BOSNIAN WAR CRIMES CHAMBER – CHALLENGE FOR JUSTICE

by

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A. INTRODUCTION

The aim of this paper is to provide some basic information about the newly established War Crimes Chamber in Bosnia. This Court is a kind of a hybrid between a mixed international tribunal and a domestic non-international judicial system. It is located in Sarajevo and is designed to prosecute major crimes committed on the territory of the Republic of Bosnia and Herzegovina during the 1992–1995 conflict. Although it belongs to a domestic Bosnian judicial system it is internationalized by the participation of international judges and prosecutors. This mechanism has been used for the first time. In the future, this Court is supposed to adjudicate cases from the ICTY (International Criminal Tribunal for the Former Yugoslavia) since the ICTY announce to finish its activity by the end of 2008, and to complete all work to 2010¹.

This mechanism of a semi-internationalized tribunal may prove that it is an efficient legal instrument having a significant impact on a reconciliation process in this post-war country.

B. HISTORICAL BACKGROUND

When Slobodan Milošević became the Serbian Communist Party chief in 1986, it was a clear sign that a strong nationalist wing was becoming

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¹ Daniel Skoglund, Bosnia Ready to Judge, The Hague tribunal is winding down, but are the Bosnian courts ready to take over war-crimes case?, www.tol.cz/look/TOLrus/article.tpl?IdLanguage=1&IdPublication=4&NrIssue=84&NrSection=4&NrArticle=1934#author, dated 5'th October 2005.
more influential. Using the media, especially television, Milošević played on fears and feelings of victimization of the Serbian society by recalling their defeat by the Ottomans on the territory of Kosovo in 1389. Growing nationalism in Serbia created anti-Serb nationalism in other republics particularly in Croatia and Slovenia. Their leaders, Franjo Tudjman and Milan Kucan, wanted to construct a looser confederation which would dilute Serbian influence. When Milošević blocked Stipe Mesic from a federal presidency it became obvious that possible negotiations about the future of the Federation would be extremely difficult. On 25 June 1991, Croatia and Slovenia declared their independence without offering concrete guarantees of security of five hundred thousand Serbs living within their borders.

A short conflict in Slovenia came to an end when Slovenian militia defeated JNA (Jugoslovenska Narodna Armija, Yugoslav People’s Army). In Croatia inexperienced and badly equipped military forces quickly lost one-third of their territory. On November 1991, Serbian forces after heavy fights, took Vukovar where heinous crimes were committed. The Vukovar case is significant because it shows the methods of the parties in this conflict, especially those used by Serbian forces.

Later in Bosnia and Herzegovina on 29 February and 1 March, a referendum took place, in which 63% of the population, mostly Muslims and Croats, voted for independence. Bosnia and Herzegovina was recognized as an independent state on 6 and 7 April, 1992.

During the next three and a half years Bosnian government forces fought to preserve the independency. They struggled not only with Bosnian Serbs under the radical leadership of Radovan Karadžić, but also with Bosnian Croats supported by the Republic of Croatia (southern Bosnia). The conflict with the Croats was resolved in 1994, while the fights with Serbs con-

2 The history of the often difficult relations between Serbs, Croats and Muslims is not the topic of this paper, so some of its aspects need to be simplified.
4 Le Serbs massacred hundreds of patients in a local hospital. Several mass graves around Vukovar were found after the war ended. Part of the city is still heavily damaged although the main fighting took place there 14 years ago (author visited Vukovar, October 2004).
5 “[I]ts name derives from the union of two provinces, Herzegovina (a region located in the south/southwest of the republic) and Bosnia (which encompass all territory not part of Herzegovina). Bosnia – Herzegovina population’s numbers was 4.35 million of which before the war 43.7 % were Slavic Muslim, 31.3 % Serbs and 17.3 % Croats” from War Crimes in Bosnia 8, A Helsinki Watch Report – Human Rights Watch, August 19, (1992), Vol. 1.
continued to the end of the war. The events that marked the Bosnian war were, to mention only a few, the besiege of Sarajevo, Srebrenica and “ethnic cleansing” on a massive scale. The war was ended by the Dayton Agreement concluded after almost three weeks of talks. By the end of the conflict, there were between 150,000 and 279,000 people dead or missing, almost one million refugees and one million internally displaced. Also, between 35% and 50% of dwelling places had been destroyed. The country was ruined, what still has a significant impact on the country’s infrastructure, as well as social and economical situation.

