

Deportation in International and Regional Law¹

Lena Karamanidou and Liza Schuster

Department of Sociology, City University

Introduction

The previously invisible process of deportation from Europe has become increasingly high profile through controversial deportations such as expulsions to countries experiencing on-going conflict (e.g. Afghanistan, Iraq, and most recently Sri Lanka) and of members of particular Social Groups, such as gays, lesbians, bisexuals and transsexuals (GLBT). Gibney and Hansen (2003) have articulated the tensions for liberal states (a self-evident descriptor for all European Union [EU] Member States [MS]) between the liberal principles embraced and enshrined in national constitutions and the EU *acquis*, and the inherently illiberal practice of deportation. This paper explores the international and European framework governing deportation, but begins with some definitions.

Definitions

Administrative removal – this term usually refers to the refusal to admit someone at a port/point of entry, but may also refer to ordering someone to leave when admission or permission to remain has been refused. It may be applied to someone who wishes to make an asylum claim, but whose claim is dismissed at or near a border as manifestly unfounded. For example, someone arriving at Heathrow or disembarking at Marseille, or crossing the Evros river from Turkey to Greece who asks for asylum, may be moved to a detention centre or zone d'attente. From there they may be immediately put into a fast track procedure without suspensive appeals and then put on a plane/train/boat back to the country from which they have arrived. It also applies to the issuing of a removal order, which announces that the recipient has a fixed period of time to remove themselves from the territory of the state (*Obligation de Quitter la Territoire Francais*) or *απόφαση επιστροφής* [return order] in Greek.

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Voluntary removal or return – when someone is notified that permission to remain has been refused, they may be granted a period of time (in the EU, this should be between 7-30 days) to put their affairs in order before leaving. There is some debate over just how voluntary some of these returns are, as the alternatives may be deportation or living without documents in fear of deportation (Bloch, Sigona and Zetter 2010; Collyer 2009). The pressure to return ‘voluntarily’ is presumably much increased if one is travelling with a family.

Deportation, expulsion or forced removal –physically removing someone against their will from the state’s territory and transporting them to their presumed country of origin, or habitual residence, or a country they have transited or to which they have agreed to be removed rather than being returned to their country of origin. The term *deportation* is usually reserved by lawyers for the forced removals of non-citizens who have been convicted of a crime, or to refer historically to deportation of the Jews to and from Nazi Germany. However, we eschew these narrow definitions.

International Law and Regulations relating to Deportation

Deportation has a long history, but its normalization (Schuster 2005) through the development of a specific legal framework is relatively new. For the most part, the regulations specify who is liable to be deported (those within a state’s frontier without permission to be present from that state) and who is exempt from deportation (vulnerable groups, those applying for asylum etc). The laws may also specify rights to appeal against deportation, the length of time between ordering and carrying out a deportation, and the conditions a state may impose to facilitate deportation (detention, reporting etc). More recently, the EU has introduced a legal framework, including the Returns Directive to which we will return below. This framework prohibits MS from using excessive force or particular techniques (choke holds, tape, cushions etc). In what follows, the development of this body of law is briefly summarized at international level before looking at some of the tensions that arise at regional level, looking in particular at deportations from Europe.

The 1951 Convention has been signed by 151 states, and it serves as a benchmark for the recognition and treatment of refugees across much of the globe. It expressly prohibits the expulsion of

refugees in two articles, Art.32 and Art.33². Both of these articles refer explicitly to refugees, rather than asylum seekers. The argument advanced by deporting states would be that only those who are not refugees, that is, those who make an unfounded claim, would be deported. Those fighting deportation are usually fighting on the basis that the asylum process is flawed, and that the person is, in fact, at risk and therefore a refugee³. Arts. 32 and 33 may be regarded as non-derogable but there are exemptions specified in each in relation to national security and serious crimes including 'for example, rape, homicide, armed robbery, and arson'. For the exemption to apply, all possible legal remedies in the country where the crime took place must have been exhausted. In addition, Hathaway and Harvey (cited in Duffy 2008) argue that there must be a connection between the convictions and the risk to the country of asylum if the person is to be deported.

The exclusions at Art.1(F) would also preclude a person from admission as being unworthy of the status of refugee if:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

² **Art. 32 Expulsion**

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Art.33 Non-Refoulement

1. 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.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

³ Of course, it is not only refused asylum seekers who are deported, overstayers and those circumventing controls altogether are also liable to deportation, but the focus here is on asylum seekers specifically.

