A Turn in Canadian Refugee Policy and Practice

by Johanna Reynolds and Jennifer Hyndman

Until recently, Canada has been a destination of choice for refugees.[1] In 2008 and 2009, Canada was the second and third highest destination country for asylum seekers globally among the group of forty-four industrialized countries.[2] Canada is home to two broad groups of refugees: successful asylum seekers turned permanent residents and resettled refugees who are selected by the Canadian Government overseas. Yet, new federal legislation introduced in December 2012 has dramatically changed the refugee determination system and landings of asylum seekers in the country. In 2013, global asylum claims rose 28 percent (133,000 claims) over 2012 levels. The EU registered an increase of 32 percent of refugee claims in 2013 over 2012, and Southern Europe saw a 49 percent increase during this period. In contrast, asylum claims in Canada declined more than 49 percent, from 20,500 claims in 2012 to 10,400 out of a global total of 612,700 in 2013.[3] In 2014, the number of claims rose slightly to 13,652, still down 34 percent compared to 2012.

In 2010, 94 percent of all resettled refugees were provided residency in Australia, Canada, Sweden, and the US.[4] By resettled, we mean that states select refugees while they are still abroad, normally through referral by the UN High Commissioner for Refugees (UNHCR) which designates them as in need of protection. *The Economist* reports that Germany and Sweden have emerged in 2015 as significant resettlement states.[5] Canada's world-renowned resettlement program continues to provide new protection places and permanent homes for resettled refugees. Yet, in 2012 the number of overall resettled refugees was down 26 percent, the second lowest in thirty years. The government settled 10,624 refugees, only 74 percent of its commitment. Given that Canada accepted 14,000 refugees annually in the early 1990s, resettlement is certainly down along with asylum claims. Government-Assisted Refugees (GARs) remain a major stream of resettlement to Canada, with Privately-Sponsored Refugees (PSRs) making up a significant portion as well. Outcomes of the new visa-office referrals

Johanna Reynolds is a PhD candidate in the Department of Geography and Director of the Centre for Refugee Studies' Summer Course on Refugee and Forced Migration Issues at York University. **Dr. Jennifer Hyndman** is Professor and the Director of the Centre for Refugee Studies at York University.

categories-where UNHCR makes referrals of refugees who meet the 1951 Refugee Convention's eligibility criteria but sponsors are still either private or providing joint assistance with the federal government-have yet to be studied in detail.

"In 2014, more people were displaced from their homes on a global scale than any other time since World War II."

What legislation and policies have changed in Canada, and what are their implications in relation to these two main groups of refugees? This paper places Canada in a global context, but also traces its history as a welcoming country for refugees to an increasingly hostile place, especially for asylum seekers. While resettled refugees have often been represented by the government and media as the *good* refugees, that is, the deserving ones who wait in camps to be resettled, the asylum seekers or refugee claimants, by contrast, arrive spontaneously at Canadian ports of entry shrouded in a discourse of suspicion. To this end, a preliminary content analysis of major Canadian newspapers shows that the frequency of the terms *bogus refugee* and *queue jumper* has increased since the implementation of this new legislation.[6] Federal legislation and policy changes introduced in December 2012 dramatically changed the refugee determination process, and are briefly outlined below. The Multiple Borders Strategy, dating back to 2003[7], is also discussed as prelude to these changes. The protection and hospitality once afforded refugees to Canada has been replaced with a much more draconian system to *preclude* or prevent their arrival unless they are *chosen* as resettled refugees, a completely discretionary act of Citizenship and Immigration Canada (CIC), a federal department of the Canadian government. Finally, both refugee claimants and resettled refugees can lose their right to remain in Canada even *after* they become permanent residents through a process called cessation, effectively making *permanent residency* less permanent and more precarious.