I. DAYTON AGREEMENT

The Dayton Peace Agreement (DPA) also known as General Framework Agreement for Peace in BiH (GFAP) was signed to end the war in Bosnia and Herzegovina. On November 1, 1995, talks began at Wright-Patterson Air Force Base in Dayton, Ohio; and on November 20, Croatian President Tudjman, Serbian President Milošević, Bosnian President Izetbegović and President Krešimir Zubak for the Bosniak Croat Federation initialed the Dayton Agreement. On December 14, the General Framework Agreement for Peace was formally signed in Paris. Although signed after Srebrenica in the Western guarantor states the Agreement was widely considered a triumph of diplomacy. DPA confirmed Bosnian state division into three separate entities. It has to be said that DPA was signed after three and a half years of attempts made by several mediators to stop the war in Bosnia, including Vance Owen mission, Fraser talks with Milošević or the involvement of Carl Bildt. Overall, DPA was one big compromise. It contained provisions related to military agreements among the parties, a demarcation line, and constitutional rules for BiH. The DPA was supported by a number of annexes which covered the cessation of hostilities, the deployment of the Implementation Forces – IFOR (to implement territorial and military provisions of DPA), inter-entity boundaries, guarantees for the protection of fundamental rights, democratic structures, and


inter-institutional relationships, the constitutional framework for Bosnia and Herzegovina, the binding arbitration of disputes arising between the Bosnian Federation and the Republika Srpska. In toto, there were eleven annexes dealing also with issues such as Ombudsman, the Human Rights Commission and many more.

The Dayton Agreement stated that, the State of Bosnia and Herzegovina should consist of three entities Republika Srpska (RS), the Federation of Bosnia and Herzegovina (FBiH) and District Brčko. In FBiH, there are ten cantons with their own ministries of justice and interior, even though FBiH has the same ministry on a central level. FBiH is mostly composed of two ethnic groups. The majority of its population is composed of Muslims and Bosnian Croats. This is a result of a strong commitment of the U.S. diplomacy which led to the so-called “Washington agreement”. That agreement allowed a formation of an alliance between Muslims and Bosnian Croats after fights which occurred between them in the spring of 1993. Letter, it led to the creation of a Muslim-Bosnian Croats entity, FBiH.

Mostly Serbian, Republika Srpska is divided into five districts with a centralized office of a ministry of justice and interior located in Banja Luka.

The third entity, Brčko District, was primarily left for a future resolution. However, on March 5, 1999 it was regulated as a self-governing region with multiethnic police forces and a separate judiciary system.

C. THE SYSTEM OF JUSTICE

I. ESTABLISHMENT OF THE ICTY

The first step of an international community towards prosecuting guilty of crimes committed during this conflict was taken in February and May of 1993, when the Security Council voted resolutions 808 and 827 for the creation of a tribunal to prosecute crimes which had occurred since 1 January 1991 on the territory of former Yugoslavia. It was the answer of the international public opinion for the widespread violations of humanitarian law, such as “ethnic cleansing”, which was considered a threat to international

9 Id., 960.
10 “Brčko, the town that sits astride the narrow Posavina corridor connecting northern and eastern Republika Srpska, and to which both Serbs and Bosniaks lay primary claim” COUSENS (note 7), 800.
11 OSCE Mission to Bosnia and Herzegovina, (note 8), 3.
peace and security. By doing so the Security Council exercised its power under Chapter VII of the United Nations Charter\textsuperscript{12}.

Some of its regulations had an impact on the relations between the Bosnian State and the international justice system. For example, a great effect had the Principle of primacy, which means that the Tribunal may formally request any national jurisdiction to defer investigation or ongoing proceedings\textsuperscript{13}. On the other hand, the regulations emphasized a complementary nature of the Tribunal to support the national justice system. Subsequently, the presented examples proved an even more complex correlation between those systems.