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

While, compared with the number of people applying for and receiving refugee status, these exemptions apply in very few cases, nonetheless according to Duffy (2008) the extent of the exemptions means *non-refoulement* in international refugee law is not absolute. In this it is in conflict with more recent developments, such as 'the 1984 Cartagena Declaration which attests the *jus cogens* nature of *non-refoulement*' (2008,376) but which is not so widely used. William Schabas (cited in Duffy 2008) argues the Refugee Convention has been rendered redundant because of increasing reliance on human rights instruments such as the Torture Convention, the ICCPR and the ECHR&FF.

These three instruments offer no exceptions or derogations to their provisions – except the standard one of national security or a national emergency. So, even where a court has decided that an individual is not protected by the 1951 Convention, or national asylum law, an appeal can be made to, for example, Art. 3 of the UN Torture Convention:

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights

However, the Torture Convention confines itself to instances of torture (and does not mention cruel or inhuman treatment and abuse) and so its applicability is much narrower than the ECHR&FF or ICCPR.

The ICCPR permits the expulsion of those *unlawfully* in the territory of a state party to the Covenant provided this expulsion is carried out lawfully(Art.13), and as such might be understood to offer little if any protection to those refused recognition as a refugee and therefore 'unlawfully' in the territory. However, in a case before the Human Rights Committee it was suggested that 'if a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant' (Kindler v. Canada, Communication No.470/1991, at para. 13.2, cited in Duffy 2008, 378). In this way, states are made responsible for breaches of rights that occur outside their territory. The rights referred to include protection from slavery, torture and arbitrary detention, but also

the right to life, to family life, to freedom of thought, conscience and religion and to freedom of assembly. Increasingly, appeals against deportation are made on the grounds that rights guaranteed to all, irrespective of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' (Art.2) would be violated in the countries to which they are being deported. The use of Human Rights instruments to protect those not covered by asylum legislation can be seen clearly when we turn to regional instruments, such as the ECHR&FF.

Regional law and practice

There have been a number of regional agreements relating to the rights of refugees, and in particular to protection from refoulement, in the post-war period. The 1984 Cartagena Declaration reiterates 'the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens'(Art.5). Fifteen years earlier, the OUA Refugee Convention declared in Art. 2(3) that 'No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.'

While an analysis of these two instruments would provide a useful and interesting comparison, in this paper the focus is on Europe and the aim is to highlight the tension between the relevant frameworks. In Europe, instruments such as the ECHR&FF offer protection to individuals *qua* human beings. This is in contrast to the various directives and regulations emanating from the EU that address and distinguish between individuals in relation to the state – that is, as citizens of the EU, as migrants, as third country nationals who are 'lawfully' or 'unlawfully' present within the territory of MS. As with all of the instruments discussed above, the only people who may not under any circumstances be deported from a state are those with the citizenship of that state (though as Gibney (2011) notes, increasingly a distinction is being made between those who acquire citizenship by birth and those who acquire it through marriage or residence).

European Convention on Human Rights and & Fundamental Freedoms

The ECHR&FF is an instrument of the Council of Europe⁴, rather than the EU, and appeals against deportation may, when all national remedies have been exhausted, be addressed to the European Court of Human Rights (ECtHR), the judicial mechanism of the Convention. Though not universally applicable (there are only 47 signatory states), the ECHR&FF is more robust and offers significantly more protection than the Torture Convention, since the ECtHR has ruled that Art.3 of 'the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct' and 'makes no provision for exception ... there can be no derogation therefrom *even in the event of a public emergency threatening the life of the nation*' (cited by Duffy 2008, 377; emphasis added). Furthermore, Art. 3 applies to everyone irrespective of their immigration status and whether they meet the criteria of the 1951 Convention. The ECtHR has ruled that Art.3 requires states signatory states to prevent acts of torture and inhuman or degrading treatment or punishment by not returning them to states where they would be subject to such acts (for an instance of the ECtHR discussing national security, see *Chahal vs United Kingdom*)⁵.

Importantly, Art 3 has also been interpreted to provide protection from *indirect* return to one's country. In a decision by the ECtHR, the UK was warned that removal in accordance with the 1990 Dublin Convention⁶ to a 3rd country that was also a signatory of the ECHR&FF:

does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention... Nor can the United Kingdom rely automatically ... on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims.' (T.I. v. United Kingdom, Admissibility Decision of 7 March 2000, Appl. No. 43844/98)

⁴ The Council of Europe has 47 members, 20 more than the European Union and is a much looser federation. Its primary aim 'is to create a common democratic and legal area throughout the whole of the continent, ensuring respect for its fundamental values: human rights, democracy and the rule of law' (www.coe.int).