Global and Canadian Context

In 2014, more people were displaced from their homes on a global scale than any other time since World War II. Some 16.7 million people were refugees, and of these, almost three quarters had been in conditions of extended exile for more than five years.[8] Those in *protracted refugee situations*

(PRS)-a term designated by the UNHCR-tend to be Afghans, Somalis, Iraqis, and others who fall under the auspices of UNHCR; however, there are also some 5 million Palestinians who have been displaced for up to two-thirds of a century. UNHCR's statistics exclude the long-term displacement of Palestinian refugees because they are supported by a different UN organization, the United Nations Relief and Works Agency (UNRWA). The Government of Canada has been an advocate for solutions to address the problem of PRS: "[t]he consequences of having so many human beings in a static state include wasted lives, squandered resources and increased threats to security."[9] Throughout the 2000s, Canada, along with the US and Australia, committed to taking thousands of refugees who were in protracted exile from Bhutan (in Nepal), Burma (in Thailand), and beyond through group processing. More than 100,000 Bhutanese refugees found permanent, new homes throughout this period. Canada also responded to the extensive human displacement generated by the war in Iraq, resettling some 18,000 refugees between 2007 and 2014.[10,11]

Canada has a strong record of refugee resettlement since World War II, with the arrival of more than 100,000 Hungarians fleeing communist rule in 1956.[12] Its first large-scale group processing occurred in the late 1970s as part of the Comprehensive Plan of Action in Indochina.[13] At that time, a serendipitous alignment of government policy, public opinion, and citizens' action brought some 74,000 refugees to Canada in a five-year period from Vietnam, Kampuchea, and Laos; most were assisted through private sponsorship.[14] The 1976 Immigration Act took effect in 1978 between the two waves of Indochinese refugee arrivals, and founded the concept of *designated class* (section 6.2).[15] This new legal structure added capacity for resettling refugees beyond the 1951 Convention's refugee definition by affirming that "in accordance with Canada's humanitarian tradition…any Convention refugee or any person who is a member of a class designated by the Governor in Council as a class... " could be eligible for resettlement.[16] In 1978, the Governor in Council adopted the Indochinese Designated Class Regulation. Key to the success of this massive resettlement program was the fortunate alignment of Soviet-era geopolitics, Canadian public opinion (as shaped by the politicized media coverage of the conflict in Southeast Asia), and government policy.[17]

Yet this remarkable show of solidarity was predicated on Cold War alliances and a geopolitical landscape in which refugees were evidence of

ideological superiority over the enemy. Even during this period, Canada began to exclude asylum seekers from the country if they did not fit these superpower allegiances. For example, in 1979, Canada imposed visas on people leaving Chile, many of whom were fleeing Pinochet's abusive military regime. Today, these tenacious Cold War politics pale in comparison to concerns over the *war on terror* and the threats that asylum seekers are seen to pose to the welfare states of the global North.

The source countries of resettled refugees to Canada have fluctuated over time and reflect geopolitical situations around the world and broader international events that displace people.[18,19] The vast majority of resettled refugees come from a small number of countries. In fact, in 2010, 82 percent of GARs and 90 percent of PSRs originated from ten source countries. According to CIC, recent GARs are likely to come from Africa (Sudan, Ethiopia, Somalia and the Democratic Republic of Congo) and Middle Eastern countries (Iraq, Iran and Afghanistan).[20] The same data reveals that recent PSRs originate from similar countries in Africa (Sudan, Ethiopia and Somalia) and Middle Eastern countries (Iraq, Afghanistan and Iran).[21] The vast majority of resettled refugees reside in Ontario. Between 1980 and 2010, 58 percent of PSRs and 40 percent of GARs settled in the province.

Since the Private Sponsorship Program for refugees began in 1979, Canada has offered protection to more than 225,000 people. The program has, however, undergone notable changes in recent years. Whereas sponsors could name the refugees they want to sponsor, the Canadian government now expects that potential refugees for resettlement will be identified by the Minister of Citizenship and Immigration. In 2015, the Canadian Council for Refugees reported that 60% of private sponsorship allocations will be decided by Ministerial Priorities, rather than by sponsors' priorities.[22] Processing times for privately sponsored refugees have become very slow, with up to a five-year wait for refugees from some regions. Furthermore, "in 2012 the government introduced new rules that bar Groups of Five and Community Sponsors from sponsoring refugees who have not been individually determined to be a refugee by either the UNHCR or the government of the country in which they are staying". In short, who can be sponsored, from where, and how many has become more restricted, resulting in dramatic changes to the Program compared to its historic roots.[23]