II. “RULE OF ROADS” AGREEMENT

First trials which took place in the post war Bosnia, proved that providing due process of law is an extremely difficult task. It was especially apparent when accused belonged to the minority and victims were in majority of particular areas. To prevent unfair trials “Rules of Road” agreement was signed on 18 February 1996, between President Izetbegović (BiH), President Tudjman (Croatia) and President Milošević (Federal Republic of Yugoslavia).

It created, based on bilateral relationship, links between International Tribunal and a local system of justice\textsuperscript{14}. The “Rules of the Road” Unit was established at the Office of the Prosecutor (OTP) of the ICTY in order to advise whether “the evidence is sufficient by international standards to justify either the arrest or indictment of a suspect, or the continued detention of a prisoner”\textsuperscript{15}. The task to send all information and evidence for review to Hague was left for the local police.


\textsuperscript{13} “The ICTY’s primacy over national jurisdiction has been upheld by the Appeals Chamber of the ICTY in the Tadić case. The prosecution of Dusko Tadić (by the German authorities but it shows the rule of law) for crimes allegedly committed by him and his alleged co-perpetrators in the former Yugoslavia in June 1992 had to be differed to the ICTY after the ICTY issued a formal request for deferral addressed to the Federal Republic of Germany. In the ICTY’s opinion, it would not be acting in the proper interest of justice if some of the alleged co-perpetrators of the same set of violations of IHL were to be judged in national courts and others by the ICTY”. \textit{Id.}, 26.

The German authorities proceeded the case against Tadić based on Universal Jurisdiction although with a kind of territorial link named \textit{ein legitimierender Anknüpfungspunkt} (a legitimate link).

\textsuperscript{14} Fionnuala Ní Aoláin (note 9), 990.

\textsuperscript{15} Id, 991.
This initially fair idea to prevent ethnically motivated arrests created a lot of problems. The ICTY was not prepared for its additional tasks in terms of personnel and facilities. Moreover, the “Rules of Roads” had an unexpected effect on the local situation since often indictments prevented full ethnic reintegration.

It has also some negative effect on the Bosnian legal system. The “Rules of Road” put on the local police the task to gather and present evidence to the ICTY. This practice is frequent in criminal cases in common law countries. In a continental civil legal system police plays a different role especially in the most serious crimes. The main role is left for the prosecutor and pre trial proceeding. Therefore, the “Rules of Road” implemented a common law instrument without providing proper safeguards from its system and removing those (safeguards) already existing in civil law system.\textsuperscript{16}

The “Rules of Road” failed to prevent the local police from abusing its power towards political opponents since they neither include a proper monitoring of police forces nor a proper domestic supervision over the investigations conducted by those local forces.\textsuperscript{17}

This instrument which had a significant impact on the Bosnian judicial system was changed when Bosnian authorities adopted the proposal of the International Tribunal’s Prosecutor that from 1 of October of 2004 the BiH Prosecutor should take responsibility for the “Rules of Road” reviews.\textsuperscript{18}

III. EVOLUTION OF THE JUSTICE SYSTEM IN BOSNIA

Since the end of the war the Bosnian judicial system has faced several serious difficulties. At the very beginning, it has to be said that the war affected not only the whole community in Bosnia, but it also created a serious problem of lack of appropriately educated judges or prosecutors.

Facilities were in a bad condition too. Not only was the courthouse in Sarajevo damaged, but also many other governmental buildings. Trials proceeded under the criminal code of the SFRY (Socialist Federal Republic of Yugoslavia), which was far from being either appropriate or efficient. In addition, there was a lack of international materials to facilitate the proper interpretation process.\textsuperscript{19}

\textsuperscript{16} Id., 1000.
\textsuperscript{17} Id., 1001.
\textsuperscript{18} OSCE Mission to Bosnia and Herzegovina, (note 8), 5.
\textsuperscript{19} FIONNUALA NI AOLAIN (note 9), pt. 997.
It is important to remember that no matter how professional the lawyers in Bosnia were, some impact of the previous war affected their perception of facts. Some of them, especially Bosnian Serbian lawyers, considered the ICTY as a political and not an independent entity. Furthermore, cooperation with the ICTY did not always function properly. Especially due to the “Rules of Road” agreement, Bosnian judges and prosecutors were confronted with delays in their cases while waiting for approval from the ”RoR” Unit in Hague. On the other hand, many commentators thought that the Bosnian system of justice did not always fulfill the criteria which would guarantee due process of law. The Sretko Damjanovic case is a good example of problems that can be encountered in conducting a fair and independent trial.

