TREASON TRIALS DEFENCE FUND

No. 9

PRESS SUMMARY

This is the ninth issue of a regular bulletin giving a factual resume of the proceedings of the Treason Trial.

Period covered: 16 to 18 February 1959

DEFENCE CRITICISMS OF CROWN'S FURTHER PARTICULARS

WHEN the trial resumed on Monday, 16 February, Mr.Kentridge began by dealing with the submission of Mr.de Vos that the particulars given by the Crown in relation to the national liberation movement were adequate. Mr.de Vos had drawn attention to the place of the "Liberatory Movement" in the Summary of Facts, but Mr.Kentridge argued that the only inference that could be drawn was that the "Liberatory Movement" was alleged to have avowed violence.

Mr.Kentridge then passed to Mr.Trengrove's submission that the only relevance of the means mentioned in the indictment was that they provided the connection with the overt acts (set out in Parts C,D and E). If so, that must be the end of sub paras (vi) and (vii) of Part IVB which were not connected with the overt acts in C, D and E.

ADVOCACY NOT AN ACT.

Mr.de Vos had submitted that, according to Professor Murray's evidence at the preparatory examination, the establishment of a Communist state by violence was inherent in the Marxist Leninist doctrine; therefore if the advocacy of Communism succeeded, the people would resort to violence. But Mr.Kentridge submitted that the advocacy could not be an act of treason, and quoted from the judgement in the case of Sachs v. Voortrekker Pers: "A philosophic adherence to Communism does not mean necessarily the intention to overthrow the Government by force." Other judgements were quoted in confirmation of this argument. Furthermore, if the accused were inciting the people to establish a Communist state by violence, it might be treason, but that did not necessarily mean that it would be the result of Marxism/Leninism. Mr.Kentridge contended that, in any case, sub para 4b(vi) of Part B did not show clearly the implication of violence and ought not to be in the indictment. This sub-paragraph read:

> "Advocating, propagating or promoting the adoption and implementation in the Union of South Africa of the Marxist/Leninist doctrine in which doctrine there is inherent the establishment of a Communist State by violence."

"CONDITIONING" FOR WHAT?

Mr.Kentridge then turned to sub para (vii) of 4(b) and the use of the word "conditioning", protesting at his "castigation" by the Crown for not knowing what the word meant. But the Defence still asked "What was the 'condition' desired?" And the Crown still had not given the reply.

Mr.Justice Bekker intervened to ask whether this would matter if Mr.Hoexter's submission were correct, that the Crown must look at the intent of the perpetrator of the speech and disregard the effect. Mr.Kentridge replied that even so, this clause still lacked particularity.

NO BASIS FOR CROWN ASSERTION THAT "IN THEIR LIFETIME" MEANT IN FIVE YEARS.

Referring to Part E of the indictment Mr.Kentridge asked the judges "What are the accused alleged to have done?" In the further particulars the pledging of themselves by the accused to achieve the demands of the FreedomCharter had

been explained as meaning voting for the resolution. But the resolution quoted did not refer to "in their lifetime", and the Defence still asked why in their lifetime was taken to mean 5 years. The Crown had stated that it relied on the Freedom Charter and the "resolution", but the Defence was however prepared to accept that the Crown meant the preamble to the Freedom Charter. Mr.Justice Bekker then asked about the last three lines of the Freedom Charter:

" Let all who love their people and their country now say, as we say here:

THESE FREEDOMS WE WILL FIGHT FOR, SIDE BY SIDE, THROUGHOUT OUR LIVES, UNTIL WE HAVE WON OUR LIBERTY."

Mr.Kentridge replied that there was still no reference to in "our lifetime". The words were "throughout our lives" and the innuendo was therefore still an innuendo attached to words not used. The 5 years only existed as an "unspoken intention" of the accused!

Mr.Pirow had submitted that the 5 years was to be inferred from the latest particulars handed to the Defence, but Mr.Kentridge argued that these particulars were irrelevant because "five years" was an unspoken intention and that they were incapable of supporting the allegation. The particulars did not distinguish between in our lifetime and five years. And they also applied to all 17 of the accused who attended the Congress of the People, although the intention was private and unspoken!

