation between border areas, and that border residents may cross the border to take part in religious activities, visit relatives and friends, seek medical treatment, engage in commercial trade, and participate in traditional ethnic festivals and events.<sup>98</sup> There is no mention of using the exit–entry pass to cross the border for reasons of personal safety or freedom, but there is also no expression in the Agreement that the numerated reasons for crossing are exhaustive. In practice, to the knowledge of the author, the exit–entry pass issued by some Myanmar immigration authorities in Kachin State does not specify the reasons for which the holder crosses or is allowed to cross the border.<sup>99</sup> Kachin interviewees who fled to Yingjiang County in 2011 and 2012 also reported that Chinese security guards generally did not prevent holders of exit–entry passes from entering Yunnan to flee armed conflict.<sup>100</sup> Those who did not have an exit–entry pass were questioned and initially prevented from crossing;<sup>101</sup> about 3,000 of them, however, managed to enter Yunnan after pushing through Chinese border guard lines.<sup>102</sup>

The 1997 Agreement does not specify the procedure for obtaining an exit–entry pass, how long it allows the holder to stay in China or Myanmar, or whether the holder may engage in paid employment during his or her stay on the other side of the border.

### 4.3 The status of ‘border residents’ under the 1990 Yunnan Rules

In 1990, the Yunnan provincial government issued the Yunnan Province Administrative Rules for Entry–Exit of External Border Residents in the Chinese–Myanmar Border Areas (1990 Yunnan Rules),<sup>103</sup> noting that the management of the exit and entry of border residents along the Chinese–Myanmar border is a ‘highly political and policy-oriented’ matter.<sup>104</sup> Article 2 of the Rules states that they apply to ‘external border residents (*jingwai bianmin*) who reside (*juzhu*) on the Myanmar side of the border, who do not hold a formal passport issued by the Myanmar government or the Chinese government, and who stay (*tingliu*), travel (*lvxing*), or temporarily live (*juliu*) in [Yunnan]

<sup>97</sup> 1997 Chinese–Myanmar Agreement, art 20(2)(i).

<sup>98</sup> *ibid* art 20(1).

<sup>99</sup> Interviews (n 31).

<sup>100</sup> *ibid*.

<sup>101</sup> *ibid*.

<sup>102</sup> *ibid*.

<sup>103</sup> Promulgated by the People’s Government of Yunnan Province on 13 July 1990 <[http://xxgk.yn.gov.cn/canton\\_model1/newsview.aspx?id=2355688](http://xxgk.yn.gov.cn/canton_model1/newsview.aspx?id=2355688)> accessed 6 October 2015.

<sup>104</sup> People’s Government of Yunnan Province Notice on the Promulgation of the Yunnan Province Administrative Rules for Entry–Exit of External Border Residents in the Chinese–Myanmar Border Areas, issued by the Yunnan provincial government on 13 July 1990 <[http://xxgk.yn.gov.cn/canton\\_model1/newsview.aspx?id=2355688](http://xxgk.yn.gov.cn/canton_model1/newsview.aspx?id=2355688)> accessed 6 October 2015.



Province'.<sup>105</sup> However, the Rules do not specify which areas in Myanmar are 'border areas'. Article 43 of the Rules states that a list of Chinese and Myanmar border counties/cities is to be published by the Public Security Bureau of Yunnan Province, which also has the authority to interpret the 1990 Yunnan Rules.<sup>106</sup> As at July 2017, no such list could be found on the official website of the Yunnan Provincial Public Security Department,<sup>107</sup> or on the official website of the Exit–Entry Administration Bureau of the Yunnan Provincial Public Security Department.<sup>108</sup>

The 1990 Yunnan Rules allow border residents from Myanmar to enter Yunnan without a passport, and exempt them from obtaining an ordinary Chinese visa which is otherwise required for Myanmar nationals.<sup>109</sup> Border residents from Myanmar who do not intend to stay overnight in Yunnan are only required to obtain a so-called 'entry card' (*rujingka*) from Chinese border inspection authorities or from a public security station (equivalent to a police station) authorized by the border inspection authorities.<sup>110</sup> Those who intend to stay overnight or longer in Yunnan are required to obtain a 'Yunnan Province Entry–Exit Pass for External Border Residents in Border Areas' (*yunnansheng bianjing diqu jingwai bianmin ruchujingzheng*) (Yunnan Pass) and a so-called 'entry visa' (*rujing qianzheng*) from Chinese border inspection authorities.<sup>111</sup> The Yunnan Pass is valid for three years and each entry visa allows the border resident from Myanmar to stay in Yunnan for 15 days.<sup>112</sup> The border resident can also apply to extend the entry visa at the local public security authority up to three times, with each extension allowing no longer than 30 days of stay.<sup>113</sup>