Despite these problems the system became operative. Recent reforms took place between 2002 and 2003. HJPCs (High Judicial and Prosecutorial Councils) opened 874 judicial and prosecutorial posts for reappointment in the FBiH cantonal and municipal courts and the RS district and basic courts. In FBiH, there are ten cantonal courts and twenty eight municipal courts. In the RS, there are five district courts and nineteen basic courts.

20 "The impact of national identity clearly became evident as participants discussed their views regarding national groups; the role of the State; responsibility and accountability for the war; genocide; the role of the ICTY and the future of BiH. For example, with regard to genocide, Bosniak participants primarily believed that Serb forces had committed acts of genocide against Bosniaks while Bosnian Serb legal professionals generally stated either that they did not have sufficient information to give an opinion or that genocide was committed by all three sides. As well, most Bosnian Croat participants stated that acts of genocide occurred on „all three sides.” The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley, and the Centre for Human Rights, University of Sarajevo, Justice, Accountability And Social Reconstruction; An Interview Study of Bosnian Judges and Prosecutors, 18 Berkeley Journal Of International Law, 102, 2000.

21 "Who was arrested and tried in March, 1993. That was the first trial for war crimes committed in Bosnia, he was accused of several murders, rapes and looting. At first, Damjanovic confessed, but later retracted his confession. He was sentenced to death by shooting. The Supreme Court of Bosnia-Hercegovina has twice confirmed the sentence, but it still hasn’t been carried out. Four years later, a relative of Damjanovic met in Vogosca, which had recently come under the control of Bosnian authorities as a result of the Dayton Agreement. Kasim and Asim Blekic, two of the six people which he had purportedly killed. In another trial it was proved that Bozo Jefic and Miro Vukovic killed Ramiz Krso (a person supposedly killed by Damjanovic). Taken from “The prosecutor’s Mistake Does not Mean that Damjanovic will be Released, but it Seriously Affects the Credibility of Bosnian Justice” by Edin Subasic and Zehra Alispahic Ljiljan, Sarajevo, Bosnia-Herzegovina, 3/11/97, available at www.ex-yupress.com/ljiljan/ljiljan9.html.
The cantonal courts, district courts and the Basic Court of Brčko District had exclusive jurisdiction to hear first instance war crimes trials committed in BiH. From these courts there was an appeal to the Supreme Court in the respective entity and to the Brčko Appellate Court. This exclusive jurisdiction was removed on 24 January 2003, when the High Representative imposed a new criminal code establishing state-level criminal jurisdiction over certain crimes, including war crimes. This new law came into effect on 1 March 2003.

D. FRAMEWORK OF THE WAR CRIMES CHAMBER

The court is a kind of a hybrid of international and national elements (it is a Section within the state-level BiH court). Jurisdiction over crimes is shared between BiH Court and entity courts (FBiH, RS, Brcko). The Chamber was proposed at the Peace Implementation Council (PIC) Steering Board meeting on 12 June 2003 and was formally established on 6 January 2005. Lower and intermediate cases will be assigned to the War Crimes Chamber. WCC may also assert its jurisdiction over sensitive cases at an entity level.

I. THE COURT

The Chamber is a part of the State Court of Bosnia and Herzegovina. The Court consists of a Plenum and three Divisions: Criminal, Administrative and Appellate (including the Electoral appeals). For the purpose of this paper the Criminal Division is the most important. Subsequent amendments established special panels for Organized Crimes and Corruption. Other significant changes were enacted on 29 June of 2004, when the Criminal Division was divided into three Sections: Section I for War Crimes, Section II for Organized Crime, Corruption and Economic Crimes and Section III for all other crimes under the jurisdiction of the Court.

