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Tutti i volumi sono sottoposti a duplice referaggio anonimo.

Le nuove giustificazioni della tortura nell'età dei diritti

a cura di

Marco Di Giovanni, Cinzia Rita Gaza, Gabriella Silvestrini

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A Bruno Debenedetti (1946-2014) e Nanni Salio (1943-2016)

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Le nuove giustificazioni della tortura nell'età dei diritti

Marta Picchi

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1. Introduction

The European Union (EU)'s commitment towards human rights is affirmed in art. 2 of the *Treaty on European Union* (TEU), which recalls the values of respect for human dignity, freedom, the rule of law and human rights as the foundation of the EU.

The prohibition of torture and inhuman or degrading treatment or punishment is expressly contemplated by art. 4 of the *Charter of Fundamental Rights of the European Union* (the so-called *Nice Charter* of 2000), which had the same legal value as the Treaties (art. 6, § 1, TEU) after the entry into force of the *Treaty of Lisbon*, and by art. 3 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention*), which has the value of general principle pending EU accession (art. 6, § 3, TEU). In addition, the Court of Justice (CJ) of the EU has stated that the right not to be subjected to torture and inhuman or degrading treatment or punishment does not tolerate any exception, unlike other rights (12 June 2003, case C-112/00 Schmidberger and Grand Chamber, 16 November 2011, case C-548/09 P).

This paper begins by examining the distinction between the external and internal action of the EU, highlighting ways in which the EU appears to pay more attention to combat practices of torture in third countries than to the incidents and the proposals to legalize

torture made at a political level in some Member States. Indeed, the positive actions of the EU in this area have focused outward partly because EU foreign policy contains among its objectives the protection of human rights (art. 21 TEU), while the internal action of the EU is more limited due to the areas of competence established in the Treaties, meaning that, e.g., the management of prisons and detention centers is a task for the Member States, while the EU has no competence even in the definition of standard measures in this matter. However, even in cases in which the EU is able to intervene, the measures taken seem timid and not completely decisive.

This analysis will allow us to make, therefore, some concluding remarks on the effectiveness of overall measures taken at the European level, especially in terms of the values that are actually protected.

2. The guidelines of the European Union towards third countries

In 2001 (with updates in 2008 and 2012), the EU General Affairs Council developed the *Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment* (GT), which complements the *EU Guidelines on the death penalty* of 1998: both are based on the relevant international norms and standards (Pistoia 2010, 246-250).

The GT covers three areas of EU activity: 1) monitoring and reporting. In particular, the EU Heads of Mission will draft periodic reports of the occurrence of torture and ill-treatment and the measures taken to combat them, and they will also provide periodic evaluation of the effect and impact of the EU actions; 2) assessment based on these reports and other relevant information. The Council Working Group on Human Rights and the relevant Geographic Working Groups will identify situations where EU actions are called upon, agree on further steps or make recommendations to higher levels; 3) concrete actions, finalized to influence third countries to take effective measures against torture and ill-treatment

and to ensure that the prohibition against torture and ill-treatment is enforced.

Following the update of 2012, operational guidelines also consider "country strategies": wherever torture and ill-treatment are a matter for concern, this includes conducting in-depth analysis of the situation regarding torture and other ill-treatment in a given country, and identifying possible preventive actions and mechanisms, as well as necessary steps to counter impunity for torture and other ill-treatment. In addition, with regard to concrete actions, more attention is paid to prevention activities and trial observation by embassy representatives sent as observers by the EU Heads of Mission where there is reason to believe that defendants have been subjected to torture or ill-treatment.

In the implementation of the GT, the EU contemplated a special system of import and export for goods used to impart capital punishment and torture or other cruel, inhuman or degrading treatment or punishment: this is addressed by Council Regulation (EC) no. 1236/2005, adopted under the common commercial policy (Scorza 2007; Magi 2007).