⁵ In *Chahal v. United Kingdom* the ECtHR ruled that returning Chahal, a Sikh activist and rejected asylum seeker, to India would violate the U.K.'s obligations under article 3, in spite of diplomatic assurances by the Indian government, since the UN special rapporteur on torture argued that the practice of torture upon those in police custody was "endemic" and in spite of the UK government's claim that his deportation was necessary on the grounds of national security (70/1995/576/662, November 15, 1996 [online] <http://www.worldlii.org/int/cases/IHRL/1996/93.html>)

⁶ The Dublin Convention was signed by EU MS and specifies that MS are entitled to return asylum seekers to the first MS they entered. It assumes that all MS have fair and robust asylum systems and that asylum seekers should demand asylum in the first safe country they enter.

In the case of *D vs. the United Kingdom* (Judgement of 2 May 1997, Appl. No. 30240/96), the ECtHR concluded that Art.3 could be used to protect someone suffering from AIDS from return to a country where the treatment and facilities available were inadequate, and the treatment available in the UK was incomparably better. The court reasoned that his removal would expose him 'to a real risk of dying under the most distressing circumstances and would thus amount to inhuman treatment' (Judgement of 2 May 1997, Appl. No. 30240/96). This rationale has also been applied to cases of deportation to another member state. In *M.S.S v. Belgium and Greece*, the court found that Belgium contravened article 3 of the Convention because

by sending [the applicant] back to Greece, the Belgian authorities exposed the applicant to risks linked to the deficiencies in the asylum procedure in that State (*MSS v. Belgium and Greece*, 2011 p. 88)

A further significant measure taken by ECtHR is the application of interim measures of protection under Rule 39 of the Court which state that

The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it. (ECtHR 2009)

As cases brought to the ECtHR do not have suspensive effect, applicants can apply to the Court for interim measures (Rule 39) to stay their removal (*Burbano Herrera and Haeck* 2011), although the measure can be applied in the cases of applicants without cases pending before the court. The Court issues such measures in order 'to prevent irreparable harm to persons in an extremely grave and urgent situation' (*Burbano Herrera and Haeck* 2011 p. 31). According to a statement by the President of the Court (2011), the use of Rule 39 has increased remarkably in the last few years, from 112 requests in 2006 to 4786 in 2010. This measure has been applied in a variety of situations involving expulsion and extradition, including removal of asylum seekers, to a country of origin (*Herrera and Haeck* 2011). For example, the Court has issued Rule 39 measures to prevent the expulsion of Tamils from UK to Sri Lanka, and of Somali nationals from the Netherlands to Somalia (*Committee on Migration, Refugees and Population* 2010). A significant element of this increase has been the requests for interim measures against removals on the basis of Dublin procedure mentioned above. Most of these were issued to

prevent Dublin transfers from member states to Greece (Council of Europe Parliamentary Assembly 2010; ECRE 2010). For example, the Court applied interim measures in the case of *M.S.S. v. Belgium and Greece* referred to above in order to prevent the deportation of the applicant to Afghanistan. In another case, the Hungarian refugee Council requested interim measures to prevent the return of an unaccompanied minor asylum seeker to Greece (Hungarian Helsinki Committee, 2010).). Since all returns to Greece were suspended in 2011, concerns have been raised about other MS, including Italy and Hungary (W2EU 2011). While Rule 39 measures are binding for states and not complying could bring on a breach of Article 34 (individual petition), states do not always comply with the Court's instructions (Committee on Migration, Refugees and Population) and the Court president has recently expressed concerns over the rise of Rule 39 applications, their use by applicants and the need for member states to provide suspensive legal remedies (Statement 2011).

The international and regional human rights instruments discussed above, through the agency of the courts, can be used to protect people who would be excludable under the 1951 Convention. In each of these cases, the decisions taken are based on the likelihood of the person suffering significant harm if deported to their country of origin. In the following section, we explore legal frameworks that have a different emphasis.

EU Directives

The emphasis of the human rights instruments discussed above is inevitably on the rights of individual and so, perhaps equally inevitably, there are conflicts with provisions in EU directives that, while ritually referring to the principle of non-refoulement, are framed by the logic of the MS' perceived need to protect its borders, rather than to protect the rights of those in flight. EU directives are laws binding on the 27 MS of the EU. While there has been some progress of the harmonization of EU migration law and policy, there are two areas in which considerable progress has been made: asylum and border controls, including deportation. The directives concerned with deportation are the *Qualifications Directive*, which specifies who qualifies as a refugee, the *Procedures Directive* which outlines the procedures governing the examination of a claim to asylum and the *Returns Directive*, which we will examine in most detail.

