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Criminalizing Hate Speech: A Comment on the ICTR's Judgment in *The Prosecutor v. Nahimana, et al.*

by Diane F. Orentlicher

ON DECEMBER 3, 2003, a trial chamber of the International Criminal Tribunal for Rwanda (ICTR) rendered the most important judgment relating to the law of incitement in the context of international criminal law since Nuremberg. In its long awaited judgment in *The Prosecutor v. Nahimana, et al.*¹ (*Nahimana*), the ICTR's Trial Chamber I convicted three defendants of, among other charges, (1) genocide, (2) direct and public incitement to commit genocide, and (3) persecution as a crime against humanity based upon the defendants' responsibility for incendiary radio broadcasts and newspaper articles. Two defendants, Ferdinand Nahimana and Jean-Bosco Baraygiza, were convicted because of their roles in *Radio Télévision Libre des Mille Collines* (RTLM), which is deservedly infamous for its central role in inciting and directing the 1994 genocide in Rwanda. One writer succinctly summarized RTLM's role in the 1994 genocide this way: "RTLM exhorted Hutus to exterminate Tutsis and moderate Hutus, identified specific targets, and helped coordinate attacks."² The third defendant, Hassan Ngeze, was convicted for his role as editor-in-chief of the newspaper *Kangura*. An appeal of this decision is now pending before the ICTR's Appeals Chamber.

There can be little doubt that the defendants in this case deserved to be convicted for their proven roles in the 1994 Rwandan genocide. Even so, the Appeals Chamber should adopt a different approach to the speech-related charges than that taken by the trial chamber. The principal reasons can be briefly stated: several aspects of the trial chamber's judgment represent an expansive interpretation of relevant international crimes, while other aspects of the court's reasoning would benefit from clarification. To the extent that the defendants' convictions were based upon novel interpretations of relevant crimes, the judgment imperils a fundamental principle of international human rights law — the prohibition of retroactive punishment. Although space does not permit a thorough consideration of the trial chamber's judgment, two examples illustrate these concerns.

INCITEMENT TO COMMIT GENOCIDE

AT TIMES THE JUDGMENT APPEARS TO ENDORSE an expansive interpretation of the crime of direct and public incitement to commit genocide. The provision of the ICTR's statute that vests the tribunal with jurisdiction over this crime³ is taken directly from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).⁴ Accordingly, the law of this treaty provides the most pertinent guide for interpreting the relevant provision of the ICTR statute. Yet the portion of the *Nahimana* judgment that addressed the charge of genocide incitement focused overwhelmingly on the law of three other human rights treaties. Two of these human rights treaties, the International Covenant on Civil and Political Rights (ICCPR)⁵ and the Convention on the Elimination of all Forms of Racial Discrimination (Race Convention),⁶ explicitly

require States Parties to proscribe not only speech that incites its listeners to racial violence, but also "hate speech" — a term I will use in this article to connote speech that incites its audience to racial discrimination⁷ or hatred, even when it does not entail incitement to violence. The third treaty, the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁸ has been authoritatively interpreted to allow (but not require) States Parties to proscribe hate speech under certain conditions.

Although its analysis is somewhat ambiguous, Trial Chamber I apparently treated the hate-speech law associated with these treaties as the most pertinent guide to its interpretation of the Genocide Convention's provision on incitement to commit genocide. The chamber signaled as much when it began its discussion

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of the genocide-incitement charges with the assertion that, in its view, “a review of international law and jurisprudence on *incitement to discrimination* and violence is helpful as a guide to the assessment of criminal accountability for direct and public incitement to genocide, in light of the fundamental right of freedom of expression.”⁹ The chamber then proceeded to discuss several sources of law, focusing overwhelmingly on the hate-speech law associated with the three aforementioned human rights treaties.

As a general rule, it is perfectly appropriate and even desirable to interpret one human rights treaty in light of others. This approach promotes coherence in human rights treaty law and helps ensure that states are not subject to conflicting obligations under different human rights treaties. Even so, it would be inappropriate to use the hate-speech provisions and jurisprudence of other human rights treaties as a touchstone for interpreting the Genocide Convention — that is, to assume that the Genocide Convention’s provision on incitement strikes the same balance between protected and unprotected speech as the balance embodied in human rights treaties that require or permit States Parties to proscribe hate speech.