Exports from and imports to the EU are generally guided by the principle of freedom and the general prohibition of restrictions: however, there are goods that are subject to special rules, and among these fall those that can be used to inflict capital punishment, torture or ill-treatment. The special rule set out in Council Regulation no. 1236/2005 states that any export and any import of goods which have no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, listed in Annex II, shall be prohibited, irrespective of the origin of such equipment. There is only one derogation: the competent authority may authorize an export or an import of goods listed in Annex II if it is demonstrated that such goods will be used for the exclusive purpose of public display in a museum in view of their historic significance.

In addition, with regard to exports only, Council Regulation no. 1236/2005 states that dual-use goods – i.e. goods that could be used for the purpose of torture and other cruel, inhuman or degrading

treatment or punishment, listed in Annex III – need an authorization to leave the customs territory of the Community. The competent authority shall not grant any authorization when there are reasonable grounds (international court judgments; findings of the competent bodies of the United Nations (UN), the Council of Europe and the EU, and reports of the Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment and of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and other relevant information) to believe that goods listed in Annex III might be used for torture or other cruel, inhuman or degrading treatment or punishment, including judicial corporal punishment, by a law enforcement authority or any natural or legal person in a third country.

Council Regulation no. 1236/2005 has certain weaknesses: the first of these is the fact that it only covers a limited group of goods, especially dual-use items, despite the expansion accomplished with implementing Regulations no. 1352/2011 and no. 775/2014.

This Regulation also has a limited impact, failing to stem the latest forms of torture: torture and ill-treatment remain effective with or without the use of specific instruments, and a trade bloc is therefore not the right tool to prevent such practices.

Moreover, Amnesty International and the Omega Research Foundation have denounced some serious failures on the part of some Member States in issuing permits for goods used for torture in countries where the practice is known, or at least in displaying carelessness towards exports by their companies (Pistoia 2010, 253-254).

Finally, goods in transit through the EU customs territory are neither subject to authorization, nor to forms of control. The proposal for a regulation of the European Parliament (EP) and of the Council amending Council Regulation no. 1236/2005 states that a broker shall be prohibited from providing to any person, entity or body in a third country brokering services in relation to goods listed in Annexes II and III, irrespective of the origin of such goods. However, it does not prohibit the transiting of such goods because, according to the European Commission (EC), information on the

end-user will not usually be available to economic operators transporting the transiting goods within the customs territory of the EU and, therefore, it does not consider it proportionate to impose a prohibition on the transporter[1].

3. Action within the European Union itself

The EU has not adopted specific measures to counter the use of torture and other inhuman or degrading treatment or punishment by its Member States.

3.1. Judicial cooperation in criminal matters

3.1.1. Approximation of criminal laws and regulations

At present, torture is not among the offences subject to legislative approximation between Member States (art. 83 of the *Treaty on the Functioning of the European Union*), that is, an offence for which the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and sanctions.

However, the presence of a European tool of harmonization of national criminal laws would exert appropriate pressure on those States that fail to respect the *European Convention* and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by the UN in 1984, which impose an obligation to introduce the crime of torture into the criminal law of the signatory States: Italy, like other Member States, has been repeatedly criticized in this regard by the Committee against Torture and the Committee for the Prevention of Torture, and has recently been condemned by the European Court of Human Rights (ECHR)[2] (Picchi 2015).

3.1.2. European arrest warrant

1 See COM(2014) 1 final, 14.1.2014.

2 See ECHR, Section IV, 7 April 2015, Application no. 6884/11, case of Cestaro v. Italy.

The Council Framework Decision of 13 June 2002 *on the European arrest warrant and the surrender between Member States* (2002/584/JHA) would seem to exclude the possibility of refusing delivery of an individual to the authorities of a Member State where there is a serious risk that the requested person may be subjected to treatment contrary to art. 3 of the *European Convention* and art. 4 of the *Nice Charter*. This is because this refusal may only be made in specific cases, which are listed exhaustively in art. 3 (*Grounds for mandatory non-execution of the European warrant arrest*) and art. 4 (*Grounds for optional non-execution of the European warrant arrest*) of the Framework Decision. However, things are different in the event of a serious and persistent breach by one of the Member States; in such cases, the "whereas" clause no. 10 in the preamble of the Framework Decision permits the suspension of the mechanism of the European arrest warrant.

