HOW THE INTERNATIONAL CRIMINAL COURT EXCEEDS EXPECTATIONS

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I. Introduction

On July 17, 1998, 120 states adopted the Rome Statute, creating the first permanent international criminal court to try individuals for genocide, crimes against humanity, and war crimes. The Rome Statute entered into force on July 1, 2002, but not all scholars were confident that the International Criminal Court (ICC) would succeed at carrying out its mandate. Eric A. Posner and John C. Yoo predicted that the Court's reliance on State Parties to conduct investigations, gather evidence, arrest suspects, and surrender defendants without independent ICC enforcement would render the Court ineffective. Have the concerns of Posner and Yoo been realized, or has the ICC exceeded expectations? After more than ten years since the institution of the Rome Statute, it is now possible to examine closely the Court's case history and either verify or falsify their predictions. Although there are many subjective factors to consider when defining effectiveness, and the passing of more time will allow for a more definitive conclusion as to the Court's overall usefulness, this study reveals that, so far, the ICC has been far more effective than Posner and Yoo imagined.

The paper will proceed as follows. First, outline the predictions made by Posner and Yoo and then briefly compare these to a model created by Michael J. Gilligan, who argues that enforcement is not necessary for effectiveness, contrary to the critics' assumptions. After establishing this theoretical foundation, I discuss my hypotheses concerning the Court's effectiveness. In the following three sections I use examples from cases that have been brought

before the ICC to test the predictions of Posner and Yoo. Lastly, I give concluding remarks about the overall effectiveness of the ICC.

II. Predictions of Posner and Yoo

In 2005, Posner and Yoo made specific predictions about the Court's future. First, they hypothesized that states will pressure other states to violate the Rome Statute so that the only remaining abiding State Parties will be those that do not conduct significant military operations abroad (Posner and Yoo 2005). The authors stressed that countries with military forces abroad will fear that their troops will be forced to appear before the Court and tried for war crimes, which at minimum will be inconvenient and embarrassing. Posner and Yoo also believed that states with troops in foreign lands will be concerned that their military personnel may be tried for crimes that their home country considers legal. These concerns, Posner and Yoo stated, explain why the United States has not ratified the statute and has pressured other states to follow suit. Second, the authors forecasted that most states will not comply with extradition requirements, given that the Court cannot sanction a country or use force to apprehend suspects. Third, the authors predicted that only nationals of a defeated state will appear before the Court as part of the new government's attempt to earn legitimacy, which will largely limit the number and types of crimes tried. Overall, Posner and Yoo expected that the ICC will be reduced to fulfilling the functions of a classic ex post tribunal, whose power and jurisdiction are defined after the atrocities are committed so that states may immunize themselves. Fundamentally, the authors stated that, "With its wings clipped, the ICC will become just another dependent international tribunal" (ibid., 70).

III. Is Enforcement Necessary?

In contrast to Posner and Yoo's pessimistic predictions, Michael J. Gilligan created a model to show that enforcement is not necessary for the Court to be effective when charging dictators with atrocious crimes. He argues that the existence of the ICC allows asylum-granting states to credibly refuse to provide a haven for dictators, which may prevent dictators from committing abuses at the margin (Gilligan 2006). His argument follows logically from the payoffs of both dictators and foreign countries. Utility for atrocity-committing dictators is greater if they expect to receive asylum when they lose grip on power and face domestic retribution if they remain in their country. Foreign countries prefer that other nations are not ruled by atrocity-committing dictators, and, therefore, cannot credibly commit to denying asylum to a dictator willing to leave his country and cease committing crimes. Gilligan states that a dictator will prefer asylum to surrendering to the ICC, but prefers surrendering to the ICC than to domestic retribution. Although the ICC has yet to make a ruling, Gilligan safely assumes that domestic vengeance will be worse than any punishment imposed by the Court. The existence of the ICC allows foreign countries to credibly reject requests for asylum, because dictators will voluntarily surrender to the ICC rather than be deposed by their domestic opposition. Therefore, the ICC lowers dictators' expected value for committing the crimes in the first place, because there is the chance that foreign countries will deny them asylum and they will be forced to surrender to the Court or face domestic retribution. Lastly, the existence of the Court does not force dictators to hold onto power to avoid prosecution. Surrender is voluntary and the ICC only reduces the incentive for foreign countries to grant asylum if the dictator