INADMISSIBLE AND IRRELEVANT SPEECHES

Mr.Kentridge pointed out that a number of the speeches were made by persons who were not accused and not even co-conspirators; surely their speeches must be inadmissible and irrelevant. In the case of the documents relied on by the Crown, it appeared to be the contents on which reliance was placed, and not possession, authorship or knowledge.

When Mr.Kentridge had read and commented on a few speeches, showing their irrelevance to in our lifetime or five years, Mr.Justice Rumpff asked if it were necessary to read the full speeches but Mr.Kentridge replied that the Crown had not limited itself in the particulars to any portion. He pointed out that several speeches had begun or ended with "Freedom in our lifetime!" and contended that this was a slogan and did not have the meaning which the Crown imputed to it.

He then read from other speeches in which there was reference to Bantu Education etc., but no reference to "in our lifetime" or 5 years. Yet Mr.de Vos had said that the particulars spoke for themselves. In searching for what the Crown relied on, he had come across "Making headway before Malan disappears". Could this be it? If so, it was worthless for the purpose relied on. When asked if any speech had a reference to 5 years, Mr.Kentridge said that he did not want to be unfair to the Crown; there was the situation where someone said "Luthuli will come after Malan". At this point Mr.Justice Rumpff said "Surely the Crown can't be relying on the next election!"

Mr.Kentridge complained that if the Crown relied on only a few speeches it should not have supplied the particulars in this way, forcing the Defence to study all the speeches. Mr.Justice Bekker commented on the phrase "Before we achieve Freedom some of us will have to die". Mr.Kentridge submitted that even so it was not referrable to in our lifetime for it could mean violence. Several more speeches were taken showing that there was no reference to "In their lifetime" or 5 years. Mr.Kentridge then referred to the statement of Mr.Pirow that he didn't want to pick out the speeches because the Crown relied on all this as background. Mr.Kentridge invited their Lordships and go through the speeches and look at them as background, claiming that this would not help to explain how, for instance, Mrs.Joseph had voted at the Congress of the People for the Freedom Charter to be achieved in 5 years. Some of these speeches were in fact made a year previously. "There is no relationship between these

speakers and the people at the Congress of the People", Mr. Kentridge said.

It had been stated by the Crown that 5 years could be inferred from the speeches and the documents, but it was clear that if there were only a few references in all the documents and speeches to five years, that would not be sufficient to say that everything fits into the pattern. "It must either be in the particulars or else it must be self evident". He then quoted a speech made in July 1954, "If we listen to him, (Luthuli) we'll have freedom in five years." This speech had nothing to do with the Congress of the People or the Freedom Charter. "Why should 17 others in June 1955 have a certain intention related th this? Once again the Judges asked Mr. Kentridge to merely refer them to the speeches which contained references to 5 years and said that they would accept the submission that the other speeches did not refer to 5 years.

But Mr . Kentridge objected that the Crown might say that speeches omitted were not irrelevant, and continued withe examination of the speeches in the particulars, pointing out that irrelevance and in some cases their inadmissibility where they were made by persons who were not even co-conspiritors.

Examples of quotations were: "It took China 30 years to achieve freedom; to achieve a lifetime of freedom takes a lifetime of struggle." "Within 5 years we can be in Parliament," (said in November 1956 and by a person not even a co-conspirator). Another man (not even present at the congress of the People): "Luthuli will be Prime Minister in 5 years." "Swart bans people for 5 years! During this time Swart and Donges will be gone." "It is important that the coming generation must enjoy freedom in their lifetime!" "I feel that if more people are called into the struggle we shall get freedom in our lifetime." "Only if we work hard shall we get freedom in our lifetime."

CONTENTS OF DOCUMENTS

Passing to the documents, Mr. Kentr idge submitted that in all the 40 documents nothing relevant had been found and protested that the Defence ought not to have had to go through all the documents searching for relevance.

Mr. Justice Bekker interjected that the Crown must be assumed to be serious in their allegations concerning these documents which they submitted they relied on in toto.

Mr. Kentridge then made the following points relating to the documents in these particulars:

(a) Some documents do contain the phrase "In our lifetime" but not all the documents.
(b) One document relied on actually contained the phrase "It would be folly to minimise our obstacles. It will be a long tough struggle..."
(c) In a report of a conference of the Transvaal Indian Youth Congress, the Chairman quoted "If I don't live to see that day, my son will see it, and if not my son, then his son."