Although the discipline of the European arrest warrant is based on a high degree of trust between Member States, the Framework Decision must be read in accordance with EU primary law: the same art. 1, § 3 explicitly states the obligation to respect the fundamental rights and fundamental legal principles enshrined in art. 6 TEU, which cannot be changed as a result of the Framework Decision. Moreover, a judge who does not refuse the mandate in the presence of such risks would be in violation of art. 3 of the *European Convention* and art. 4 of the *Nice Charter*.

The EC largely adhered to this reconstruction and considered the explicit grounds of refusal for the violation of fundamental rights or discrimination to be legitimate; however, it pointed out that these grounds should be invoked only in exceptional circumstances within the EU, emphasizing the problematic aspect with respect to the principle of mutual recognition of criminal judgments[3].

The paucity of references to the protection of human rights in the discipline of the European arrest warrant is due to the fact that this institution is based, as noted, on mutual trust between Mem-

3 See Reports from the Commission of 23 February 2005 [COM(2005) 63 final] and 24 January 2006 [COM(2006) 8 final] *on the European arrest warrant and the surrender procedures between Member States*.

ber States and on the assumption that there is no place for torture and ill-treatment in Europe, despite the fact that, in reality, practice proves otherwise and national rules are often characterized by ambiguity and inadequacy (Pistoia 2010, 254-267).

3.1.3. Cooperation between judicial authorities

The Framework Decisions governing cooperation between judicial authorities distinguish between those areas of criminal justice in which cooperation does not require that the offence be considered a crime in both jurisdictions and those in which the application of the dual criminality principle is to be decided by the second State. This State, if it decides to adhere to this principle, will ensure that the request of the foreign judicial authority is only complied with if the offence in question can also be prosecuted under its own national legislation.

The crime of torture, however, is not one of those areas in which the principle of dual criminality is abandoned in favor of a simplified system of cooperation between judicial authorities.

3.2. Right to asylum, refugee status and repatriation

Art. 18 of the *Nice Charter* recognizes the right of asylum and art. 19 sets out the limits to be observed in the event of removal, expulsion or extradition, stating that collective expulsions are prohibited and no one may be removed, expelled or extradited to a State where there is a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment (Pistoia 2010, 272-275).

The crucial point lies in the procedures for identifying the State responsible for examining the asylum application, provided for in Council Regulation (EC) no. 343/2003 of 18 February 2003 (*Dublin II*). The Regulation contains a number of criteria to be applied with a clear hierarchy in order to avert the risk of abuse of asylum claims

by so-called apparent refugees. However, it does not consider the possibility that the State responsible for examining an asylum application may still decide to reject the applicant, exposing this person to the risk of torture. The designation of the State responsible for examining an asylum application is not affected even by an evaluation of the treatment that the same State may apply to the applicant.

The case law interpretation of the CJ of the EU is therefore important (Parisi, Rinoldi 2012): recently, the CJ, in line with the case law of the ECHR (Grand Chamber, 21 January 2011, Application no. 30696/09, case of MSS v. Belgium and Greece), stated that a Member State enjoys a rebuttable (not absolute) presumption of respect for fundamental human rights, and particularly for the prohibition of torture and inhuman or degrading treatment; however, that presumption can be rebutted by evidence to the contrary provided, e.g., by authoritative international organizations and non-governmental bodies (Grand Chamber, 21 December 2011, cases C-411/10 N.S. and C-493/10 M.E.). The transfer of an asylum seeker by one Member State to another of first entry must be subjected to strict scrutiny: art. 4 of the *Nice Charter* must be interpreted as meaning that Member States must not transfer an asylum seeker to the Member State designated as responsible when there are serious systemic deficiencies in the asylum procedure and reception conditions for asylum seekers in that country and there are substantiated reasons for believing that the applicant runs a real risk of being subjected to ill-treatment. The requesting Member State may itself examine the asylum application (art. 3, § 2, Council Regulation no. 343/2003), but it can also verify the existence of an additional criterion in the Regulation that allows another Member State to be identified as competent to examine the application for asylum: however, the procedure for identifying the competent State must not be such as to exacerbate the violation of the applicant's fundamental rights.