prefers surrendering to the Court to staying in power. If the dictator would rather stay in power than surrender to the Court, foreign states can still offer asylum and these asylum-granting states will not be punishment by the Court (ibid.). This aspect of the model, however, rests on the assumption that potential asylum granters are aware of the preferences of dictators. In sum, Gilligan's model "allows states to credibly refuse asylum in some cases, when, without [the ICC] they would prefer to offer it, and it does so without prolonging the reign of atrocity-committing dictators" (ibid., 943).

Posner and Yoo, on the other hand, predict that State Parties will not comply with extradition requirements. By not extraditing a foreign suspect, the countries that do not comply with the Rome Statute are, in effect, providing asylum. A lack of compliance with extradition requirements, the authors argue, will render the Court ineffective (Posner and Yoo 2005). Gilligan's model, however, demonstrates that the existence of the ICC offers foreign countries another option. While states may not have complied with extradition requirements before, the existence of an international court may alter their preferences (Gilligan 2006). Furthermore, Posner and Yoo state that only nationals of a defeated state will appear before the Court, but Gilligan provides for the possibility of voluntary surrender, an option not addressed by Posner and Yoo. Overall, Gilligan's model predicts that the ICC can be effective without the enforcement mechanisms that Posner and Yoo believe are necessary (ibid.).

IV. Hypotheses

To determine if Posner and Yoo's predictions are accurate or if I can extrapolate Gilligan's model beyond dictators to explain the effectiveness of the ICC, one must examine the ICC cases since the Court's creation in 2002. If it is true that countries will pressure other states

to violate ICC obligations so that the only remaining abiding State Parties are those that do not conduct military operations abroad, we should observe three outcomes. First, State Parties that once ratified the Rome Statute will withdraw their ratification. Second, those nations that withdraw will be states that conduct significant military operations on foreign land. Third, none of the remaining State Parties that have ratified the statute will conduct significant military operations abroad. If Posner and Yoo's second prediction – that states will not comply with extradition requirements – is accurate, most State Parties will not have extradited suspects to the ICC. Lastly, Posner and Yoo predict that only nationals of a defeated state will appear in Court due to the new government's quest for legitimacy. If this is true, only suspects that were previous members of a now defeated state structure will arrive at The Hague. Although it is difficult to determine the individual motivations of state leaders, a new government would also need to be in place of that defeated state structure in order to substantiate the claim that the new regime hopes to gain legitimacy by bringing defeated nationals before the ICC. If Posner and Yoo's predictions are accurate, the ICC is an ineffective international tribunal, but I disagree. By examining the Court and each of its cases, I find that few nations withdrew their ratification, not all State Parties refrain from military operations abroad, State Parties do comply with extradition requirements, and suspects other than defeated nationals appear before the Court. Overall, the International Criminal Court is more effective than Posner and Yoo predicted.

V. Testing Predictions: State Withdrawal

To reiterate, Posner and Yoo predict that, "as time passes and more states put pressure on other states to violate their ICC obligations [...] the only remaining State Parties will be states

that do not conduct significant military activities on foreign territory" (2005, 70). This statement suggests that powerful nations, such as the United States, will pressure other states to withdraw their ratification of the Rome Statute. Although one can also interpret the prediction to mean that states will pressure other countries not to ratify the statute, the word "remaining" suggests that Posner and Yoo believe that nations will withdraw after already ratifying. Furthermore, Posner and Yoo specifically use the word "withdrawal" when referring to the United States (ibid., 69). This is misleading. The United States was never a State Party, and therefore, could not withdraw from the statute. Although the United States did retract its signature, the distinction between being a signatory and a State Party is important when determining if Posner and Yoo's prediction is true. The Vienna Convention on the Law of Treaties states that:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed (1969, Article 18).