Mr. Kentridge submitted that there was nothing whatever in these documents to support the allegation that the 17 accused had pledged themselves to overthrow the Government by violence in order to achieve the demands of the Freedom Charter within five years.

Reverting to his original argument in the attack on the indictment, Mr. Kentridge complained that there were a number of aspects with which Mr. de Vos had not dealt in his reply, notably the attack on Part E of the indictment and the question whether the 17 accused who attended the Congress of the People there reformulated or reaffirmed in June 1955 the intention to overthrow the government. If the allegation were that these 17 accused had first ente red into an agreement to overthrow the government by violence and had then made an act of reaffirmation in June 1955, the Defence submitted that this was not a second overt act for it was not capable of taking the conspiracy anywhere.

The question of the pledge appeared to be important, for if the pledge went, then in their lifetime must also go.

Para 4 (b) 1 alleging the Congress of the People to be a means of the treasonable agreement would also be affected by Part E, and the Defence argued that it should in fact have no place in the indictment.

Finally Mr.Kentridge asked their Lordships, when examining the documents and speeches, to ask themselves whether one could reasonably infer from them that these 17 accused had resolved to achieve the demands of the Freedom Charter within five years.

DUTIES AND POWERS OF COURT

Mr.I. Maisels, Q.C., dealt with Mr.Pirow's submission on the duties and powers of the Court. Mr.Pirow had argued that the Court had a duty to remedy an indictment if it were possible without injustice to the accused. This submission was based on the English statute but Mr.Maisels submitted that in S.A. Law the Court could only quash, refuse to make an order to quash, or order the Crown to amend. Mr.Pirow had suggested that the Court should draw the indictment for the Crown, but that would be to bring the Court into the arena of Conflict.

Mr.Maisels then dealt with Mr.Trengove's submission that the Defence was not entitled to the particulars requested, quoting from the Criminal Code "Each count must set forth the events of the charge as may be reasonably sufficient to inform the accused of the nature of the charge" and submitting that there was no basis for the Crown's contention that having alleged overt acts of treason, they were not obliged to give particulars. Mr.Justice Bekker suggested that the Crown might not, in para 4 b (i) to vii of Part B, have intended to set up separate overt acts, but merely explanations. Mr.Maisels replied that this would be putting the cart before the horse as Parts C, D and E of the Indictment alleged acts in pursuance of Part B 4 1, and contended that the allegations in Part B 1 must be taken as overt acts, and that the accused were entitled to the particulars relating to these allegations.

ABSENCE OF VIOLENT ACTS

Mr.Nicholas had argued that, in peacetime, treasonable conspiracy is a conspiracy to commit violent acts, and the Defence still wanted to know what violent acts the accused had agreed to do? The overthrow of the state could not be the act. It is a metaphorical expression describing the consequence of acts. The violent or treasonable acts must lead to it and therefore the accused were entitled to the particulars if the grounds from which the agreement to commit treasonable acts was inferred.

CROWN APPLIES FOR THREE FURTHER AMENDMENTS

On the resumption of the trial the following day, Mr.Pirow contended that neither of the two points raised by Mr.Maisels had been raised before and informed the Court that the Crown had filed three notices of amendments to the indictment.

Mr.Justice Rumpff pointed out that in the final clause of part A and in the contents of part E, the number of overt acts did not appear. Did the Crown intend to rely on one overt act or 9 overt acts? Mr.Pirow replied that he had thought that this had been clear, but that one of the amendments would remedy the difficulty. Mr.Justice Rumpff suggested that the first amendment would affect Mr.Maisels' argument, to which Mr.Maisels added that he might have to start the argument all over again, asking: "Is this the last amendment? If not, let's have them! Days of argument have been wasted." He denied that any new points had been made in his reply to the argument, irrespective of what Mr.Pirow contended.

DEFENCE RENEWS ATTACK ON WHOLE CROWN CASE

After a brief adjournment for the defence to study the effect of the amendments, Mr.Maisels submitted that if the Court were to grant these amendments it might be necessary to request a postponement of the trial for the preparation of further argument, particularly in regard to part E. His present argument would however be only partially affected since even if the separate overt acts in Part B were held not to be overt acts, they were the agreements which were the basis of the acts in parts C, D and E. "It doesn't help the Crown to wriggle as they have been wriggling since last August" said Mr.Maisels, "these agreements are pleaded as agreements to be inferred and once they are pleaded not as express agreements, the accused are entitled to the facts on which the allegations of each of them is based."