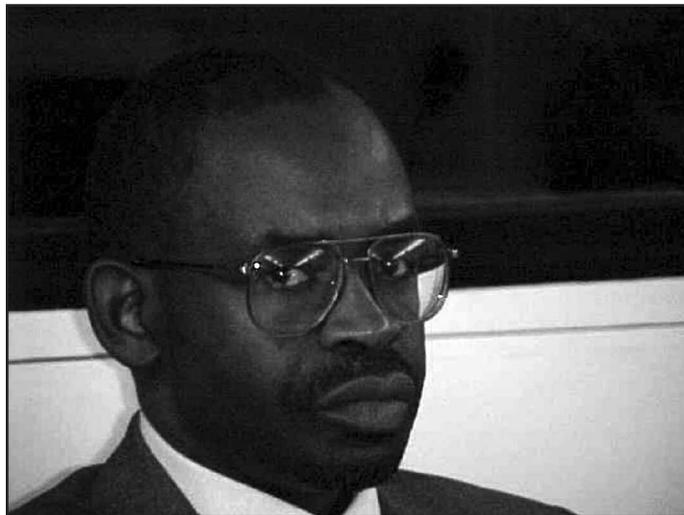
The most important reason is that this approach would fly in the face of the drafting history of the Genocide Convention. The *travaux préparatoires* disclose an unambiguous determination by the treaty’s drafters to *exclude* hate speech from the ambit of the clause

“To the extent that the defendants’ convictions were based upon novel interpretations of relevant crimes, the judgment imperils a fundamental principle of international human rights law — the prohibition of retroactive punishment.”

that makes “direct and public incitement to commit genocide” a punishable offense. At several points during the treaty negotiations, the Soviet delegation proposed text that would have criminalized not only direct and public incitement to commit genocide, but also hate speech. Each time, its proposal was rejected.

But while portions of *Nahimana* moved dangerously close to endorsing an interpretation at odds with the *travaux préparatoires* of the Genocide Convention, other portions of the judgment hewed more closely to the path charted by the genocide treaty’s drafters. For example, after implying that speech promoting ethnic hatred falls beyond the bounds of “protected speech,”¹⁰ the trial chamber noted, “not all of the writings published in *Kangura* and

highlighted by the Prosecution constitute direct incitement. *A Cockroach Cannot Give Birth to a Butterfly*, for example, is an article brimming with ethnic hatred but did not call on readers to take action against the Tutsi population.”¹¹ While the former implication would thwart the intent of the drafters of the Genocide Convention, the latter observation seems broadly consistent with their determination to exclude hate speech from the writ of the incitement provision.



Courtesy of Internews

Jean-Bosco Baraygiza, founding member of RTLM.

These and other ambiguities cry out for clarification by the Appeals Chamber. In particular, the Appeals Chamber should make clear that “incitement to commit genocide” does not encompass words that, however deeply they affront human decency, do not advocate the commission of genocide.

CRIMES AGAINST HUMANITY/PERSECUTION

IF TRIAL CHAMBER I STOPPED just short of criminalizing hate speech under the rubric of incitement to commit genocide, it achieved much the same result — that is, convicting defendants of an international crime by virtue of hate speech — through an expansive interpretation of the crime against humanity of persecution. In a departure



Courtesy of Internews

Ferdinand Nahimana, former director of RTLM.

from established jurisprudence, the chamber convicted all three defendants of this charge based upon speech that constitutes incitement to racial hatred, but not incitement to violence.

To understand why this holding represents an innovation, it is necessary to consider how international tribunals had previously approached the charge of persecution as a crime against humanity with respect to speech-related conduct. The leading precedent is the judgment of the International Military Tribunal (IMT)¹² convened at Nuremberg following World War II. Two defendants before the IMT, Julius Streicher and Hans Fritzsche, were charged with crimes against humanity by virtue of anti-Semitic advocacy.¹³ Streicher was convicted of this charge and sentenced to hang, while Fritzsche was acquitted.