On May 6, 2002, the United States "made its intention clear not to become a party to the treaty" and thus withdrew its signature. On August 28, 2002, Israel also informed the Secretary-General that it did not intend to become a party to the treaty. On August 26, 2008, Sudan withdrew its signature as well (United Nations 1998). Assuming that Posner and Yoo's prediction refers to the withdrawal of State Parties from the statute, not the retraction of signatures, none of the aforementioned countries fulfilled the prophecy. If one interprets their statement more broadly to include the withdrawal of signatures by nations that currently

conduct military operations abroad, then Israel and the United States do fulfill the authors' prediction. While the United States is not shy about promoting its anti-ICC stance and encouraging countries to sign the Article 98 Agreement to prevent the surrender of U.S. soldiers to the ICC (ibid.), several State Parties, such as the United Kingdom, France, Poland, Australia, and South Korea, conduct significant military activities abroad and have not succumbed to pressure to withdraw from the Rome Statute.

Before looking more closely at State Parties to determine whether or not Posner and Yoo's prediction is true, it is first necessary to clarify the vague phrase "significant military activities." Posner and Yoo do not offer a definition of "military activities," which can range from a declaration of war to the presence of military advisers abroad. In order to develop a working definition for military activities, I have adopted Ann E. Story and Aryea Gottlieb's framework, which divides military operations into three categories – combat operations, noncombat operations, and an overlapping category that may or may not involve combat depending on the situation. To address Posner and Yoo's use of the word "significant," I consider combat operations and the overlapping category as "significant." Therefore, "significant military activities" include war, operations to restore order, retaliatory operations, combating terrorism, exclusion zone operations, ensuring freedom of navigation, noncombatant evacuation operations, and recovery operations (Story and Gottlieb 1995). In order to adhere to what I interpret as Posner and Yoo's meaning of "significant" and to restrict my findings to make them as robust as possible, I did not include noncombat operations, such as show of force, truce keeping, and support and assistance operations.

Based on this definition, at least five State Parties to the Rome Statute can be classified as conducting significant military operations abroad. Although I chose only a few of the most apparent cases, there are more countries conducting military activities abroad that have ratified the Rome Statute than countries that have withdrawn from the ICC, even when interpreting Posner and Yoo's prediction in its broadest sense. The United Kingdom, for example, has 40,880 troops deployed around the world. After the official end of the Iraq War in April 2003, UK troops have remained in the country to restore infrastructure and provide security. In Afghanistan, UK forces are stationed mainly in the southern province of Helmand to combat the Taliban. Until 2007, UK forces in Northern Ireland were also deployed to combat terrorism and maintain public order (British Broadcasting Company 2008). The French military is engaged in operations around the world as well. In Afghanistan, 3,800 armed troops are working to secure the country and allow for development and reconstruction. With 1,300 soldiers, France is the third largest supporter of the United Nations Interim Force in Lebanon. French naval forces have also been deployed off the coast of Somalia to prevent piracy and armed robbery and are presently in Chad and Kosovo to ensure stability and security. Most recently, France launched a military operation to support the Malian armed forces and stop the advancement of jihadi groups to the south of Mali (Ministére de la Défense et des Anciens Combattants). Like France, Poland is currently contributing to many international operations with a total of 3,500 deployed forces. Poland participated in a stabilization mission during operation Iraqi Freedom in 2003 and sent an anti-terrorism contingent to Afghanistan in 2002. Today, the country's largest mission is contributing to the NATO operation in Afghanistan (Ministry of National Defense Republic of Poland). Furthermore, Australia has a military

presence on the world stage with 1,550 troops combating terrorism, improving maritime security, and countering piracy, as well as managing humanitarian relief, recovery, and reconstruction in Afghanistan. (Australian Government: Department of Defense). Lastly, the South Korean military has deployed troops to help the United States in every major conflict throughout the last fifty years. With 3,300 troops that fought in northern Iraq, South Korea is the third largest contributor to the Iraq War effort after the United States and Britain (South Korea Government). With troops stationed around the globe and continued ratification of the Rome Statute, these countries have failed to live up to Posner and Yoo's expectations of withdrawal.