The CJ also held that where a Member State has agreed to take charge of an asylum seeker as a Member State of first entry into the EU, the applicant may only challenge this decision if there are systemic deficiencies in the asylum procedure and reception conditions

for asylum seekers in that Member State, as these constitute serious and proven reasons to believe that the applicant runs a real risk of being subjected to ill-treatment (Grand Chamber, 10 December 2013, case C-394/12 Abdullahi).

Council Directive no. 2004/83/EC (the so-called *Qualification Directive*) addresses subsidiary protection. This measure seeks to overcome the stringent requirements for the acquisition of refugee status, extending its system of protection to persons not in possession of such requirements: the criteria for subsidiary protection include the real risk of suffering serious harm, including torture and other forms of inhuman or degrading treatment or punishment. In this regard, the CJ stated that the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection does not require proof that he as an individual is specifically targeted by reason of factors particular to his personal circumstances. In exceptional cases, the existence of such a threat is established where the degree of indiscriminate violence characterizing armed conflict taking place reaches such a high level as to suggest that a civilian who returned to the country or region in question, would face a real risk of suffering serious harm merely by their presence in the territory (Grand Chamber, 17 February 2009, case C-465/07 Elgafaji). The CJ also clarified the meaning of art. 12, § 2 of the *Qualification Directive*, i.e. whether the membership of an organization included in a list attached to the Common Position of the Council of 27 December 2001 (2001/931/CFSP) on the application of specific measures to combat terrorism is sufficient to exclude the recognition of refugee status. The CJ stated that refugee status may be denied only after an individual examination of the specific facts in order to verify the existence of reasonable grounds to believe that, as part of the organization, the person has individual responsibility for having committed a serious non-political crime or an act contrary to the purposes and principles of the UN (Grand Chamber, 9 November 2010, cases C-57/09 B and C-101/09 D). In particular, the competent authorities must assess whether the applicant runs a real risk of being criminally persecuted or subjected to inhuman or degrading treatment or punishment (Grand Chamber, 5 September

2012, cases C-71/11 Y and C-99/11 Z; Section IV, 7 November 2013, cases C-199/12 X and C-201/12 Y).

The new *Qualification Directive* (no. 2011/95/EU of the EP and of the Council) pays more attention to the clarifications of the CJ and introduces further changes of no small importance: however, the EC considered it unnecessary to include details regarding the interpretation doubts analyzed in the Elgafaji judgment, even if it would perhaps be appropriate to reduce the variation in implementation by each Member State.

Finally, Council Directive 2005/85/EC of 1 December 2005 (the so-called *Asylum Procedures Directive*) also creates problems of interpretation due to its ambivalent character: the controversial element is the use of the notion of safe countries to determine the inadmissibility of an application for asylum, and, in particular, the eligibility of a list of countries which have this quality. Indeed, although the term appears consistent because it adheres to the principle of non-refoulement under the *Geneva Convention* and to the prohibition of removal in violation of the right to freedom from torture and cruel, inhuman or degrading treatment, there is cause for concern in the preparation of lists based on a theoretical and rough-and-ready evaluation by individual States.

On account of the increase in flows of asylum seekers in recent years, the EU seems to have adopted a less favorable policy of support to refugees[4], despite the *Stockholm Programme 2010/2014*'s emphasis on the need for a common area of protection and solidarity, founded on a common asylum procedure and a uniform status for those that have obtained international protection, and based on high standards of protection and of fair and effective procedures.

4 See Directives of the EP and of the Council of 26 June 2013, no. 2013/32/EU, *on common procedures for granting and withdrawing international protection (recast)*, and no. 2013/33/EU, *laying down standards for the reception of applicants for international protection (recast)*, and Regulations (EU) of the EP and of the Council of 26 June 2013, no. 603/2013, *on the establishment of Eurodac for the comparison of fingerprints* and no. 604/2013 (the so-called *Dublin III*), *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, amending *Dublin II*.