Trial Chamber I apparently relied upon the *Streicher* case to establish that hate speech can form the basis of a conviction for persecution as a crime against humanity even without a call to violent action:

Unlike the crime of incitement, which is defined in terms of intent, the crime of persecution is defined also in terms of impact. It is not a provocation to cause harm. It is itself the harm. Accordingly, there need not be a call to action in communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence. The Chamber notes that Julius Streicher was convicted by the International Military Tribunal at Nuremberg of persecution as a crime against humanity for anti-semitic writings that significantly predated the extermination of Jews in the 1940s. Yet they were understood to be like a poison that infected the minds of the German people and conditioned them to follow the lead of the National Socialists in persecuting the Jewish people. In Rwanda, the virulent writings of *Kangura* and the incendiary broadcasts of RTLM functioned in the same way, conditioning the Hutu population and creating a climate of harm, as evidenced in part by the extermination and genocide that followed.¹⁴

It is difficult to see how the *Streicher* verdict could support a conclusion to the effect that “communications that constitute persecution” need not include a call to action, let alone a call to violence. Although the IMT did not clearly enunciate the elements of persecution as a crime against humanity, its conviction of Streicher and acquittal of Fritzsche strongly suggest that the Tribunal was prepared to judge a defendant guilty of persecution as a crime against humanity based upon his expressive activity only when he intentionally urged listeners to commit atrocities.

The charges against Streicher were based on his role as publisher of the virulently anti-Semitic weekly newspaper *Der Stürmer*, in whose pages Streicher advocated the extermination of Jews in terms that would readily qualify as direct and public incitement to commit genocide as that term is used in the Genocide Convention.¹⁵ Streicher was convicted of “persecution on political and racial grounds” constituting a crime against humanity based upon his “incitement to murder and extermination” of Jews in Nazi-occupied territory¹⁶ — not, as *Nahimana* implies, for conduct constituting hate speech that is not linked to a call to violent action.

In contrast to Streicher’s unambiguous calls for extermination of Jews, Fritzsche’s speeches, while “show[ing] definite anti-Semitism ... did not urge persecution or extermination of Jews.”¹⁷



Courtesy of Internews

Hassan Ngeze, former editor and owner of the Hutu newspaper *Kangura*.

Moreover, while Fritzsche “sometimes made strong statements of a propagandistic nature in his broadcasts,” the IMT was “not prepared to hold that they were intended to incite German people to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged.”¹⁸ Accordingly, Fritzsche was acquitted.

Nahimana further misread Nuremberg in claiming that Julius Streicher was convicted “for anti-semitic writings that significantly predated the extermination of Jews in the 1940s [yet] were understood to be like a poison that infected the minds of the German people and conditioned them to follow the lead of the National Socialists in persecuting the Jewish people.”¹⁹ To begin, Streicher was convicted only with respect to speech-related activities that occurred during World War II. Although the IMT described Streicher’s “25 years of speaking, writing, and preaching hatred of the Jews,”²⁰ apparently to establish his unambiguous intent to incite Germans to exterminate Jews, the Tribunal was at pains to emphasize that Streicher “continued to write and publish his propaganda of death” at a time when he knew “of the extermination of the Jews in the occupied territory.”²¹ Concluding the portion of its judgment relating to Streicher, the IMT held that his “incitement to murder and extermination at the time when Jews in the east were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes, as defined by the [Nuremberg] Charter,” — that is, during World War II — “and constitutes a crime against humanity.”²²

If Streicher had been convicted of pre-war conduct, Nuremberg could be more readily interpreted as precedent for convicting a defendant of persecution as a crime against humanity by virtue of speech that does not qualify as incitement to racist violence but nonetheless helps condition a society to regard members of a particular group with racial animus. But such an interpretation would misread Nuremberg. Streicher’s conviction rested squarely upon his calls for the extermination of Jews at a time when they were being slaughtered “under the most horrible conditions,” and when Streicher knew as much.