As noted, Canada is situated in a very different political landscape today. The Cold War is long over and, in the absence of ideological imperatives;

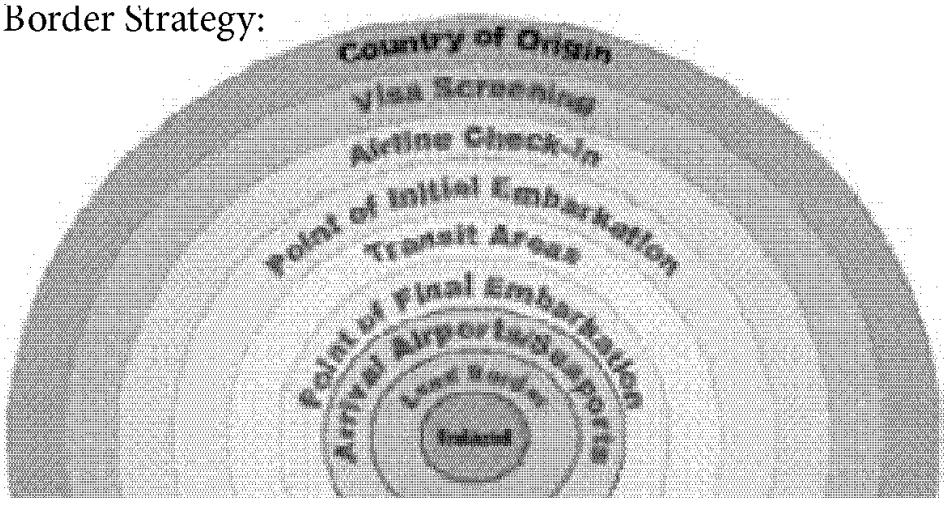
once-positive attitudes towards refugees are declining. Governments in the global North learn migration management strategies from one another and regularly cross-transfer policies designed to restrict access to sovereign territory.[24] In the Canadian context, access to Canadian territory is highly managed. Canada's legal obligations under the 1951 Convention Relating to Refugees and the 1967 Protocol state that asylum seekers who arrive on sovereign Canadian territory have the right to seek asylum.

Changes in Canadian Border Policy and Refugee Determination

Preclusion has been ushered in by Canada's Multiple Borders Strategy, an approach espoused by the Canadian Border Services Agency (CBSA), a Canadian corollary to the Department of Homeland Security in the US.[25] The Multiple Borders Strategy conceives of the border not merely as a territorial boundary or geopolitical line between the US and Canada; rather,

> [t]he strategy strives to "push the border out" so that people posing a risk to Canada's security and prosperity are identified as far away from the actual border as possible, ideally before a person departs their country of origin. Admissibility screening occurs prior to the arrival of an individual in Canada or after they have entered the country in order to ensure that those who are inadmissible do not enter or cannot remain in Canada. [27]

The border is reconceived as any point at which the identity of the traveler can be verified. Pre-emptive screening by airline liaison officers—through visa requirements, and based on biometric requirements—potentially *precludes* a lot of people from coming to Canada, especially from refugee-producing countries. CBSA posts this figure (Exhibit 3) to illustrate the Multiple Border Strategy:



Source: Canadian Border Services Agency (CBSA) in Arbel and Brenner, 2013

The image clearly shows the state's intent to prevent or preclude uninvited people from arriving in Canada by intervening before they reach Canadian ports of entry.

Article 33 of the 1951 Convention Relating to Refugees and its 1967 Protocol prohibit the forced return, or *refoulement*, of refugees.[28] It states:

> *1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*
>
> *2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*

Such protection from forced return, however, does not apply if an asylum seeker does not arrive on a signatory state's territory. Preventing the landing of potential *asylum seekers*, who have been renamed *irregular migrants* in the Canadian Multiple Borders Strategy, is precisely the point of the policy. It precludes concern that Canada may breach this international law.

"The Canadian Government created the category of designated foreign nationals."