Art.21 of *Qualifications Directive* specifies that MS shall respect principle of non-refoulement, but may refole a refugee, whether formally recognised or not, on the grounds of national security of

the Member State in which he or she is present; or if having been convicted of a particularly serious crime, he or she constitutes a danger to the community of that Member State. The *Procedures Directive* (2005/85/EC) doesn't refer to expulsion or refoulement directly, but states that applicants shall be allowed to remain in MS until the determining authority has made a decision on their claim (Art.7.1), and whether 'applicants for asylum who have arrived and made an application for asylum at [the border], may enter their territory' (Art.35(2)). It also specifies the appeals available to individuals (Art.39), including against the decision not to admit at the border (Art.39 (1a)) and whether these appeals are suspensive or not (Art. 39 (3a&b)). The directive gives a right to an effective remedy before a court or tribunal but does not force MS to make remedies have a suspensive effect (Reneman 2010; Vested Hansen 2005). Art.35 specifies the procedures that must be followed before someone is refused entry or returned across the border, including access to legal advice, an interpreter and a personal interview.

The *Returns Directive* (2008/115/CE) is an attempt to provide common standards and procedures for the removal of 'third country nationals residing illegally on territory of a Member State'. It begins by asserting the legitimacy of removing those people, '*provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement*'. Furthermore states are enjoined when implementing the Directive to take due account of the best interests of the child, family life, the state of health of the third-country national concerned, and to respect the principle of non-refoulement (Art.5). There is provision for a monitoring system for returns in Art. 8, which also states that the use of force should comply with human rights and be reasonable and proportionate. A number of legal safeguards are also articulated such as issuing return decisions in writing, with legal reasoning and information on remedies, and legal assistance (Art 12 & 13).

One of the biggest problems with the *Returns Directive* is the assumption that 'fair and efficient asylum systems are in place'. Yet the variation of recognition rates across the EU, and the shortcomings of national asylum systems – such as those of the asylum system in Greece which prompted the suspension of removals to that country, demonstrate that this is far from the reality (ECRE 2009; Baldaccini 2009). A number of other criticisms have also been addressed to the directive. Like other EU documents it leaves certain matters to the discretion of the states – for example, abrogating from the directive obligations in cases of emergency, excluding irregular migrants crossing a border into EU territory and deciding on the form of judicial review of removal decisions and whether legal remedies

should have a suspensive effect (Baldaccini 2009; ECRE 2009). Art. 8(6) states that ‘Member States shall provide for an effective forced-return monitoring system’ and while in a report by MatrixInsight/ICMPD (2011) most declared their intention to do so, in practice monitoring largely ceases once the plane has touched down in the country to which the person is being removed. In terms of protection, the provisions of the Returns directive conflict with the asylum acquis in the EU as it could potentially allow the return of irregular migrants before the determination of their asylum cases, due to the compulsory nature of the issuing of return decisions (Baldaccini 2009).

EU Practice

Although the balance of removals has been shifting in some MS, there remains significant weighting towards forced removals (see table below). Forcing unwilling people to leave a country is difficult and requires considerable resources and cooperation between states.

Voluntary and Forced Returns in 2008 and 2009 - Selected States

Column1	2008			2009			rank
	Voluntary	Forced	% Forced	Voluntary 2	Forced	% forced	
Italy	144	24,234	99%	241	18,361	99%	1
Spain	178	11,847	99%	269	7,710	97%	2
Finland	37	785	95%	228	1,812	89%	3
Bulgaria	0	275	100%	44	283	87%	4
Slovakia	96	1,311	93%	139	890	86%	5
Czech Rep	96	291	75%	110	631	85%	6
Germany	2,799	14,139	83%	3,107	17,612	85%	7
Romania	20	395	95%	73	392	84%	8
Poland	137	5,779	98%	510	2,165	81%	9
Hungary	188	1,485	89%	293	1,186	80%	10
Iceland	5	44	90%	10	34	77%	11
Norway	565	2,326	80%	1,019	3,343	77%	12
Switzerland	1,366	3,562	72%	1,793	5,421	75%	13
Austria	2,741	2,026	43%	3,428	2,481	42%	24
Sweden	5,978	3,010	33%	6,379	3,785	37%	25
Denmark	1,170	543	32%	251	148	37%	26
Netherlands	13,280	6,870	34%	14,770	7,270	33%	27
Total (all respondents)	59,875	128,346	68%	67,064	182,228	73%	

Source: MatrixInsight/ICMPD

While most operational matters relating to migration and asylum are still dealt with at national level, recent years have seen the creation of EU institutions designed to circumvent some of the difficulties

experienced by individual MS in dealing with border related issues, including deportation. With increasing frequency MS are pooling resources and cooperating on joint charter flights to deport particular nationals from a number of MS.