This interpretation is reinforced by other passages in the Nuremberg judgment. Immediately after citing a 1940 publication in *Der Stürmer* calling for the complete extermination of Jews, the IMT observed, in a passage paraphrased by Trial Chamber I, “Such

was the poison Streicher injected into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish persecution *and extermination*.²³ These last two words, which were omitted in the above-quoted passage from *Nahimana*,²⁴ imply that Streicher's expressive activity amounted to a crime against humanity only when linked to extermination.

Fast-forwarding to contemporary case law, the ICTR and its sister tribunal, the International Criminal Tribunal for the former Yugoslavia (ICTY), have repeatedly held that the crime against humanity of persecution requires "a gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity"²⁵ as other acts that may constitute a crime against humanity. Those acts include such conduct as murder, extermination, and torture. Applying a variation of this test in *Prosecutor v. Kordić, et al.*,²⁶ an ICTY trial chamber rejected the prosecutor's attempt to convict Dario Kordić on the charge of persecution as a crime against humanity based upon the act of "encouraging and promoting hatred on political etc. grounds."²⁷ Noting that the indictment against Kordić was "the first indictment in the history of the [ICTY] to allege this act as a crime against humanity,"²⁸ the chamber concluded that this conduct "does not by itself constitute persecution as a crime against humanity."²⁹ The court's reasoning is instructive:

It is not enumerated as a crime elsewhere in the [ICTY] Statute, but most importantly, it does not rise to the same level of gravity as the other acts enumerated in Article 5 [of the statute]. Furthermore, the criminal prohibition of this act has not attained the status of customary international law. Thus to convict the accused for such an act as is alleged as persecution would violate the principle of legality.³⁰

Although this judgment was rendered more than two and one-half years before Trial Chamber I rendered its verdict in *Nahimana*, the ICTR chamber made no mention of *Kordić* and reached the opposite conclusion. Citing just one precedent, an ICTR judgment that had been based upon a guilty plea, Trial Chamber I wrote that it "consider[ed] it evident that hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches [the same] level of gravity [as the other crimes against humanity enumerated in its Statute] and constitutes persecution under Article 3(h) of its Statute."³¹ The chamber asserted that the ICTR had "so held" in *Prosecutor v. Ruggiu*,³² "finding that the radio broadcasts of RTLM, in singling out and attacking the Tutsi ethnic minority, constituted a deprivation of the 'fundamental rights to life, liberty and basic humanity enjoyed by members of the wider society.'"³³

But the trial chamber's judgment in *Ruggiu* did not go as far as *Nahimana* implied.³⁴ Immediately after the passage quoted in *Nahimana*, the *Ruggiu* judgment continued, "The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself."³⁵ Thus the *Ruggiu* judgment did not explicitly hold that advocacy of racial hatred, as distinguished from speech advocating racial violence, could form the basis of a persecution conviction. Instead it found that RTLM broadcasts aimed at "the death and removal" of the Tutsi minority "from the society in which they live . . . or eventually even from humanity itself" qualified as the crime against humanity of persecution.

Trial Chamber I sought to justify its conclusion that hate speech constitutes the crime against humanity of persecution by characterizing such speech as "a discriminatory form of aggression that destroys the dignity of those in the group under attack."³⁶ The judgment continued:

[Hate speech] creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.³⁷

From this observation it was a short step toward the conclusion that it is not necessary to establish that the speech in question constitutes incitement to commit another crime. Rather, the chamber found, the effect of hate speech "is itself the harm" that amounts to persecution.³⁸

This approach makes powerful and compelling claims. But they are properly addressed in fora other than an international criminal tribunal whose statute does not provide a clearly established basis for jurisdiction over hate speech. As ICTY judgments have noted, the principle of legality requires that "acts in respect of which [a defendant is] indicted under the heading of persecution must be found to constitute crimes under international law at the time of their commission."³⁹ Accordingly, "there must be *clearly defined limits* on the expansion of the types of acts which qualify as persecution."⁴⁰

CONCLUSION

If some aspects of *Nahimana* are worrying, the judgment as a whole provides an invaluable account of the media's key role in the 1994 Rwandan genocide. This, in itself, is an historic measure of justice.