As Hyndman and Mountz (2008) contend, such measures to externalize asylum beyond the borders of one's state may involve *neo-refoulement*, a set of geographical tactics to keep refugee claimants at bay, away from the border, and prevent their access to asylum.[29] In so doing, they are *indirectly* forced to return *before* arriving on sovereign territory. *Neo-refoulement* is to preclude, defined in the Concise Oxford English Dictionary as to "prevent (something) from happening or (someone) from doing something."[30]

To this end, and as part of the discursive shift from *asylum seekers* to *irregular migrants*, the Canadian Government created the category of *designated foreign nationals* (DFNs), which was incorporated into Canada's Immigration and Refugee Protection Act (IRPA) and part of the 2012 legislative changes. A designated foreign national is a person or a group identified by Canada's Minister of Public Safety and Emergency Preparedness as a potential threat to Canada under section 117 (1) of IRPA, which

outlines enforcement against human smuggling to Canada. One Canadian Government 'Backgrounder' relating to DFNs (2012) outlines how the 2012 legislation is "cracking down on human smugglers" by creating DFNs who are subject to mandatory detention. It expounds the *Ocean Lady* as a vessel with "a history of smuggling cocaine, explosives, and weapons as cargo."[31] This ship reached Canada's west coast on October 17, 2009 with seventy-six Sri Lankan Tamil men on board who sought asylum upon arrival after being arrested, jailed, and interrogated.[32] As of June 2014, thirty of seventy-six men on the *Ocean Lady* have been accepted as refugees, and seven have been issued deportation notices. Another twenty-seven men had their claims rejected but are under review. The acceptance rate for Sri Lankan asylum seekers in 2014 was 58 percent, up from 51 percent in 2013, so the men on board *Ocean Lady* face a much lower acceptance rate.

In August 2010, after three months at sea, the *MV Sun Sea* arrived on the same piece of Canadian coast, this time carrying 492 Sri Lankan Tamil men, women, and children.[33] On August 13, 2010, the day after the ship was boarded by the Canadian authorities but before it even docked, then-Public Safety Minister Vic Toews said that those on board would be investigated to determine who were "human smugglers or terrorists" among them.[34] Toews went on to say that Canada has been "very welcoming" of refugees, but the government "must ensure that our refugee system is not hijacked by criminals or terrorists."[35]

On more than one occasion after their arrival, he called the Sri Lankan asylum seekers *queue jumpers*.[36] As Mr. Toews, who currently sits as a judge having retired from politics, *queue-jumping* is incorrect and has no meaning in refugee law. There is no queue or sequential order required in making a refugee claim. The suggestion that asylum seekers engage in illegal activity by securing irregular access (i.e. via *smuggling*) to sovereign Canadian territory for the purpose of claiming asylum is also spurious. The 1951 Convention Relating to Refugees is clear on this point, stating in Article 31, section 1 that,

> [t]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. [Article 31, (1)]

Through its designation of designated foreign nationals, future asylum seekers arriving on ships like the *MV Sun Sea* or *Ocean Lady* could be considered security risks by the Minister and be declared *irregular migrants* or DFNs. This provision thus creates uneven access to refugee protection for those who might arrive by boat if they are designated as *irregular migrants*. Even if they are found to be asylum seekers who are *bona fide* refugees, they will be subject to mandatory detention, denied permanent residence for five years, and separated from family members for at least five years—likely many more—if they decide to remain in Canada.

In 2013, Canada dropped to 16th place as a destination for asylum seekers, from second and third place in 2008 and 2009, respectively. Canada's share of applications fell from 10 percent of the total in 2008 to 2 percent in 2013.[37] Since 2009, Canada's asylum applications fell by two-thirds, from 33,250 in 2009 to 10,380 in 2013. The US, in contrast, ranked second in 2013, after being the top destination for refugee claimants in 2009, 2011, and 2012. Between 2009 and 2013, the US received 311,700 claims, the largest number during that period, followed by Germany, Sweden, and the UK.[38] With a 28 percent rise in asylum applications worldwide in 2013 over 2012, and a concomitant decline of almost 50 percent in Canada, access to seek asylum and to the refugee determination process in Canada appears increasingly difficult after the changes to policy and legislation in 2012.

