

# ДИСКУССИОННАЯ ТРИБУНА PRO ET CONTRA

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## Rein Müllerson's New Philosophy of International Law

**Abstract.** Researchers of international legal reality continue to master the theoretical advances of prof. Rein Müllerson. Newly published monograph by Austin Macauley Publishers Ltd *Living In Interesting Times: Curse or Chance? Recollections of an International Lawyer — Participant and Observer* sums up the fruitful work of this famous international lawyer, conveys his experience to the next generations of theorists and practitioners. An experience that not only contains the international legal qualification of modern life's complex concepts, but also brings them together into a coherent system. Based on a broad doctrinal basis, the book is, in the words of the author himself, a reflection of subjective realism, the author's understanding of the philosophy of international law. Operating with such instruments of a modern researcher of international relations as liberalism and democratization, globalization and regionalization, linking the theory built in the Soviet scientific paradigm with the practice tested in the UN structures, the author brought international law to a higher level of comprehension as a complex system of regulators of interstate behavior. The neutral and non-politicized views of prof. Müllerson on most modern international problems, as well as his rich experience in the application of legal norms in practice, should be appreciated by present and future generations of researchers interested in building a new world — free from wars and confrontations.

**Keywords:** realism; legacy; international law; international relations; Müllerson; liberalism; totalitarianism; democratization; globalism.

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**Аннотация.** Исследователи международно-правовой действительности продолжают изучать теоретические достижения проф. Рейна Мюллерсона. Недавно опубликованная монография издательством Austin Macauley Publishers Ltd «Жизнь в интересные времена: проклятие или возможность? Воспоминания юриста-международника — участника и наблюдателя» подводит итог плодотворной работе этого известного юриста-международника, передает его опыт следующим поколениям теоретиков и практиков. Опыт, который не только содержит международно-правовую квалификацию сложных концепций современной жизни, но и объединяет их в целостную систему. Написанная на базе большого количества доктринальных источников, книга является, по словам самого автора, отражением субъективного реализма, авторского понимания философии международного права. Опираясь такими инструментами современного исследователя международных отношений, как либерализм и демократизация, глобализация и регионализация, связывая теорию, построенную в советской научной парадигме, с практикой, апробированной в структурах ООН, автор вывел международное право на более высокий уровень понимания как сложную систему регуляторов межгосударственного поведения. Нейтральные и неполитизированные взгляды проф. Мюллерсона на большинство современных международных проблем, а также его богатый опыт применения правовых норм на практике должны быть оценены нынешним и будущими поколениями исследователей, заинтересованных в построении нового мира — свободного от войн и конфронтаций.

**Ключевые слова:** реализм; наследие; международное право; международные отношения; Мюллерсон; либерализм; тоталитаризм; демократизация; глобализм.

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### I. Formative Years (Soviet Estonia, Moscow University, the Academy of Sciences of the USSR): the 1950–70s

Quite interesting autobiographies of people who were not only witnesses of modern rapid history, but also its creators were published at the end of 2020 and the beginning of 2021<sup>1</sup>. This category of

novelties also includes the autobiography *Living In Interesting Times: Curse or Chance?* (London, 2021, 219 p.) of R. Müllerson, who played a significant role in reformatting the Eurasian legal order at the turn of the millennium.

R. Müllerson was born, grew up and became a person in times of change — a difficult period of history for any nation and any country. The occu-

<sup>1</sup> *Albright M.* Hell and Other Destinations: A 21st-Century Memoir, 2020 ; *Obama B.* A Promised Land, 2020.

<sup>2</sup> *Müllerson R.* Living in Interesting Times: Curse or Chance? Recollections of an International Lawyer — Participant and Observer, 2021. P. 19–28.

pation, the armed conflict, forced displacement — these are the circumstances through which the Estonian society passed before and after the Second World War and which can either temper a person or break him. The difficult life circumstances that the future world famous researcher of law and theorist faced in his youth, allowed him to absorb the experience so necessary for every person. Having reworked and rethought it, R. Müllerson was able to build his own legal approaches and concepts that influenced the Soviet, Estonian and, as a result, the international (universal) legal order. R. Müllerson described his childhood colorfully, truthfully and, at the same time, with an open mind (which is characteristic of his style of narration), which began from birth on the road and spent in Estonia, in the corresponding chapter of his autobiography<sup>2</sup>. The history of the native country, seen through the eyes of a little boy and rethought by a mature scientist and politician, seemed to be a theatrical scenery against which in the 20th century the fascist Reich and the communist USSR played bigger cards. In this regard, it should pay tribute to how objective and impartial evaluation of the many events is given in this book.