VI. Testing Predictions: Compliance with Extradition Requirements

Posner and Yoo's prediction that countries will not comply with extradition requirements has also failed to materialize. Of the fourteen cases currently being investigated by the ICC, four different countries have extradited suspects. Mr. Thomas Lubanga Dyilo, for example, was arrested on March 17, 2006 by Congolese authorities and transferred to the International Criminal Court. Lubanga is the alleged founder and leader of the Union des Patriotes Congolais (UPC) and has been charged with committing the war crime of conscripting and enlisting children less than fifteen years of age to be used actively in hostilities (International Criminal Court "First Arrest" 2006). A Rwandan citizen, Callixte Mbarushimana, was also arrested in France for allegedly committing war crimes and crimes against humanity in the Democratic Republic of the Congo (DRC). Mbarushimana is believed to be the Executive Secretary for the Forces Démocratiques pour la Libération du Rwanda (FDLR) and is allegedly responsible for committing five counts of crimes against humanity, including murder, torture,

rape, inhumane acts, and persecution, as well as six counts of war crimes (International Criminal Court "Callixte Mbarushimana" 2010). In the suburbs of Brussels, far from the "trail of death and destruction behind him," Jean-Pierre Bemba was arrested for allegedly committing crimes against humanity and war crimes in the Central African Republic (CAR) (International Criminal Court "ICC Arrest of Jean-Pierre Bemba" 2008). As chairman of the Mouvement de Libération due Congo (MLC), Bemba actively participated in the MLC intervention in the 2002-2003 armed conflict in the CAR. He has been accused of terrorizing innocent civilians and carrying out a massive campaign of rape and looting. Prosecutor Moreno-Ocampo stated, "We are grateful to all the countries involved, including Belgium which immediately executed the Arrest Warrant in accordance with their obligations under the Rome Statute" (ibid.). As these cases demonstrate, State Parties to the Statute have executed their commitment to extradition and are in compliance with the Statute.

In addition, Cote d'Ivoire, which is not a State Party to the Rome Statute, also extradited an ICC suspect. In a close November presidential election, Alassane Outtara won fifty-four percent of the vote, but his opponent Laurent Gbagbo refused to leave office. Gbagbo's supporters quickly took up arms to fight for his presidency, and in April of 2011, the Republican Forces of Cote d'Ivoire, with the backing of French troops, arrested Gbagbo (Lynch and Branigin 2011). On April 18, 2003, Cote d'Ivoire accepted the jurisdiction of the ICC and on October 3, 2011, the Prosecutor of the ICC was granted his request to investigate alleged crimes committed in the Ivory Coast and later opened the case of *Prosecutor vs. Laurent Koudou Gbagbo* (International Criminal Court "Situations and Cases"). Gbagbo is charged with murder, rape and sexual violence, persecution, and other inhumane acts allegedly committed during the

post-election violence (International Criminal Court "Cote d'Ivoire"). Although never having signed or ratified the Rome Statute, the Ivory Coast has declared its acceptance of ICC jurisdiction and extradited one of its own citizens to face trial.

Furthermore, nine suspects voluntarily surrendered to the Court and, therefore, did not require extradition (International Criminal Court "Situations and Cases"). Bahr Idriss Abu Garda, for example, voluntarily arrived in The Netherlands aboard a commercial plane and appeared at the Court on May 27, 2009. After charging Abu Garda with three counts of war crimes committed on September 29, 2007 against the African Union Mission in Sudan (AMIS), the Court issued a summons for his appearance rather than release a warrant for his arrest. Silvana Arbia, the Registrar of the Court, was very pleased by Abu Garda's response to the summons and hopes that, "The voluntary appearance of Abu Garda might serve to encourage other suspects currently at large to come before the Court to be heard with all guarantees of a fair trial" (International Criminal Court "Bahr Idriss Abu Garda" 2009). Her wish was granted a year later when Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus responded to a summons and voluntarily arrived at the ICC on June 16, 2010. Like Abu Garda, the suspects are charged with committing war crimes during the September 29 attack, which killed twelve AMIS soldiers and wounded eight others (International Criminal Court "New suspects" 2010). In addition, six Kenyan citizens responded to a summons by appearing before the Court on April 7 and 8, 2011 in order to face charges for human rights abuses committed when post-election violence broke out in 2007 and 2008 (International Criminal Court "Situations and Cases"). It is possible, as Arbia hoped, that Abu Garda's voluntary surrender motivated others to seek a fair and balanced trial, which may not have been available in their own respective countries.