Of key and increasing importance in these operations is Frontex. Frontex is an EU agency founded in 2004 tasked with coordinating the operational cooperation between Member States in the field of border security. It has various functions in relation to border control but here we will focus on aspects relative to returns and practices preventing entry that might amount to refoulement. Some of the most high profile operations have been around the control of irregular migration, so that it participates in operations, along with member states, preventing the entry of irregular migrants into EU territory, and these are most notably, those in the Mediterranean concerned in particular with movements through Greek seas and territory: RABIT, Hermes and Poseidon (Frontex 2011, MIGREUROP 2011). In announcing Operation Hermes, Commissioner Malmström clearly stated that the Frontex mission would 'be governed by European legislation and that the interdiction and push-back of migrants encountered at sea [would not be] permitted' (Il Velino/AGV 2011). Nonetheless, Frontex operations preventing the entry of migrants into EU territory effectively return them to countries where they face persecution or inhumane and degrading treatment under the definition of Art. 3 ECHR, and prevent them from accessing asylum procedures in Europe (MIGREUROP 2011; Papastavridis 2010). For example, UNHCR (2011) has remarked that the interpretation services used by RABIT 2010 were more concerned with ascertaining nationalities and travel routes of migrants rather than whether they wished to claim asylum.

In addition to activities in the Mediterranean, the co-ordination of joint return flights is becoming another of the main activities of Frontex. Such joint flights are normally initiated and organized by one MS but Frontex oversees the co-operation between the initiating state and other MS. The number of migrants deported on such flights, and the number of flights generally, is relatively small compared with operations initiated and carried through by individual MS, such as the UK, but nonetheless, the numbers have risen from 428 in 2007 to 2038 in 2010 and are likely to continue to rise because MS prefer to distance themselves from these distasteful practices (Frontex Annual Reports 2009;2010). As with sea-based operations, several concerns have been raised about the role and practices of Frontex in joint return flights operations. From the perspective of non-refoulement, it is worrying that Frontex has coordinated return flights to Iraq, contrary to the advice of NGOs, including those with representatives in the field.

While FRONTEX is bound by human rights instruments, there seems to be some confusion on whether matters that pertain to refugee protection and respecting the principle of non-refoulement are primarily the responsibility of member states or should be underpinning all Frontex operations (Klepp 2010; MIGREUROP 2011). In terms of enforced removals, it has been observed that the practices of Frontex personnel are not monitored by independent bodies and there have been accusations of mistreatment of migrants in the return flights (MIGREUROP 2010). An amendment to regulation 2007/2004 requires FRONTEX to develop a code of conduct regarding joined return operations but this appears not to be binding (MIGREUROP 2011).

Conclusion: The Gap in the Law

This paper has sought to outline the different emphases between international human rights law, and regional law governing deportation, drawing attention to the conflict between legal frameworks designed to protect individuals (the former) and states (the latter). Before concluding, we wish to draw attention to the complete absence of post-deportation monitoring. Evidence of harm that has befallen people who have been already been deported would make it more difficult to return others to the same country. Collyer notes that such evidence has carried and would continue to carry significant weight with judges in asylum and human rights cases (2010) but is not collected systematically. There are evaluation programmes being carried out, but these are concerned with evaluating the effectiveness of 'voluntary' returns programmes in order, not to assess the decisions that lead to deportation, or to ensure that those who are deported are safe, but to see whether it is possible to ensure that the removal is definitive, and to persuade more people to return 'voluntarily' – thus making the deportation process easier for MS. In spite of arguments that 'that the best way to avoid ill-treatment is to make sure that we do not return those who are at real risk, not by monitoring them after they have returned' (UKBA), mounting evidence that people are being returned to danger must raise questions about how effective the protection regime is. We suggest that states' refusal to check what happens to those deportations indicates a preference to remain blind to the consequences of their actions lest it undermine their claims to have in place the 'fair and efficient asylum procedures' that legitimize deportation. This consideration of international and regional deportation law and practice has demonstrated that while Human Rights legislation does protect some individuals, the courts much often battle against the urge of states to 'protect' themselves.

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