Evaluating the hardships of two similar and simultaneously different regimes, prof. Müllerson claims: «both totalitarianisms — fascism and communism — were indeed in some respects similar. However, their ideologies were rather different. If fascism represented moral nihilism and ideas of supremacy of certain races or nations, communism was a utopian creed, which due to its humane ideas had wide attraction»<sup>3</sup>.

It seems that this complicated and difficult experience, through which both the Estonian nation as a whole and Estonian Rein boy in particular have passed, have become the value foundation that allowed R. Müllerson to operate in the future with such categories as «personal» and «common» interests. It is really a difficult challenge to balance these categories and lay them in the basis of your own worldview system in order to transfer them to the field of serving your own country and the world at large: «Estonia in autumn 1991 ratified, on my initiative, together with many other UN human rights instruments the UN Covenant on Economic, Social and Cultural Rights»<sup>4</sup>.

It is often impossible to estimate the same event the one-sided. Therefore, even now, the revolution in 1917 seems to many Russians to be an important and necessary event for the development of a society, which liberated the population that was suffering from imperialism and class inequality. An objective view of history allows us to conclude that after the revolution, the population of the Russian Empire fell into even greater bondage, fell under the oppression of the uncontrollable and cruel dictatorship of the proletariat. But from Estonian or a Finnish point of view, it was, indeed, the Bolsheviks revolution that made possible their eventual independence. The events that took place in Russia at the beginning of the 20th century changed the entire subsequent structure of the world order, further dividing the world into West and East, which ultimately led to the Cold War. The main reason for the tragedy of the Russian Empire and the socialist experience is not readiness of a relatively backward country to build socialism according to Marxist patterns. Marx's ideas that a socialist revolution would have chances of success only in a highly developed industrial bourgeois society were discredited by the attempts of the Lenin government to implement this theory with significant utopian elements<sup>5</sup>.

In the book, prof. Müllerson delicately balances on well-known and well-established philosophical ideas (K. Marx, K. Popper, B. Russell, R. Collingwood, etc.) and concepts (historicism, determinism, voluntarism, etc.). He, fueled by his Nordic-Scandinavian roots, looks somewhat fatally at the problem of historical materialism. In his opinion, «in the history of humankind, there are three possible types of forces at play: (1) [...] patterns, trends, probabilities and regularities as well as sheer impossibilities and improbabilities [...]; (2) [...] certain parameters established not only by 'the necessary order of the physical universe', but established also by the limits of malleability of the social universe; (3) [...] accidents and unpredictable forces that do not have any trends or regularities. Such forces are not only of a physical nature, they may also originate in social life and even be unexpected results [...] of our conscious choices»<sup>6</sup>. Such a broad understanding of causes and effects in the history of mankind, often out of the control

<sup>3</sup> Müllerson R. Living in Interesting Times. P. 23.

<sup>4</sup> Müllerson R. Living in Interesting Times. P. 23.

<sup>5</sup> Müllerson R. Living in Interesting Times. P. 31.

<sup>6</sup> Müllerson R. Living in Interesting Times. P. 34.

of man's will, undoubtedly expands the horizons of historicism, taking it beyond the framework of determinism and voluntarism.

## **II. Encounters with the International Lawyers (Grigory Tunkin, Dame Rosalyn Higgins): His Majesty Chance. The Fight for Human Rights**

A special place in the memoirs is occupied by the chapter dedicated to G. Tunkin — the teacher who played a key role in the fate of the author, and the architect of the Soviet doctrine of international law. The utopian teacher G. Tunkin, unlike the realist student R. Müllerson, worked not only with his head, but also with his heart. He was also a kind of utopian (in Koskenniemi's sense), who sincerely believed in the ability of international law to contribute to the world peace<sup>7</sup>. By the way, now the student believes the world famous «theory of the coordination of wills» in the process of creating the norms of international law created by the teacher does not differ much from Western approaches to this problem<sup>8</sup>.