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ENDNOTES: Orentlicher

¹ Case No. ICTR-99-52-T, Judgment (Trial Chamber) (Dec. 3, 2003).

² Joel Simon, *Murder by Media: Why the Rwandan genocide tribunal went too far*, <http://slate.msn.com/id/2092372/> (Dec. 11, 2003).

³ Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), art. 2(3)(c), available at <http://www.un.org/ict/statute.html> (accessed Oct. 29, 2005).

⁴ Adopted by G.A. Res. 260 A (III), Dec. 9, 1948, entered into force Jan. 12, 1951, 78 U.N.T.S. 277, art. III(c).

⁵ Concluded Dec. 16, 1966, entered into force Mar. 23, 1976, 999 U.N.T.S.

171, art. 20(2).

⁶ Concluded Mar. 7, 1966, entered into force, Jan. 4, 1969, 660 U.N.T.S. 195, art. 4(a).

⁷ Here the phrase "racial discrimination" is used as short hand for the various forms of group-based discrimination typically encompassed in hate-speech laws.

⁸ Concluded Nov. 4, 1950, entered into force, Sept. 3, 1953, 213 U.N.T.S. 221, E.T.S. 5.

⁹ *Nahimana*, ICTR-99-52-T at ¶ 980 (emphasis added).

¹⁰ See *id.* at ¶ 1020.

¹¹ *Id.* at 344, ¶ 1037. Similarly, the trial chamber implicitly acknowledged that direct and public incitement to commit genocide does not encompass “advocacy of ethnic hatred in other forms.” *Id.* at 353, ¶ 1078.

¹² *Nazi Conspiracy and Aggression: Opinion and Judgment* (Oct. 1, 1946) (United States Gov’t Printing Office 1947) [hereinafter *Nuremberg Judgment*].

¹³ Both defendants were also charged with a common plan or conspiracy to wage aggressive war; Fritzsche was also charged with war crimes. Both defendants were acquitted of the first charge and Fritzsche was acquitted of all charges against him. See *id.* at 129 (finding Streicher not guilty of the charge relating to crimes against peace) and 162-63 (acquitting Fritzsche on all counts).

¹⁴ *Nahimana*, ICTR-99-52-T at ¶1072.

¹⁵ According to the *Nuremberg Judgment*, a leading article in *Der Stürmer* published in May 1939 called for Russia’s Jews to “be exterminated root and branch.” *Nuremberg Judgment* at 130. As the war progressed, “Streicher even intensified his efforts to incite the Germans against the Jews.” Twenty-six articles published between August 1941 and September 1944, 12 of which were written by Streicher himself, “demanded annihilation and extermination in unequivocal terms.” *Id.*

¹⁶ *Nuremberg Judgment* at 131.

¹⁷ *Id.* at 163.

¹⁸ *Id.*

¹⁹ See also *Nahimana*, ICTR-99-52-T at ¶1078.

²⁰ *Nuremberg Judgment* at 129.

²¹ *Id.* at 130.

²² *Id.* at 131.

²³ *Nuremberg Judgment* at 130 (emphasis added).

²⁴ In other passages paraphrasing or quoting this language from Nuremberg, the *Nahimana* judgment includes the phrase “or extermination.” See, e.g., *Nahimana*, ICTR-99-52-T at ¶¶ 981, 1007 (in which the ICTR trial chamber quoted the *Streicher* judgment in support of the claim that causation is not an element of incitement to commit genocide).