Mr.Trengove had said that it could take 6 months for the Crown to supply particulars of violence and Mr.Pirow had said it was impossible.

Mr.Maisels submitted that even if it took six months, it must be done. It was a matter of law, and the accused were entitled to it. "Six months is no answer! The Crown has had two and a quarter years! If it is impossible then the Crown has no case."

"WHERE" AND NOT "WHY".

The accuracy of the allegations of violence must be doubted unless there was a serious attempt at particulars and not the type served up for "in our lifetime" and the period of five years. The Defence had listened in vain for any real argument as to why the Crown was unable to put violence - or the case - into the pigeonholes into which they wanted the Defence to put it. If the Crown's case was genuine and bonafide, there should be no difficulty in giving the facts and circumstances from which the agreements were inferred. If the Crown can't do it, then they shouldn't draw the indictment and were not entitled to bring the accused to Court. "We are entitled" said Mr.Maisels, "to know the case we have to meet. How otherwise shall we know what witness we have to cross-examine. The Defence is not interested in the Crown's reasons. We want to know where they put a particular thing, not why they put it there!"

Mr.Justice Bekker: "Is 'where' not dangerously close to why?"

Mr.Maisels: "No. The Crown may be wanting to use a particular speech for a particular purpose, e.g. for 4(b)(i) "to oppose the authority of the State" - does it go only into that pigeonhole? The summary of facts must be pigeonholed and by the Crown, not the Defence. If the Crown wants the accused to be Sherlock Holmes, then this offends the primary principles of law relating to indictments.

Mr.Justice Bekker: "But does not the Crown say, 'Here are the clues for Sherlock Holmes; work it out for yourselves"? Where is the line to be drawn? The Defence cannot find out how the Crown's mind works."

Mr.Maisels reminded their lordships that Mr.Pirow had contended that reference to non-violence in these speeches might be intended to promote violence. This might be so, but which of the speeches gave a basis for this?

DEFENCE DIFFICULTIES BECAUSE OF CROWN'S INSISTENCE ON INFERENCE

Passing to his submission that the Crown had failed to properly inform the accused of the allegations relating to their organisations, Mr.Maisels pointed out that according to the Crown case, each of the fifteen organisations had adopted each of the 8 policies and means outlined in (part B4 of) the indictment. The Defence must therefore look for the adoption by each of the organisations of these 8 policies and means, and then look for the support by each of the accused and co-conspirators for the overthrow of the State by violence. From this point, the defence must go to the summary of facts, for the overt acts in (part B) of the indictment must be inferred from a large number of other facts:-

1. The policy of each organisation
2. The means adopted to carry out the policy
3. The ways of advocating policy
4. The circumstances in which each accused became a party to the policy.

The Crown relied on all the facts in the summary to establish these facts, therefore from this mass of facts (including the facts relating to other organisations) each accused must infer that his organisation adopted a policy and decided on specific dates on the means set out in the indictment. Both the policy and the means must be extracted from a mass of facts. The Defence submitted that this was "a wrong and indefensible approach by the Crown!"

CROWN ACCUSED OF MALA FIDES

Mr.Trengove had suggested that the policy of the organisation was to be inferred by public statements made by responsible members. "Why doesn't the Crown tell us; why keep it secret? Who are the responsible members?" The Summary of Facts did not disclose this. The Defence had found no statements by responsible persons to support the Crown case but exactly the opposite of what the Crown alleged. Were the statements supposed to be double talk? Mr.Maisels referred to the statements of Chief A.J. Luthuli, President General of the African National Congress - a man who said constantly "No violence". He accused the Crown of mala fides and challenged Mr.Pirow to say who were the responsible persons and what they said. It must be done at some time.

Mr.Trengove rose immediately to ask for the Defence allegation of mala fides to be repeated. Mr.Maisels replied "If the Crown persists in this attitude, it is mala fides! It is not a question of what the accused said and what they meant by it, but what the Crown says they meant by it!" He asked "Is it impossible for the Crown to refer us to the speeches by the responsible persons which it relies on for the policies of the organisations? Or is the only acceptable explanation that the speeches don't support the Crown's allegations?"