Perhaps, more in line with Gilligan's model, these nine suspects preferred to surrender to the Court rather than face domestic retribution at the hands of their opposition. Although the counterfactual can only be considered theoretically, it is possible that if the ICC did not exist to offer an alternative option to the committers of these human rights abuses, they may have prolonged their destructive and violent acts in order to deter punishment from their respective domestic opposition. Regardless of their personal motivations for surrender, however, suspects' voluntary appearance at The Hague would not have been possible without the existence of the Court.

Despite these optimistic findings, there are countries that have failed to fulfill the Court's requests for extradition. The ICC issued an arrest warrant for President Omar Hassan Ahmad al Bashir, but he has since traveled to Kenya, Chad, Malawi, and Djibouti without being apprehended or extradited, despite these nations' ratification of the Rome Statute and obligation to comply with the ICC's request for arrest (International Criminal Court "Pre-Trial Chamber I informs" 2010; International Criminal Court "Pre-Trial Chamber I requests observations" 2011; International Criminal Court "Pre-Trial Chamber I informs" 2011). The President of the Republic of Sudan is allegedly responsible for five counts of crimes against humanity, two counts of war crimes, and three counts of genocide (International Criminal Court "Darfur, Sudan"). After Al Bashir's visit to Kenya, however, a Kenyan judge issued an arrest warrant for Al Bashir if he were ever to return to Kenya (British Broadcasting Company "Sudan to Expel Ambassador" 2011). Al Bashir also planned to travel to the Central African Republic, however, when the ICC learned of Al Bashir's travel plans, it requested that the CAR take all measures necessary to arrest Al Bashir (International Criminal Court "Pre-Trial Chamber I

requests the cooperation" 2010), and Al Bashir cancelled the trip (Goldberg 2010). Given the CAR's previous voluntary involvement with the ICC and the Court's direct appeal to the country, Al Bashir may not have wanted to risk extradition by traveling to the nation.

As such, Posner and Yoo's prediction is validated in the case of Al Bashir. It seems unlikely that Al Bashir will be denied asylum and thus be forced to surrender to the ICC given the support he enjoys among many members of the AU. Although many African Union members have agreed to ignore the ICC's arrest warrant, others, such as Zambia, remain committed to their obligations under the Rome Statute. The Director of the Southern African Centre for the Constructive Resolution of Disputes stated that, "Zambia has an obligation to assist the ICC in enforcing its outstanding warrants against al- Bashir [...] If al-Bashir is granted entry into Zambia and then not arrested, it would send the wrong signal to victims in Darfur" (Human Rights Watch 2010). It is encouraging that not all nations intend to disregard their ICC obligations and that the Lord's Resistance Army rebels, Al Bashir, and other Sudanese suspects, have been restricted as a result of the Court's existence. Overall, there has not been complete compliance with the Court's extradition requirements, but the arrests that have been made and restrictions on travel that have been placed as a result of the Rome Statute have allowed the Court to function more effectively than Posner and Yoo anticipated.

VII. Testing Predictions: Nationals of Defeated States

In addition, the suspects who failed to surrender voluntarily and were arrested were not "nationals of a defeated state." This fails to support Posner and Yoo's prediction that, "War criminals will appear before the ICC only in those rare cases where they are nationals of a defeated state whose new government seeks to acquire international legitimacy" (2005 70).

Their statement depicts a scenario in which a state is overthrown and replaced with new leadership, which strives to gain legitimacy by holding the previous leaders or supporters of the old regime accountable for their crimes. None of the alleged war criminals facing trial at the ICC are "nationals of a defeated state." The case of Jean-Pierre Bemba almost fulfilled Posner and Yoo's prediction, but fell short because Bemba is not a citizen of the Central African Republic, which referred the investigation to the ICC.