In this historically valuable chapter, the author deals with many issues of deep character along the way that contributed to the fall of the curtain and the disintegration of the Soviet Union. He critically analyzes many of the contradictions of our time that could lead to the collapse of Western civilization. So, the author, based on his Soviet experience, notes, and it is difficult to disagree with him: «political correctness running amok in Western societies is not socially innocuous»<sup>9</sup>.

Another person who has played a large role in the life of the author and his family is Dame R. Higgins. When describing life in London, attention is paid to the impressions of communicating with her. Probably, the interest in the perception of international law through the prism of politics, philosophy and economics is to some extent due to the disputes with Dame R. Higgins, a vivid supporter of a policy-oriented approach to international law.

To some extent prof. Müllerson was among those who took part in laying the foundation for the effective application of universal international norms on the protection of human rights in the Soviet legal system. It's about discussing the possibility of ratification of certain human rights

instruments, including the Optional Protocol to the International Covenant on Civil and Political Rights. The Optional Protocol would have provided the Soviet citizens and all those under the jurisdiction of the state, the right to send complaints to the Human Rights Committee in Geneva. As a result, this would make it possible to make the political system of the USSR more open to the relevant international jurisdiction (the Protocol was ratified a few years later, on October 1, 1991).

Independent (with respect to the Soviet) approach to human rights in the UN Human Rights Committee did not remain without attention of then foreign policy leadership of the USSR. Dive into the sensitive issues for the state served as a powerful trigger for the formation of their own vision of their essence. The author outlined some conclusions in this area in his book *Human Rights: Theory, Norms and Practice* (Moscow, 1991). For the Soviet reader, this book was notable for the fact that it as an example of special bodies disclosed UN human rights mechanism. This question was not a subject of special study previously. Meanwhile, the monograph mostly treats of the mechanism itself and the human rights situation in the world. Beliefs about the nature of human rights have been formulated later.

## **III. U-turn in the teaching methodology and research**

It is noteworthy that suitable conditions for scientific activity lead to the fact that during this period there is a gradual qualitative U-turn in the teaching methodology and research by prof. Müllerson of international law. If initially this or that issue was revealed by him mainly with the help of legal categories and concepts, in a more familiar way for international lawyers, then in subsequent writings the corresponding judgments were supplemented by socio-political observations. Here is how the professor himself describes the reasons for changing his attitude towards the explanation of international law: «I started also writing more and more not only in international law, but also on international relations theory and on politics. [...] Law is [...] a very important layer of social life. However, it is never an end in itself; it is an instru-

<sup>7</sup> Müllerson R. Living in Interesting Times. P. 36.

<sup>8</sup> Müllerson R. Living in Interesting Times. P. 40.

<sup>9</sup> Müllerson R. Living in Interesting Times. P. 44.

ment of the achievement of certain social, political, economic and other goals; it is a mechanism of protection and promotion of certain values and interests. [...] One doesn't win cases by speculating at lengths on values protected by legal norms and principles or talking on philosophical foundations of law while addressing the jurors, judges or arbitrators. But [...] it may be necessary to go to the root causes of certain legal principles»<sup>10</sup>.

How can this approach be assessed? Needless to say, examining the causes of disagreements that lie outside the scope of the law should be considered by the judge, arbitrator or interested parties of the conflict. However, cannot this approach lead to the desire to resolve the disagreement in unlawful ways that run counter to the prescriptions of international law? Obviously, such a temptation can take place, but should be limited or excluded.

#### **IV. Müllerson's Outlook for Values and Challenges of International Law and International Community**

Most reflections on the nature of international law and its place in the system of inter-state and social relations and regulators end up thinking about the problem of the effectiveness of international law itself. Is there a worthy replacement for this regulator, or at least an assistant? In what direction will evolve and transform international law? How to improve and strengthen the mechanism of implementation of international law?

The theoretical developments laid down by G. Tunkin in the Moscow period of his life in the 1960–70s, Müllerson was able to bring to a new level of comprehension in the 21st century, based on his experience (work in practical positions of the highest level). The result of this research work was numerous publications of the so-called the third Tallinn period, in which the author himself tried to explore «underlying causes of the changes in the world, including the fundamental reasons why high expectations that many [...] had for the coming of an era when not force, but law would govern the behavior of states, didn't materialized»<sup>11</sup>. Let us turn to the characteristics of the key concepts that currently constitute the sphere of scientific interests of prof. Müllerson.