WHAT EACH ACCUSED IS OBLIGED TO SEARCH FOR - NEW PRINCIPLE OF JURISPRUDENCE

The Crown was saying in fact "It's a jigsaw puzzle. Here are the pieces; you fit them together." Mr.Maisels submitted that this was a new principle in S.A. jurisprudence. Each accused was expected to search for:

a) The policies of the organisation, his own and others, and also indirect proof, which was more difficult.

b) The activities of each organisation in pursuance of its policy, which could include both direct and indirect advocacy.

c) Proof that he knew of and supported the policy of the organisations.

d) The extent to which he participated in the policy of the organisation.

Some speeches would prove all these, some only one or more; it might be a portion only of a document or speech. Some speeches were innocent in themselves but the Crown claimed that all were relevant. Mr.Maisels said: "These speeches and documents can't be used as a vague background to the case or placed next to eachother to make a background of the Crown's own choosing."

MULTIPLICITY OF "PIGEONHOLES"

Mr.Trengove had said that the evidence in the documents and speeches could be pigeonholed provided there was intelligent reading of the Summary of Facts. But when constructing these "pigeonholes" there had to be

(a) Policy pigeonholes
(b) Pigeonholes for speeches relating to the 8 means in the indictment.

c) Pigeonholes for
   (i) Other speeches at the same meetings.
   (ii) Speeches with sinister background, e.g. Mau Mau, Korea, etc.
   (iii) 39 kinds of Communist speeches (according to Professor Murray's 39 tests for determining whether a speech was communist.)
   (iv) Speeches referring
      (1) to the liberatory movement
      (2) the World Peace Council
      (3) the Defiance Campaign etc., etc.

But even then the task would only be half done! Now more sets of pigeonholes must be constructed for the individuals and the organisations! Mr.Maisels maintained that Mr.Trengove's pigeonhole argument could not hold water: it was no pigeonhole but a honeycomb!

Mr.Justice Rumpff: "I am afraid 'pigeon hole' was my word!"

Mr.Maisels: "But Mr.Trengove 'associated' himself with it!"

SUPPLY INFORMATION - OR QUASHING

"What is to be done?" Is the Crown to be given another opportunity to cure the indictment? The Defence says No.... If the Defence argument is correct then the Court must reject Mr.Trengove's claim that the information has been given and accept Mr.Pirow's case that it can't be given. It follows then that the Crown does not have an explicable course of action and can't go to trial on this indictment. It should not be allowed to cast around for another! If the Crown cannot give the information required by the defence, then the Court must quash the indictment."

Mr.Maisels reopened his argument on the twelfth and last day of the attack on the indictment by quoting authorities to support his objection to the Crown's submission that it was the duty of the accused to study a mass of documents and evidence.

DEFENCE OBJECTIONS TO NEW AMENDMENTS

Turning to the amendments brought by the Crown, Mr.Maisels opposed the second and third amendment, particularly that which sought to delete the words "in their lifetime" from the first paragraph of part E and the whole of the following paragraph

> "..... the achievement in their lifetime of the demands set forth in the said Freedom Charter, which included, inter alia, the following demands:
>
> 1. Every man and woman shall have the right to vote for and to stand as a candidate for all bodies which make laws;
>
> 2. The national wealth of the country, the heritage of all South Africans, shall be restored to the people;
>
> 3. The mineral wealth beneath the soil, the banks and monopoly industry shall be transferred to the ownership of the people as a whole;
>
> 4. Restriction of land ownership on a racial basis shall be ended, and all the land re-divided amongst those who work it, to banish famine and land hunger;
>
> 5. All shall have the right to occupy land wherever they choose;

which said demands the accused intended to achieve by overthrowing the State by violence."

Mr.Maisels submitted that these were not amendments in form but were based on entirely different facts. The Crown had brought the accused to Court on allegations based on certain facts, i.e. that the accused had pledged themselves to work for the achievement of certain demands in their lifetime and to the overthrow of the State by violence. The facts alleged to support this allegation had now disappeared in terms of the amendment and new facts were before the Crown. Before their Lordships could ever consider granting an amendment, the Court must be satisfied that the amended indictment will be free from criticism. The Defence submitted that the Court could not be so satisfied because the proposed amendment did not deal with the contention of Mr.Kentridge that an unexpected intention cannot make an innocent act treasonable, there was still no indication of any expression of intention "This amendment will create as many problems as those it purports to remove!" said Mr.Maisels.