In 2002, the president of the Central African Republic, Ange-Felix Patassé, asked Bemba, a citizen of the DRC, to help put down an attempted coup. A year later, Bemba laid down arms and was sworn in as vice-president in charge of finance in the DRC (British Broadcasting Company 2010). Meanwhile, Francoi Bozizé, the former Army Chief of Staff of the CAR, launched a coup against President Patassé and overthrew the government in March of 2003. Under Bozizé's government, the judicial authorities in the CAR began proceedings in 2004 against Patassé and military commanders for crimes against the civilian population committed during the 2002 coup attempt. The case was later referred to the ICC (Human Rights Watch 2007). Across the border in the DRC, Bemba ran for president against incumbent Josepeh Kaliba and lost during the run-off election in 2006 (British Broadcasting Company 2008). He was then accused of refusing to disarm his militia and of promoting violence in Kinshasa, DRC. In March 2007, the army and his bodyguards clashed in the capital and Bemba fled to Belgium where he was arrested and surrendered to the ICC in May 2008 (British Broadcasting Company 2010). It is likely that President Bozizé hoped to gain legitimacy in his newly usurped position by referring the crimes committed by the previous administration to the ICC. Thus far, however, the ICC investigation has only led to the arrest of Congolese national Bemba. Therefore, the hypothesis

that only ""nationals of a defeated state"" will appear before the court does not hold true because Bemba is not a citizen of the CAR. If the investigation later leads to the arrest of members of Patassé's administration, the situation in the Central African Republic will offer evidence for Posner and Yoo's prediction.

The story of Laurent Gbagbo's arrest is similar, but fundamentally different in that the state itself was not defeated. After Gbagbo lost to Alassane Outtara in the Ivory Coast's presidential elections, Gbagbo supporters took up arms and caused an explosion of post-election violence. The Ivory Coast had previously accepted the jurisdiction of the ICC in April 2003, but also reconfirmed its acceptance in 2010 and 2011, after Ouattara was inaugurated (International Criminal Court "Situations and Cases"). Ouattara may have chosen to reaffirm the country's commitment to the Rome Statute immediately following his election in order to encourage ICC involvement in the post-election crisis, which led to Gbagbo's arrest and trial. By holding Gbagbo accountable for the atrocities he committed after the election and preventing the spread of more violence, Ouattara garnered further legitimacy both domestically and on the international stage, where we was already widely accepted. Regardless of his motivations, however, the situation in the Ivory Coast fails to support Posner and Yoo's hypothesis. Although the transition of power that resulted from the Presidential election unfortunately led to violence, the state as a whole was not defeated and the government remained intact. Therefore, Gbagbo is a defeated national, but not a national of a defeated state.

Similarly, the suspects arrested for crimes committed in the Democratic Republic of the Congo can also be considered defeated nationals, but not citizens of an overthrown or dismembered state. President Joseph Kabila referred the country for investigation by the ICC on

April 19, 2004. He may have been seeking to gain legitimacy as an interim president by allowing the Court to open cases against alleged war criminals, such as Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui, and Callixte Mbarushimana. None of these men, however, were involved with the state structure, ousted politicians of a defeated state, or war criminals that lost power in a coup. Therefore, despite their downfalls at the hands of Congolese authorities, none of these militia leaders could be termed "nationals of a defeated state." Furthermore, the DRC has not experienced a complete state defeat since Mobuto was ousted from power in the late 1990s (British Broadcasting Company "Democratic Republic of Congo Profile" 2011), and Kabila did not use the ICC to prosecute members of Mobuto's regime. Therefore, although Kabila may have referred the DRC to the ICC for investigation to gain legitimacy, he was not seeking to prosecute nationals of a defeated state.

VII. Conclusion

Despite the ICC's lack of enforcement mechanisms, the Court has failed to fulfill Posner and Yoo's predictions. As such, the ICC has proved to be more effective than the critics anticipated. Although the ICC is still a relatively new establishment and it will take several more years to determine the full extent of the Court's effectiveness, this preliminary survey has produced optimistic results. Not only have very few states withdrawn from the Rome Statute, but also many countries are committed to the ICC despite conducting significant military activities abroad. Several states have extradited suspects to the ICC and, even more promising, nine alleged war criminals have voluntarily surrendered without the issuance of arrest warrants. Posner and Yoo's assumption that only nationals of a defeated state will be brought before the Court has also been proved inaccurate. Overall, the Court has not devolved into

another dependent international tribunal as Posner and Yoo expected, but appears to be solidifying its role as an irreplaceable asset to ending impunity at an international level.

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