In general, reception procedures have not improved, while there has been increased use of "administrative detention" measures or limitations on freedom of movement. In addition, there has been a confirmation of the old principle that formed the basis of the *Dublin Convention* of 1990 and the *Dublin II*: i.e., as a rule, every asylum application must be examined by a single Member State and the competent State is the State of entry of the applicant.

However, taking into account the case law of the CJ, art. 3, § 2 of Regulation no. 604/2013 states that where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of art. 4 of the *Nice Charter*, the determining Member State shall continue to examine the criteria in order to establish whether another Member State can be designated as responsible. Moreover, where the transfer cannot be made to any Member State, the determining Member State shall become the Member State responsible.

There are further limits in this new discipline: the State responsible for examining the request of the applicant coincides, as a rule, with the one in which the refugee will remain when he is granted protection, without the possibility of a transfer coordinated with other Member States and without an evaluation conducted by a specifically designated third party. However, the recent state of emergency in Italy has highlighted the need for solutions that allow, despite the opposition of some States, a "redistribution of refugees" between Member States irrespective of the country of first entry.

Directive no. 2008/115/EC of the EP and the Council of 16 December 2008 *on common standards and procedures in Member States for returning illegally staying third-country nationals* (the so-called *Returns Directive*) gives rise to different considerations, as it seems more attentive to human rights and the principle of non-*refoulement* of undocumented migrants.

The measures to combat the phenomenon of illegal immigration include readmission agreements whereby parties agree to readmit

their own nationals into their territories when they have been found illegally in the territory of another Contracting Party. The conclusion of these agreements requires the approval of the EP, and they share similarities of structure: in particular, to ensure the protection of the fundamental rights of migrants, the preamble usually includes references to human rights and the main international agreements on the subject.

In this regard, the EC's proposal[5],whereby future agreements would include clauses allowing the EU to unilaterally terminate the agreement where there is a risk of serious and persistent violation of human rights of readmitted persons, is inadequate because it is not a dissuasive solution: on the contrary, it could encourage partner countries to engage in violations of human rights in order to avoid readmitting irregular immigrants found in the countries of the EU, since the agreement is finalized in order to restrain illegal immigration from third countries to European countries and not vice versa. In these cases, Member States should not dismiss these migrants to third countries, as there are other solutions: general international law provides the most effective tools of reaction, such as the suspension of agreements other than those regarding readmission (Nicolin 2012).

Moreover, the way to reduce the risk of violation of migrants' human rights is to (essentially) conclude readmission agreements only with States that are Signatories of the major treaties on the protection of human rights, and to provide for a post-repatriation control mechanism to monitor and obtain information on the situation of persons readmitted.

4. Concluding remarks

In the Resolution of 27 February 2014 *on the situation of fundamental rights in the European Union (2012)*, the EP expressed its alarm at the persistence of instances of violation of human dignity in the Union and in its Member States. Victims include minorities (Roma

5 See COM (2011) 76 final.

in particular), asylum-seekers, migrants, people suspected of having links with terrorism and people who are deprived of their freedom, as well as vulnerable groups and poor people. The Resolution stressed that public authorities must abide by the absolute prohibition on torture and cruel, inhuman or degrading treatment, carry out swift, effective and independent in-depth investigations into any breach and prosecute those responsible.

The numerous instances of ill-treatment by the police and the forces of law and order, particularly in relation to the disproportionate use of force at demonstrations against peaceful participants and journalists, and the excessive use of non-lethal weapons, are of great concern since the primary role of the police forces is to guarantee people's safety and protection.

Moreover, the EP reiterates its call for a full investigation into collaboration by European States with the "extraordinary rendition" program of the United States and the CIA, flights and secret prisons within the territory of the Union. It also insists that Member States must perform effective, impartial, in-depth, independent and transparent investigations, and that there is no place for impunity, since the ban on torture is absolute and, therefore, state secrecy cannot be invoked to limit the obligation on States to investigate serious human rights violations. Indeed, the EP went on to stress that respect for fundamental rights and the rule of law is an essential element in successful counterterrorism policies[6].