Mr.Justice Rumpff interjected "That is so!" and continued by saying that the Court must first decide on the rest of the indictment.

JOINT RESPONSIBILITY

Mr.Maisels then pressed for an answer to the question "Is each accused liable for the overt acts of other accused?" The words "in pursuance and furtherance of the said conspiracy" appearing in the preamble to parts C, D and E could be used

a) to taint an innocent act with illegaility; or
b) to impose criminal liability on each accused for the acts committed by other accused; or
c) to achieve both purposes.

If the Crown intended to impose liability on each accused for the acts of all accused, new argument would be required. The Crown had refused to answer this question and if the answer were yes, the position would be that each accused would be charged

a) with the conspiracy alleged in Part B
b) with the number of other offences in parts C, D and E personally
c) with a number of further offences in parts C, D and E committed by others, for which he would be held vicariously liable because they were committed in furtherance of the conspiracy.

If the Crown however were to state that each accused is not liable other than for the acts set out against him or her, then the overt acts must be numbered. For on this would depend the question whether the whole of the proceedings had been properly brought to Court.

CROWN'S REPLY TO DEFENCE OBJECTIONS

Replying to Mr.Justice Rumpff, Mr.Pirow maintained that the acts had been numbered through the division into parts A,B,C,D etc. He repudiated the onus on the Crown to interpret the indictment. "We stand or fall by the interpretation which the Court puts on the indictment."

VIOLENT INTENTIONS STILL PRESENT

Dealing with Mr.Maisels' argument on the amendment, Mr.Pirow submitted that although the question of "in our lifetime" and the inference of five years had been eliminated, the intention to overthrow the State by violence was still there and had always been there. No further particulars could be required as a result of the elimination of "in our lifetime" and the inference of five years.

ACCUSED INDIVIDUALLY COMMITTED ACTS

Finally, Mr.Pirow informed the Court that each accused either alone or together with other accused committed separate overt acts for which no other accused was liable, and the Crown did not allege vicarious liability.

TREASON - OR CONSPIRACY ?

Mr.Justice Rumpff commented that the Crown's attitude towards vicarious responsibility might affect the whole indictment. Mr.Maisels then addressed the Court briefly on misjoinder ... submitting that it now appeared that parts B, C, D and E were the four counts. He pointed out that in part D only 7 of the accused were alleged to have committed an overt act, and in part E only 17 of the accused. The effect of the Crown's amendment made it clear that except for part B, it was clearly a case of misjoinder. The Crown could on this indictment only go to trial on conspiracy alone.

Answering questions by the Judges, Mr.Pirow submitted that treason had its own law of liability, peculiar to treason and the nature of the overt act. All the accused were in the conspiracy and everything every one of them did was for the furtherance of the conspiracy, but the case of the overt act might be regarded as different although only for purposes of proof.

COURT MAY ALLOW EXCEPTION TO MISJOINDER LAW

Mr.Justice Rumpff then indicated that although in law no misjoinder is permitted, the Court might have to consider, in the case of treason where conspiracy is alleged and every one of the accused committed one or more entirely separate acts in pursuance of the conspiracy, whether an exception to the general rule should be made to permit the accused to be charged jointly because of the conspiracy.

Mr.Maisels submitted that although the difficulties of the Court were appreciated, it was not the function of the Court to change the Criminal Code. Why were the accused charged jointly? There was no reason why they should not be charged separately. The Crown must not be allowed by the Court to take advantage of the position to get a conviction jointly which they could not get separately. The question of the convenience of the accused must not arise, if it would deprive them of any statutory rights. A joint trial might be convenient for the accused but it would not be the law.

Mr.Justice Rumpff asked whether the position was that if vicarious liability were alleged, there would then be no misjoinder.

Mr.Maisels agreed, but added that the indictment would still be bad in law.

THE COURT ADJOURNS

The Judge President then stated that the Judges would require considerable time to study the indictment and the amendments and adjourned the Court until March 2, adding that even then there would not be time for the judges to give all the reasons.

Mr.Pirow was given permission to submit a written argument on misjoinder, provided that the submission was first sent to the Defence.

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