*The Human Rights.* The result of his practical work began him to doubt the universality and naturalness of human rights. If you recognize all human rights are universal and natural, then, as rightly observed prof. Müllerson: «in such a case, human rights would have been like laws of nature (the laws of gravitation or quantum physics), waiting for thousands of years for a Newton or an Einstein of social sciences to discover them»<sup>12</sup>. In other words, human rights are at different times and in different societies, so to speak, were not one and the same, respectively, it is rather problematic to characterize them all as universal. In this regard, the author's reflections seem logical and consistent: «I would admit that today some rights are (or it would be more precise to say, have become) universal, some may arguably be universal, i.e., their universal nature is not yet universally recognised, some may become universal in future, i.e. they are in principle universalizable. But there may be also rights that may never become universal, i.e. they may exist in some societies but be absent in others. And there may be even some rights that exist today but will disappear in future either because of the change of conditions that has made their realization possible or because a wrong that a specific human right has been called to prevent or remedy has disappeared»<sup>13</sup>.

Subjective realism and within the framework of the issue under consideration is manifested in the views of prof. Müllerson. He, expressing his position, warns individual states against actions to impose, either by the military or otherwise, their own standards in the field of human rights to other societies and states. The author formulates his own conclusions, in which we see a certain message, and perhaps even a call to the international community, to which it is impossible not to heed: «even the very idea of the universality of human rights, notwithstanding the good intentions of most of its advocates and regardless of the positive results these ideas have produced, has its dark side. Whether done purposefully to destroy societies that do not conform, or in the sincere belief that what is good and true for us is (or should be) good and true for all, such a forced homogenisation of the world by way of a heterogenisation of individual societies tears apart many countries, de-

<sup>10</sup> Müllerson R. Living in Interesting Times. P. 95–96.

<sup>11</sup> Müllerson R. Living in Interesting Times. P. 122.

<sup>12</sup> Müllerson R. Living in Interesting Times. P. 71.

<sup>13</sup> Müllerson R. Living in Interesting Times. P. 72.



stroying societal bonds that had developed during centuries or even millennia and are not amenable to rapid change»<sup>14</sup>.

The question of the natural grain of human rights is even more controversial. People are known to be biosocial creatures. In a biological sense, any person has the fit instincts given by nature (for example, fear, distrust of something or someone unfamiliar). In social terms, people are «doomed» to live in society, to communicate with each other, to unite in social groups and communities (family, the state, the international community) on the basis that whatever (views, religious beliefs, nationality, language, and so on) which sometimes leads to misunderstandings and direct clashes with other associations of people. In this regard, it is not surprising that wars have taken place and are still occurring, violence, xenophobia, discrimination are manifested in societies, despite the attempts of mankind (successful or not) to minimize these phenomena and their consequences. That is, the naturalness of human rights reflects not only the positive, but also the negative aspects of human nature in general. However, this does not diminish the importance of human rights.

Thus, regarding the naturalness of human rights, the author of the reviewed work comes to the conclusion that rights are natural only in the sense that they have developed (continue to take shape) as a result of a long process, the evolution of man (humanity) with all its inherent properties (positive and negative). Moreover, the naturalness of rights is also understood in different ways in different societies.

*The Multipolarity in the international system.* It is totally unjustified to study international legal problems without reference to politics, political science, international relations theory and economics. In this sense all the works of R. Müllerson, and especially the recent works<sup>15</sup>, as if build bridges between these pseudo-autonomous spheres of life. Ultimately the interests of all peoples and all mankind, and not of states or their groups, must be returned to the basis of international law.

Being no illusions about the possibility of recognition of the mistakes by senior management of several leading world states at the moment,

he hopes the younger generations. He speaks to them: «think more in terms of collective security than in terms of military alliances. Security against others has always been temporary, usually short-lived and often illusory. It is more difficult to create durable and effective collective security arrangements than collective self-defence organisations, that is to say, military alliances. Yet, the logic of military alliances is confrontational logic that, as history of international relations testifies, usually ends with a military confrontation»<sup>16</sup>.