In 2010, new legislation affecting refugees was passed; the Balanced Refugee Reform Act (BRRA) granted the government the authority to identify designated countries of origin (DCO). These are defined as "countries that do not normally produce refugees, but do respect human rights and offer state protection."[39] Subsequent legislation passed in 2012, the Protecting Canada's Immigration System Act, created more flexibility around the selection of DCOs, allowing the Minister of Citizenship and Immigration the power to choose which countries are safe without the advice of an expert committee.[40] The identification of DCOs has been subject to criticism; to qualify, a country of origin must have at least 30 cases finalized in any twelve month period in the past three years, and a 75 percent or greater claim rejection rate, or a 60 percent or greater rate of abandonment/withdrawal during the relevant 12 month period.[41] Yet in Canada, based on this criterion, North Korea meets the standard to be a DCO.[42] The list of DCOs has also been criticized for its blanket exclusions based on country of origin, which may deny genuine refugees from claiming asylum. For example, despite being on the DCO list,

Slovakia and Hungary were among the top 10 refugee-producing countries in 2014 for inland refugee claims, with Slovakia in 7th place and Hungary in 9th.[43]

Unofficial data from the Immigration and Refugee Board of Canada show that refugee claims from several DCOs designated as safe have high rates of acceptance: Slovakia (61 percent); Hungary (49 percent); and Mexico (30 percent). The acceptance rate for new refugee claims since the 2012 legislation was introduced is significantly higher than for backlog claims from the old caseload (pre-December 2012 when no DCOs, or *safe countries*, were designated), with 61 percent for new claims compared to 34 percent for backlog claims.

There are currently 42 countries listed as *safe*.[44] Asylum seekers from these countries face a truncated period to prepare their refugee claims:

> *Hearings on these claims are expected to be held within 30 – 45 days after referral of the claim to the Immigration and Refugee Board of Canada (IRB) as opposed to the 60-day timeframe for other refugee claimants. Failed DCO claimants will not have access to the Refugee Appeal Division, and will not be able to apply for a work permit upon arrival in Canada.*[45]

Not only are claimants from DCOs not entitled to an appeal, but they must wait one year before applying for humanitarian and compassionate (H&C) status. They may request judicial review from the Federal Court on procedural grounds, but claimants are potentially subject to deportation while awaiting either an application for H&C status or a judicial review.

One other notable change introduced in the 2012 Act and accompanying Regulations is the biometric requirement for fingerprints from temporary residents coming to Canada (who come to visit, study or work) along with visas from designated *dangerous* countries. While not explicitly labelled as such, twenty-nine countries and one territory (consisting of the West Bank and Gaza) have been identified as requiring biometric data to accompany visa applications.

Countries for Biometric Screening		
Afghanistan	Haiti	Saudi Arabia
Albania	Iran	Somalia
Algeria	Iraq	South Sudan
Bangladesh	Jamaica	Sri Lanka
Burma	Jordan	Sudan
Cambodia	Laos	Syria
Colombia	Lebanon	Tunisia
Congo, Democratic Republic of	Libya	Vietnam
Egypt	Nigeria	Yemen
Eritrea	Pakistan	
Territory for Biometric Screening		
Palestinian Authority		

Source: *The Canada Gazette*[46]

While the Canadian Government does not purport to support a two-state solution for Israel and Palestine, it does include Israel on the DCO list and the Palestinian Territories on the list of countries for biometric screening.

The collection of biometric data is viewed as the most effective way of identifying individuals entering the country in order to reduce identity fraud and "strengthen the integrity of Canada's immigration system."[47] Just as the rhetoric of *queue jumpers* or *bogus refugees* is used to justify the implementation of DCO and DFN lists in order to reduce risk and enhance security, a similar logic is used to justify the increased use of biometric testing. Through the joint cooperation of CIC, CBSA and the Royal Canadian Mounted Police (RCMP), an enhanced identification system provides a first line of defense against potential security threats or fraudulent applicants, while simultaneously helping to facilitate legitimate travel.[48] Biometric testing is believed to be an effective tool in identity management because of its ability to detect potential identity fraud or identity theft prior to arrival in Canada. Moreover, governments can also ascertain if a person has made a refugee claim in another country in the shared database of the Five Country Conference, whose members include Canada, the US, the United Kingdom, Australia and New Zealand.[49] Interestingly, most of the countries on the list for biometric screening are major refugee-producing or hosting countries. In 2014, at least thirteen of the states listed in *The Gazette* were among the top twenty source countries for asylum seekers whose claims were decided, including both new cases since the 2012 legislation was introduced and backlog files from the old caseload. The new legislation aims to deter potential abuse of the system and protect the security and safety of Canadian citizens by preventing them from getting to Canada altogether.[50]