²⁵ *Prosecutor v. Zoran Kuprešić, et al.*, Case No. IT-95-16-T, Judgment (Trial Chamber), 252-53, ¶ 621 (Jan. 14, 2000), *rev’d in part on other grounds*, Case No. IT-95-16-A, Judgment (Appeals Chamber) (Oct. 23, 2001); see also *Prosecutor v. Georges Ruggiu*, Case No. ICTR-97-32-I, Judgment and Sentence (Trial Chamber), ¶ 21 (June 1, 2000); *Prosecutor v. Tihomir Blašić*, Case No. IT-95-14-A, Judgment (Appeals Chamber), ¶ 135 (July 29, 2004); *Prosecutor v. Dario Kordić, et al.*, Case No. IT-95-14/2, Judgment (Trial Chamber), 54, ¶ 195, (Feb. 26, 2001) *aff’d*, *Prosecutor v. Dario Kordić, et al.*, Case No. IT-95-14/A, ¶ 102 (Dec. 17, 2004); *Prosecutor v. Radislav Krstić*, Case No. IT-

98-33-T, Judgment (Trial Chamber), ¶¶ 535, 621 (Aug. 2, 2001), *rev’d in part on other grounds*, Judgment (Appeals Chamber) (Apr. 19, 2004). In another variation, the ICTY Appeals Chamber approved the following formulation of law by a trial chamber: “the crime of persecution consists of an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*).” *Prosecutor v. Milorad Krnojelac*, Judgment (Appeals Chamber), ¶ 185 (Sept. 17, 2003), *quoting* Judgment (Trial Chamber) (Mar. 15, 2002).

²⁶ Case No. IT-95-14/2-T, Judgment (Trial Chamber) (Feb. 26, 2001).

²⁷ *Id.* at 59. This sub-heading apparently summarizes the following charge in the indictment against Dario Kordić: “encouraging, instigating and promoting hatred, distrust and strife on political, racial, ethnic or religious grounds, by propaganda, speeches or otherwise.” *Id.* at 59, n. 272; Amended Indictment, *Prosecutor v. Kordić, et al.*, Count 1 (Persecutions), ¶ 37(c) (Sept. 30, 1998).

²⁸ *Prosecutor v. Dario Kordić, et al.* at 59, ¶ 209.

²⁹ *Id.*

³⁰ *Id.* (footnotes omitted). This aspect of the trial chamber’s judgment was not addressed on appeal.

³¹ *Nahimana*, ICTR-99-52-T at 351, ¶ 1072. In a recent decision, Trial Chamber I cited this passage in *Nahimana* as its sole support for the proposition that “[e]xamples of acts that have been found to be persecution [as a crime against humanity] include [among others] hate speech.” *Prosecutor v. Théoneste Bagosora, et al.*, ICTR-98-41-T, Decision on Motions for Judgment of Acquittal, ¶ 32, n. 68 (Feb. 2, 2005).

³² *The Prosecutor v. Georges Ruggiu*, Case No. ICTR-97-32-I, Judgment and Sentence (June 1, 2000).

³³ *Nahimana* at ¶ 1072, *quoting Ruggiu* at ¶ 22.

³⁴ Like *Nahimana*, *Ruggiu* was decided by Trial Chamber I.

³⁵ *Ruggiu* at ¶ 22.

³⁶ *Id.* at 351, ¶ 1072.

³⁷ *Id.*

³⁸ *Id.* at ¶ 1073; see also *id.* at ¶ 1072 (concluding that the effects of hate speech “can be an irreversible harm” and that hate speech constitutes a form of persecution as a crime against humanity). In a recent judgment, the Supreme Court of Canada — a country whose domestic law criminalizes hate speech — adopted the reasoning of *Nahimana*. See *Mugesera v. Canada* (Minister of Citizenship and Immigration), 2005 S.Ct. Canada 40, ¶ 147 (June 28, 2005).

³⁹ *Prosecutor v. Dario Kordić, et al.*, Case No. IT-95-14/2, Judgment (Trial Chamber), ¶ 192 (Feb. 26, 2001).

⁴⁰ *Id.* at ¶ 194, *quoting Prosecutor v. Zoran Kuprešić, et al.*, Case No. IT-95-16, Judgment (Trial Chamber), ¶ 618 (Jan. 14, 2000) (emphasis in original).

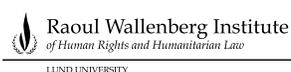


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