We see a vivid manifestation of this confrontation in the Balkans at the turn of the millennium. NATO's bombing of Yugoslavia, the genocide in Srebrenica and other bloody pages of this war still occupy the minds of law researchers and political scientists. It is difficult to be objective in qualifying what happened in the Balkans. It is especially difficult to be objective, knowing through which filter and through which propaganda any information about this conflict passes.

The Multipolarity in the international system is needed due to the scale of the world and its diversity. Therefore, the current games with and against Russia and China, played by the United States and Europe, can and will certainly lead to the collapse of the entire international system, including the legal one. In this regard, prof. Müllerson's fears about the state of the current international legal order are understandable. It should be noted that as such, the balance of power concept is not new, but it is important to be aware of the presence of threats, to understand the fact that the assault on the status quo hinders the effective functioning of the international law. As B. Weiss rightly argued, «at least three developments challenge the legal order that we have known for the last nearly 70 years. These include the threats to multilateralism, the fragmentation of public international law, and the controversy surrounding the question of universal values. [...] Multilateralism, with the international cooperation that it represents, has been the globally accepted strategy for ensuring peace, promoting economic development, protecting the human environment, and fostering human rights. Some States have been pushing back against multilateralism and pro-

<sup>14</sup> Müllerson R. Living in Interesting Times. P. 77.

<sup>15</sup> Democracy Promotion: Institutions, International Law and Politics (2008) ; Democracy — A Destiny of Humankind? A Qualified, Contingent and Contextual Case for Democracy Promotion (2009) ; Regime Change: From Democratic Peace Theories to Forcible Regime Changes (2013) ; Dawn of a New Order: Geopolitics and Clash of Ideologies (2017).

<sup>16</sup> Müllerson R. Living in Interesting Times. P. 127.

moting bilateral agreements or even unilateral policies»<sup>17</sup>.

It is noteworthy that the analysis of international relations in the book is, in principle, free from any criticism of international law itself. The emphasis is largely on the conditions of its functioning, predetermined by the policies of the leading countries. Indeed, international law largely depends on the actions of its actors and meets the interests of these countries. As T. Pogge writes, «the ability of affluent countries to take advantage of the fragmentation of the current global order is likely to be a long-lasting, if not permanent, feature of our world. These countries will probably continue to exploit this and other loopholes to further their ends»<sup>18</sup>.

In any case, it is interesting to know how prof. Müllerson describes the current system of international law that emerged after the tragedy in Yugoslavia and the active expansion of NATO in the late 1990s and early 2000s, albeit in the absence of the necessary balance of power. After all, modern international law has been making an important development path not only after the end of World War II and the confrontation of the both superpowers, but also over the past two decades.

*The Morality and International Relations.* R. Müllerson's reasoning about morality, international law and international relations is based not on simple theoretical views, but taking into account real international events with which the professor's professional activity was connected (for example, he tells us about his experience of work in the states of Central Asia, formed after the collapse of the Soviet Union).

Prof. Müllerson, noting that moral norms are applicable primarily in interpersonal relations, comes to the conclusion that in international (interstate) relations the issue of morality and its applicability is extremely important. However, moral norms should be applied with caution in international relations. He explains it by saying that it is in international relations, as opposed to interpersonal relationships, morality can be distorted and ambiguous. He philosophically notes: «the world

is too complicated and colourful to be adequately expressed in black and white colours: democracy versus authoritarianism, absolute evil versus absolute good»<sup>19</sup>.

R. Müllerson also discusses moral aspects in international relations in his other work devoted to issues of international law and the use of force. He notices: «If there are circumstances when the use of military force is the only means of protecting rights, and the resort to such an extreme measure, which in itself is wrought with the danger of massive violations of most fundamental human rights, is proportionate to the seriousness of the human rights violations (genocide, crimes against humanity and systemic massive violations of international humanitarian law), then the use of military force may be morally justified as a necessary condition of these rights being rights. The most important general guiding principle in such a situation should be that extreme human suffering, which one attempts to stop or prevent, has to be significantly and foreseeably higher than the human suffering that inevitably results from the use of force to end the suffering. And always, the objective should be to stop or prevent extreme human suffering and not to effect regime change, though this might occur as an inevitable or even necessary corollary of the intervention»<sup>20</sup>.