Since the Designated Country of Origin (DCO) provisions have been implemented and the Temporary Resident Biometric Program (TRBP) introduced, the number of applications from major source countries for refugee claims and the acceptance rates for each have changed dramatically over the five year period between 2009 and 2015. Mexico was ranked first in terms of the number of asylum applications in 2009, but by 2014 had fallen out of the 'top ten' source countries. Hungary, as a DCO, in contrast, was not a major source country in 2009, but became the top ranking source country by 2012 and this continued in 2013. In 2014, the acceptance rate of refugee claims (mostly Roma) from Hungary had risen to 35%, suggesting

that Hungary is not as safe as its DCO designation would suggest.[51] Both lists make huge generalizations about the entire population. *Safe* and *dangerous* are cast as inherent traits of an entire country rather than contextualized across space and social locations such as race, ethnicity, gender, sexuality, religion, and age. The disaggregation of *safety* and *danger* is already underway, as rogue *safe* designated countries of origin like Slovakia have acceptance rates on par with those of Somalia and Colombia.

DCOs may be assumed to be safe in some general sense, but as these statistics illustrate, not for everyone. Particular groups clearly have genuine and legitimate claims to protection.

One further outcome of the 2012 legislation (C-31) is the increased precariousness of status for permanent residents (PRs) who came to Canada as refugees. The Act outlines grounds for *cessation* under section 108(1) – that is, when the government can rescind PR status and return permanent residents who came as refugees to Canada to their country of nationality. Such residents can be returned if,

(a) the person has voluntarily re-availed him/herself of the protection of their country of nationality;

(b) the person has voluntarily reacquired his/her nationality;

(c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality; or

(d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada.

"PR status for former refugees is more precarious than it was before."

In short, PR status for former refugees is more precarious than it was before. PR's who were once refugees need to know that if they return home for visits, get a passport from their home country, travel on a passport from their home country, and get citizenship in a third country (e.g. by marriage), they may have their PR status removed. Cessation cases were identified as a priority for the Canadian Border Services Agency (CBSA) in 2013, in order to "improve the integrity of the system."[52] As a result, although it was possible to make a cessation application prior to recent changes in Canadian law, there has been a significant increase in the number of cases. Data collected by the Canadian Council for Refugees from the federal tribunal that adjudicates claims, the Immigration and Refugee Board (IRB), indicate that the number

of finalized cessation cases has been on a steady rise: from 2009-2012, under 40 applications for cessation were made per year, compared to 178 applications made in 2013.[53] Data for 2014 has not yet been made publically available but estimates indicate a continued increase.

Conclusion

Recent legislation and policy changes in Canada have had major implications for refugees coming to Canada. Despite being a signatory to the 1951 Convention and to national legislation that integrates the refugee protection ensconced in this law, Canada actively participates in strategies that push the border out in order to preclude the arrival of asylum seekers, thus making it more difficult to reach Canadian territory. The designation of *safe* countries and foreign nationals, and the increase in biometric testing for temporary residents to Canada are examples of how the borders are pushed out and the practice of preclusion proceeds. Border practices and enforcement are not only extended beyond the territorial boundaries of the state; they are evident in the new cessation measures to remove one's residency status.[54] Refugees who have become permanent residents may lose their right to remain in Canada under a cessation application if the government decides that persons have re-availed themselves of the protection of their countries of citizenship.[55] In addition to these policy changes, there has been an increase in government and media speech acts in relation to asylum seekers; they are called *queue jumpers* or *bogus refugees*, which are part of an alarmist discourse that serves to raise suspicion and securitize asylum seekers that in turn provide grounds to exclude them.

Notes

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