Border residents from Myanmar who intend to stay in Yunnan for more than three months for reasons such as employment, study, business, or medical treatment, must obtain a 'Yunnan Province Temporary Residency Permit for External Border Resident' (*yunnansheng bianjing diqu jingwai bianmin linshi juliuzheng*) (Temporary Residence Permit) from the local public security authority at county/city level within 10 days of their entry into Yunnan.<sup>114</sup> The duration of validity of the Temporary Residence Permit may last from three months to one year, and may be extended twice, with each extension

<sup>105</sup> Translation of the 1990 Yunnan Rules from Chinese is the author's own. Art 2 of the Rules seems to indicate that Chinese nationals, as well as Myanmar nationals, who permanently reside on the Myanmar side of the border, may qualify as 'border residents' in the Rules.

<sup>106</sup> 1990 Yunnan Rules, art 44.

<sup>107</sup> Website address: <<http://www.ga.yn.gov.cn/>> accessed 26 July 2017.

<sup>108</sup> Website address: <<http://www.crjyn.net/>> accessed 11 February 2017.

<sup>109</sup> Normally, Myanmar nationals are required to apply for a visa at Chinese diplomatic establishments overseas: see Embassy of the People's Republic of China in the Republic of the Union of Myanmar, 'Description of Visa Categories' (29 August 2013) <<http://mm.china-embassy.org/eng/lsw/hzqz/t1070839.htm>> accessed 6 January 2017.

<sup>110</sup> 1990 Yunnan Rules, art 5.

<sup>111</sup> *ibid.*

<sup>112</sup> *ibid* art 6.

<sup>113</sup> *ibid.*

<sup>114</sup> *ibid* art 15.

allowing no longer than six months of stay.<sup>115</sup> The Temporary Residence Permit allows the holder to temporarily reside in the county/city in which he or she applied for the permit, and to travel to other counties/cities bordering Myanmar within the same prefecture or equivalent administrative division.<sup>116</sup> However, if the border resident from Myanmar wants to travel outside such areas, he or she must further apply for a different permit and provide relevant documents.<sup>117</sup>

In addition, the Rules require any border resident from Myanmar who stays overnight or longer to register with local authorities.<sup>118</sup> Those who stay at a hotel or guest-house must complete a registration form which should be submitted to the designated public security office within 24 hours.<sup>119</sup> Those who stay in a residential home are required to register in person or through the host with the local public security authorities or the town/village administration office authorized by the public security authorities.<sup>120</sup> Those who stay in makeshift or movable accommodation such as tents or sheds are required to obtain prior approval from the public security authorities in person or through the venue provider.<sup>121</sup>

There are inconsistencies between the 1990 Yunnan Rules and the 1997 Chinese–Myanmar Agreement. For example, under the Rules, border residents are required to use an entry card or Yunnan Pass issued by the Chinese authorities to enter Yunnan,<sup>122</sup> whereas under the Agreement, border residents must use an exit–entry pass issued by the Myanmar authorities.<sup>123</sup>

According to article 27 of the Vienna Convention on the Law of Treaties,<sup>124</sup> to which China is a party,<sup>125</sup> a State party may not invoke the provisions of its domestic law as justification for its failure to perform a treaty. Therefore, where there is a conflict between the 1997 Chinese–Myanmar Agreement and the 1990 Yunnan Rules,

<sup>115</sup> *ibid* art 18.

<sup>116</sup> *ibid* art 20. For more information on the administrative division system in China, see Consulate-General of the People's Republic of China in Gothenburg, 'China's Administrative Division System' <<http://www.fmprc.gov.cn/ce/cggb/eng/xnyfgk/t216950.htm>> accessed 10 February 2017.

<sup>117</sup> *ibid* arts 24–26.

<sup>118</sup> *ibid* art 10.

<sup>119</sup> Seventy-two hours for remote rural areas: *ibid* art 11.

<sup>120</sup> *ibid* art 12.

<sup>121</sup> *ibid* art 13.

<sup>122</sup> *ibid* art 5.

<sup>123</sup> 1997 Chinese–Myanmar Agreement, art 20(2)(iv).

<sup>124</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

<sup>125</sup> China acceded to the VCLT on 3 September 1997. UN, 'Status as at 26-01-2017: Vienna Convention on the Law of Treaties' <[https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en)> accessed 26 January 2017.

the 1997 Chinese–Myanmar Agreement should prevail.<sup>126</sup> However, where the 1997 Chinese–Myanmar Agreement leaves a gap, for example how long the border resident is allowed to stay in Yunnan, the 1990 Yunnan Rules apply.