His position is in many respects similar to the opinion of British political and legal philosopher Lord Raymond Plant who writes: «Our responsibility for the rights of others is therefore not confined to non-interference in those rights, but also has to involve responsibility for doing what we can to secure those enforceability conditions, just because these are part of having a right and therefore must be involved in what respecting rights means. This seems to me to be the best way of linking a concern for rights and the possibility of intervention in a particular country, which may not be securing the enforcement conditions»<sup>21</sup>.

*The Globalization.* The history of globalization as a social process with temporal and geographical characteristics reflects the history of all mankind, linking negative factors (such as campaigns

<sup>17</sup> Weiss E. B. Establishing Norms in a Kaleidoscopic World, 2019. P. 392–393.

<sup>18</sup> Pogge T. Divided against itself: aspiration and reality of international law, in: James Crawford and Martti Koskeniemi (eds.), Cambridge Companion to International Law, 2012. P. 396.

<sup>19</sup> Müllerson R. Living in Interesting Times. P. 106.

<sup>20</sup> Müllerson R. International Legal Politics and Use of Force // Theory and Practice of the restoration of rights. 2013. № 1. P. 30.

<sup>21</sup> Plant R. Rights, Rules and World Order in Global Governance: Ethics and Economics of the World Order (M. Desai, P. Redfern eds.). Pinter, 1995. P. 207.

of conquest and expansion of empires, epidemics, international criminal activity, etc.) and positive factors (desire for expansion and uniformity in all spheres of life, economic prerequisites, blurring of boundaries — real and virtual, etc.). The central problem of globalization is the search for a balance of interests, a kind of compromise between the needs of the economy and universal human values, such as the preservation of peace, respect for human rights, democracy, humanity, etc.<sup>22</sup>.

The openness of borders as a manifestation of globalization enhances the international demonstration of crisis phenomena. IT revolution and economic globalization force greater mobility of the population, but a significant part of the people were not ready for the rapidly changing conditions. Democracy is undermined by both economic liberalism and social liberalism. Prof. Müllerson comments on the situation as follows: «The wealth gaps are increasing practically in all countries. If in autocracies people are powerless vis-a-vis their rulers, in the globalised world people are powerless vis-a-vis global markets, even if they live in so-called liberal democracies. At the same time, the rise in importance of individual rights and rights of a multitude of minorities [...] are undermining social cohesion and common values»<sup>23</sup>.

The work focuses on the negative consequences of globalization on peace and development. Pointless to object to this. Meanwhile, isn't there a reverse so-called «bright» side of this multifaceted phenomenon? Elimination of national, cultural, ideological and other differences is a condition, a feature of globalization as such. It is not able to globalization and international law predetermine the actions of participants in international relations for the implementation of a number of common tasks, albeit conditional in nature due to the differences inherent in a particular society?

## V. Instead of Conclusion

One of the pleasant moments in human life is the opportunity to refer to the results of the activities of specialists whom you admire. And it is not in banal adherence to the latest trends, but the significance of the author's statement and the consonance of his reasoning for you personally. The author is not one of those who leave his colleagues without food for thought for a long time (a little over 3 years have passed since the publication of his previous evocative book *Dawn of a New Order: Geopolitics and the Clash of Ideologies*). As he often notes, «if one can live without writing, one should not write». He seems to have something to say. The new work is a visual confirmation.

The impartiality of the narrative and the balanced assessment of many past and present international legal problems is a good example of how to interpret the political events and to settle seemingly unsolvable differences. This approach helps to find a much needed compromise for all of us in international relations and international law. It is the guarantee of a long-awaited and lasting peace between torn apart by contradictions the leading poles of the international (heterogeneous) community striving for homogenization. Open-mindedness is a valuable quality for any, especially a practicing, international lawyer. For its formation it is important not only to be able to reconcile the parties, but also not to be indifferent to international incidents.

The work contains an appeal not only to its characters. Equally important is the appeal to the reader himself, on whom the future of peace and international law may depend. Rein Müllerson's new work is about how international law has been changed during difficult times for him — after the Second World War to the present day. But what is also important is that this work contains specific recipes in order to bring humanity out of the impasse.

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