22 OSCE Mission to Bosnia and Herzegovina, (note 8), 9.
23 Id.
24 Id., 10.
26 Art.6 of the Law on Court of Bosnia and Herzegovina, November 6, 2002 “Official Gazette” of Bosnia and Herzegovina.
Pursuant to amended article 65, during the transitional period, a number of international judges may be appointed to both Section I and Section II of the Criminal and Appellate Divisions. Importantly, international judges may not be the citizens of Bosnia and Herzegovina or of any neighboring state such as Serbia and Montenegro, Slovenia or Croatia. At the beginning, trial and appeal panels will consist of two international judges and one national judge. Latter, it will evolve into panels composed mostly of national judges. The Court will be fully national at the end of a five year period. As mentioned subsequently, a similar processes will take place within the Special Department in the Office of the Prosecutor of BiH. Among others, Melchior Brilman, Lars Folke, Bjur Nyström, Gerald Gahima, Finn Lynghjem, Jose Ricardo de Prada Solaesa, Georges Reniers, Almiro Simoes Rodrigues were appointed as judges. Persons such as Judge Finn Lynghjem have a significant experience regarding Bosnian issues, while judge Rodrigues with his practical knowledge of ICTY jurisprudence is capable of keeping Bosnian Court judgments in compliance with ad hoc tribunals achievements. The Appellate Division consists of three sections: Section I to hear appeals of the judgments of Section I of the Criminal Division, Section II to hear appeals of judgments of Section II of the Criminal Division etc.

II. REGISTRY

There is a Common Registry and a Registry for Section I and Section II. The Common Registry is responsible for the administration and servicing of Section III of the Criminal and Appellate Divisions and the Administrative Division. Pursuant to amended article 65 during a transitional period international Registrar shall be appointed as a Chief Registrar for Section I and Section II. This transitional period shall not last more than five years. The International Registrar has also other obliga-

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27 Art. 17 of the Law on the Amendments to the Law on Court of Bosnia and Herzegovina (Published in the Official Gazette of Bosnia and Herzegovina No 61/04).
28 See, supra note 8, 11.
29 Judge Rodrigues participated in the judge panel of such cases i.e. Krstic, Aleksovski and Kvocka to mention only a few.
30 The Law on the Amendments to the Law on Court of Bosnia and Herzegovina (note 27), art.11.
tions. He *ex officio* participates in consultations with the President of the Court on the assignment of particular judges of Section I and Section II of the Criminal and Appellate Divisions. Moreover, the International Registrar is obliged to issue the Rule of Procedure for Section I and Section II of the Criminal and Appellate Divisions which will become an integral part of the Rules of Procedure of the Court. The Registry must establish a case allocation system for Section I and Section II of the Criminal and Appellate Divisions.

### III. PROSECUTION

The Prosecutor Office was also modified. A Special Department for War Crimes and a Special Department for Organized Crime, Economic Crime and Corruption were established by article 1. International prosecutors may be appointed for both departments, but this transitional period, just like for judges should be no longer than five years. The idea is to create a fully national prosecutorial system within this period of time. At the beginning there will be seven international prosecutors, and the office will later evolve into a department with a majority of national prosecutors. In the end, it will be a fully national prosecutorial Office in the same way as the Chamber. Similarly, there is a Registry responsible for providing support and administration services to the War Crimes Chamber, as well as the Specialized War Crimes Department in the Office of the Prosecutor of BiH. It is going evolve into a national structure as well. The nominated prosecutors are George Halbach, Peter Tinsley, Maria Jesus Moya Martinez, Julia A. Baly, Erik Nils Larson, Michael P. McVicker.

With regard to the previous law, “Law on Court of Bosnia and Herzegovina” consisted of several articles governing Criminal Procedure. It covered a lot of procedural guarantees such as *ne bis in idem* or the presumption of innocence. These provisions were renounced after the Criminal Code of Bosnia and Herzegovina was introduced.

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31 *Id.*, art. 11 point 3.
32 The Law on the Amendments to the Law on the Prosecutor’s Office in The Bosnia and Herzegovina Official Gazette of Bosnia and Herzegovina No.35/04.
The following three types of cases may be heard before the War Crimes Chamber:

- Deferred from the ICTY,
- Deferred from the ICTY where indictments have not yet been issued,
- Those cases which due to their sensitivity should be tried at a state level.