#### 4.4 The legal status of displaced Kachins and Kokangs in China

As discussed above, displaced Kachins and Kokangs in Yunnan *prima facie* merit refugee status under the Refugee Convention. Many of them also qualify as ‘border residents’ under the 1997 Chinese–Myanmar Agreement and the 1990 Yunnan Rules.

There is nothing in international or Chinese law that suggests that refugee status and the status of border resident are mutually exclusive. The fact that a Myanmar national is a border resident does not automatically prevent the person from qualifying for refugee status at the same time. As such, displaced Kachins and Kokangs in Yunnan who simultaneously fulfil the criteria for refugee status and border residents should be entitled to the rights attached to each status.

### 5. EVALUATION OF CHINA’S TREATMENT OF DISPLACED KACHINS AND KOKANGS IN YUNNAN

#### 5.1 Admission to Yunnan Province

As mentioned above, the Chinese authorities have generally allowed displaced Kachins and Kokangs to enter Yunnan following the resumption of armed conflict in Kachin State and the Kokang Region in Shan State, although forced repatriation of displaced Kachins has been reported from time to time.<sup>127</sup> The fact that many displaced Kachins and Kokangs in Yunnan are from areas very close to the Chinese–Myanmar border and hold, or would be eligible for, an exit–entry pass in accordance with the 1997 Chinese–Myanmar Agreement and the 1990 Yunnan Rules may have been the main reason for China’s tolerance of their entry. However, China also admitted displaced Kachins from remote areas who did not have, and probably would not be eligible for, an exit–entry pass, and allowed many displaced Kachins and Kokangs to remain in Yunnan longer than their exit–entry pass would normally have permitted.<sup>128</sup> By doing so, China provides a much-needed, temporary safe space for Kachins and Kokangs displaced

<sup>126</sup> The Yunnan government seems to have made an effort to reconcile the differences between the Chinese–Myanmar Agreement and the Yunnan Rules. A recent Yunnan provincial regulation correctly recognizes that the exit–entry document(s) issued by a neighbouring country should be the primary document(s) used by border residents from that country to enter Yunnan. See Yunnan Province Regulations on Border Management, issued by the Yunnan government (promulgated by the Standing Committee of the Yunnan Province People’s Congress 15 December 2016, entered into force 1 January 2017) art 17 <[http://www.yfao.gov.cn/xxgk/zfwj/201612/t20161229\\_480215.html](http://www.yfao.gov.cn/xxgk/zfwj/201612/t20161229_480215.html)> accessed 9 February 2017.

<sup>127</sup> HRW (n 5) 36.

<sup>128</sup> Normally, holders of an exit–entry pass were allowed to stay in Yunnan for up to 7 days per trip. Interviews (n 27).

by armed conflicts in Myanmar. China's admission of these displaced Kachins and Kokangs is in line with UNHCR guidelines for dealing with large-scale influxes of displaced persons.<sup>129</sup>

## 5.2 Denial of refugee status without individual assessment and forced repatriation

There is no evidence that China's denial of refugee protection to displaced Kachins and Kokangs in Yunnan was based on an assessment of their individual circumstances. As mentioned above, Chinese border guards briefly questioned some displaced Kachins and Chinese officials collected some basic information, such as name, gender, age, and home village, about the displaced Kachins and Kokangs who stayed at self-established camps. Although such questioning and collection of information could be seen as some form of interview,<sup>130</sup> it falls short of an adequate individual assessment for the purposes of RSD in accordance with relevant international standards.<sup>131</sup> For example, UNHCR's Executive Committee, recognizing the grave consequences of an erroneous determination of refugee status, recommends that:

as in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status.<sup>132</sup>

As pointed out by Lauterpacht and Bethlehem, any decision to deny refugee protection without assessment of the claimant's individual circumstances would be inconsistent with article 33(1) of the Refugee Convention,<sup>133</sup> which provides that:

No 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.

<sup>129</sup> See eg UNHCR Executive Committee Conclusion No 22 (XXXII), 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (21 October 1981); UNHCR Executive Committee, 'The Scope of International Protection in Mass Influx', UN doc EC/1995/SCP/CRP.3 (2 June 1995); UNHCR, 'Protection of Refugees in Mass Influx Situations: Overall Protection Framework', UN doc EC/GC/01/4 (19 February 2001).

<sup>130</sup> HRW (n 5) 26.

<sup>131</sup> See UNHCR Executive Committee Conclusion No 30 (XXXIV), 'The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum' (1983) para e(i); UNHCR (n 36).

<sup>132</sup> UNHCR ExCom (n 131) para e(i).

<sup>133</sup> Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 118.