Later, the EP, in the Resolution of 11 March 2014 *on the eradication of torture in the world*, observes that the implementation of the EU guidelines on torture remains insufficient and at odds with EU statements and commitments to addressing torture as a matter of priority, pointing out the need for a revision of the action plan in order to define more ambitious and specific actions to eradicate torture.

Regarding the EC proposal amending Council Regulation no. 1236/2005, aimed at overcoming the incompleteness of the lists of goods in Annexes II and III, the EP reiterates Parliament's earlier

6 See EP resolution of 11 February 2015 *on the US Senate report on the use of torture by the CIA.*

call for the insertion of a "torture end-use catch-all clause" into the regulation in order to allow Member States, on the basis of prior information, to license or refuse the export of any items which pose a substantial risk of being used for torture, ill-treatment or capital punishment[7].

The EP believes that the EU should adopt more decisive positions and calls on the EU institutions and Member States to strengthen their commitment and political will in order to achieve a worldwide moratorium on capital punishment. Furthermore, the EP calls on the EC to draw up an action plan with a view to creating a mechanism for listing and imposing targeted sanctions (travel bans, freezing of assets, etc.) against officials of third countries involved in grave human rights violations, such as torture and cruel, inhuman or degrading treatment.

The developed analysis and the two EP resolutions give rise to some thoughts: first, contrary to the claims of some commentators, the EU commitment against torture and other ill-treatment is often cloaked in hypocrisy, both in policies towards third countries and in internal policies, since the operative solutions are not completely effective and adequate. The EP has clearly expressed its alarm, although it sometimes takes an ambiguous position: when the EP refers to the different forms of use of force by police, without using the term torture or ill-treatment, it seems to identify something other than torture and ill-treatment, i.e. forms of violence that have less negative impact.

As for the action directed towards third countries, its limitations arise not only from inadequate operative solutions but also from the fact that the goals presuppose the effective cooperation of these third countries.

Regarding action within the EU, it is necessary to reiterate that the legalization of torture in Member States (although all of them have agreed to the various international agreements aimed at the eradication of torture) is absolutely contrary to the principles en-

7 See, in the same direction, EP resolution of 12 March 2015 on the *Annual Report on Human Rights and Democracy in the World 2013* and the European Union's policy on this matter.

dorsed by European primary law (art. 2 TEU) and the provisions of the *Nice Charter* and the *European Convention*. However, it must be emphasized that the instruments used at European level to prevent these practices appear inadequate in some respects and relatively underused in others.

They are inadequate because, where there is a clear risk of a serious breach of the values of art. 2 TEU or of serious and persistent breach by a Member State of the same values, the procedures described in art. 7 TEU – which can involve, in the first instance, the adoption of recommendations to the Member State and, in the second, the suspension of certain rights deriving from the Treaties to the Member State – seem difficult to apply due to the fact that "the grave breach" is understood as a constant, or at least recurrent, behavior: therefore, it does not cover individual instances spaced out over time.

They are not fully exploited because, even when there is room for intervention – e.g., by including the crime of torture among those subject to common minimum standards, or in the case of simplified judicial cooperation – the will to do so seems to be lacking, despite the positions taken by the EP. However solutions of this type would have positive effects: first, the Member States would have to introduce the crime of torture into their legislature, and, secondly, they would have to pay more attention to cases of abuse in the use of force.

Consequently, there is some doubt (even in spite of proposals made at the political level in some Member States) as to whether, at the base of EU policy on torture, there is a latent distinction between those forms of torture or ill-treatment which must be rejected, and the use of coercive means which may in some circumstances be accepted, or which are in any case not explicitly condemned.

A full cultural evolution has yet to take place: the belief is still held that, in certain cases, a minimum degree of violence may be necessary and that, in any case, the evaluation of this necessity must remain at the level of individual Member States.

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