This court is to operate under the laws of BiH as a national legal institution. However, in its first phase of existence it will have a temporary international component. As it has been mentioned before, a significant number of cases will still proceed before fully domestic courts i.e. district courts, cantonal courts and the Basic Court of the Brcko District.

For practical purposes international judges are allowed to use English in any stage of the proceedings of the Court of Bosnia and Herzegovina and a court interpreter translates that into one of the official languages of Bosnia and Herzegovina.

E. SIMILARITIES AND DIFFERENCES BETWEEN “TRADITIONAL” MIXED TRIBUNALS

The War Crimes Chamber in Bosnia is different from other internationalized mechanisms of prosecuting those who committed the greatest crimes during international or non international armed conflicts. In Kosovo, crimes can be prosecuted by all courts that have territorial jurisdiction under local law. However, those courts can be internationalized if it is necessary to ensure independence or impartiality of justice. Such internalization may be carried out by the Special Representative of the Secretary General. Therefore, this system is less centralized than the one in Bosnia. In contrast, there is no transitional period which terminates the presence of international judges. Kosovo is therefore an example of a very nationalized court with an international component.

The Tribunal for Sierra Leone is a good example of an opposite model as it is the most internationalized mixed tribunal. Just a few examples prove

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33 OSCE Mission to Bosnia and Herzegovina, (note 8), 10.
34 Id., 11.
35 Amended Art. 65 of The Law on the Amendments to the Law on Court of Bosnia and Herzegovina (note 25).
that it is much closer to an international tribunal than to a national domestic court. For instance, the Statue of the Court states that the Rules of Procedure and Evidence of the ICTR apply to its proceedings. Additionally, the Appeals Chamber is guided by the decisions of the Appeals Chamber of the ICTY and ICTR. Simply, the Special Court for Sierra Leone does not form a part of the judiciary system of Sierra Leone. In principle, jurisdiction of this court over the violators of IHL and Sierra Leone law is concurrent with that of national courts. There are no provisions which preclude jurisdiction of ordinary courts. However, the Special Court may formally request a national court to defer to its competence at any stage of a procedure. Thus, the relations between Sierra Leone Tribunal and the national courts of Sierra Leone resemble those between the ICTY, ICTR and national courts.

Now, it is possible to compare the above with the War Crimes Chamber which is an institution of BiH operating under the laws of the State of BiH. The War Crimes Chamber seems to be an institution in between those two examples.

**F. CONCLUSIONS**

The War Crimes Section or so-called War Crimes Chamber is an institution composed of national and international elements. It is true that every mixed or hybrid tribunal is unique. The abovementioned examples show how broad an understanding of mixed tribunals can be. They vary from a court being deeply involved in a local judicial system as it is in Kosovo to a court being almost international as the one in Sierra Leone. This variety stems from political and geographical differences characteristic to every situation. Sometimes they are supported by other instruments such as the Truth and Reconciliation Commission in Sierra Leone. It is hard to form an opinion about the War Crimes Chamber before the first judgment is rendered and transitional period ends. It is necessary to see how international jurisprudence influences the judicial standard in Bosnia and particu-

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38 Jann K. Kleffner, Andre Nollkaemper, 365 (note 34).
39 Id., 367.
40 Speaking about Section I and II of the Criminal Division in its new shape.
larly the judgments of the War Crimes Chamber. Some conclusions may be drawn from the history of the Court creation. For example, the implementation of common law instruments needs to be done very carefully, because such rapid changes often have unexpected negative effects. On the other hand, it seems that the War Crimes Chamber, which is in fact a national–internationalized instrument, could potentially bring positive results. The implementation of the transitional period is a visible sign that the Court founders intended to allow justice in Bosnia to be carried out by the people of the Bosnian State itself. Only this kind of approach can lay the ground for true reconciliation. It also provides an opportunity to improve the judicial standard of the whole post war area. The participation of experienced international judges ensures the automatic transposition of the most accurate and modern understanding of international criminal law. The Courts, located close to places where the crimes were committed, have an opportunity to handle significantly greater number of cases than the ICTY. This model of fighting impunity seems to be very appropriate. I strongly believe that in the future it will be possible to say that this system is not only appropriate but also fair and efficient.
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