Even in mass influx situations, to avoid *refoulement*, denial of refugee status should not be made without an individual assessment;<sup>134</sup> a group determination approach operates only to *recognize* refugee status.<sup>135</sup> As a report by the UN Secretary-General stated in 2016, '[a]ll refugees and migrants, regardless of status, are entitled to due process of law in determination of their legal status, entry and right to remain, and in no cases are collective expulsions permissible.'<sup>136</sup>

While China does not have a national RSD mechanism, the lack of national RSD procedures is no excuse for its failure to allow assessment of the individual circumstances of the displaced Kachins. China's denial of refugee status to the displaced Kachins without individual assessment resulted in the forced repatriation of thousands of displaced Kachins.<sup>137</sup> The most reported repatriation took place in mid-August and early September 2012, when about 5,000 displaced Kachins, mainly those staying in self-established camps, were forcibly returned to Myanmar.<sup>138</sup> Such forced repatriation without individual assessment is inconsistent with the principle of *non-refoulement* under article 33(1) of the Refugee Convention.<sup>139</sup> In addition, China's refusal to allow UNHCR to access the displaced Kachins is also inconsistent with its commitment under article 35 of the Refugee Convention, as well as article 3(5) of the 1995 China–UNHCR Agreement, to cooperate with UNHCR in the exercise of its functions.

### 5.3 Restrictions on travel

Displaced Kachins and Kokangs in Yunnan, as mentioned above, are generally not allowed to travel beyond the boundaries of the Chinese border town they entered.<sup>140</sup> This seems to be in accordance with the relevant provisions on travel restriction applicable to border residents under the 1997 Chinese–Myanmar Agreement and the 1990 Yunnan Rules.<sup>141</sup>

However, article 26 of the Refugee Convention requires States to allow refugees lawfully present to move freely within the country, subject only to limitations applicable to

<sup>134</sup> UNHCR, 'Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards' (2 September 2005) para 6 <<http://www.unhcr.org/4aa76da49.pdf>> accessed 22 June 2016.

<sup>135</sup> *ibid*; UNHCR ExCom 1981 & 1995 (n 129); Albert (n 35).

<sup>136</sup> UN, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants. Report of the Secretary-General*, UN doc A/70/59 (21 April 2016).

<sup>137</sup> For example, HRW (n 5) 36; Interviews (n 31).

<sup>138</sup> Edwards (n 69).

<sup>139</sup> China also has the obligation of *non-refoulement* under art 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (Convention against Torture), to which it is a party. If there are substantial grounds for believing that the Kachins would be in danger of being subjected to torture upon return to Myanmar, China would also have violated art 3(1) of the Convention against Torture.

<sup>140</sup> Zhang (n 11); Interviews (n 31).

<sup>141</sup> 1997 Chinese–Myanmar Agreement, art 22(2)(i); 1990 Yunnan Rules, art 20.

aliens generally in the same circumstances. As noted by Goodwin-Gill and McAdam, lawful presence ‘implies admission in accordance with the applicable immigration law, for a temporary purpose.’<sup>142</sup> Many of the displaced Kachins and Kokangs entered Yunnan on a valid exit–entry pass. They are therefore lawfully present in China and should be allowed to travel freely within China on the same footing as other foreigners in China.

## 6. CONCLUSION

This article considers the legal status of the displaced ethnic Kachins and Kokangs who fled to China’s Yunnan Province from Myanmar and evaluates China’s treatment of these two groups. The displaced Kachins and Kokangs in Yunnan Province *prima facie* meet the criteria for refugee status under the Refugee Convention and Protocol. Many of them also qualify as ‘border residents’ under the 1997 Chinese–Myanmar Agreement and the 1990 Yunnan Rules. These two types of status are not mutually exclusive. Displaced Kachins and Kokangs who simultaneously qualify for both types of status are entitled to the rights attached to each status.

China’s treatment of displaced Kachins and Kokangs in Yunnan is generally based on their status as border residents under the 1997 Chinese–Myanmar Agreement and the 1990 Yunnan Rules, since it refuses to consider them as refugees. As a party to the Refugee Convention and Protocol, China should take all necessary measures to ensure that its treatment of displaced Kachins and Kokangs in Yunnan is in accordance with its obligations under those instruments, including, most importantly, allowing UNHCR to access the displaced Kachins and Kokangs in Yunnan to conduct RSD, and refraining from forced collective repatriation without individual assessment of their protection claims under the Refugee Convention and Protocol.

<sup>142</sup> Goodwin-Gill and McAdam (n 37) 524. See also James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 174: according to Hathaway, a refugee is lawfully present if admitted to a State party’s territory and as long as his or her presence is officially sanctioned.