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UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

AFRICAN REGIONAL & SUB-REGIONAL SYSTEMS

COLLECTIVE RIGHTS BUT NO INDEPENDENCE FOR SOUTHERN CAMEROONS

On May 27, 2009, the African Commission on Human and Peoples' Rights declared Southern Cameroonians "a people." Nearly eight months later, the decision remains a topic of vigorous public debate in Cameroon. The recognition of Southern Cameroonians as a people culminated a six-year legal battle initiated by a complaint filed on behalf of the people of Southern Cameroons against the Republic of Cameroon. The complainants asserted that the Republic of Cameroon is illegally occupying the Southern Cameroons in violation of Article 20 of the African Charter on Human and Peoples' Rights. For the Southern Cameroonian independence movement, this decision represents only partial success. As a recognized people, Southern Cameroonians can now assert collective rights under the African Charter. However, the Commission stopped short of the complainants' ultimate goal, instead upholding a high threshold for a people to be able to exercise the right to self-determination through secession where doing so challenges the territorial integrity of a state.

As the Commission explained, "a people" is a group that shares "a common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life." The people of Southern Cameroons contend that their history of British colonial occupation differentiates them from the majority population of the Republic of Cameroon and defines their present-day identity. While Southern Cameroonians speak English and follow the common law system, most people of the Republic of Cameroon speak French and ascribe to the civil law system.

In their initial filing, the complainants asserted that recognition of a group as "a people" under the Charter entitles the

group to collective rights. They contended that all peoples have a right to secession by means of self-determination under Article 20(1) of the Charter, which states:

All peoples shall have the right to existence. They shall have the unquestionable right to self-determination. They shall freely determine their political status, and shall pursue their economic and social development according to the policy they have freely chosen.

However, according to the Commission, the right to self-determination is not absolute. Meeting the requirements to be recognized as a people "cannot be used as the only determinant factor to accord or deny the enjoyment or protection of peoples' rights."

To determine whether the African Charter permits Southern Cameroons to secede from the Republic of Cameroon, the Commission relied on precedent established in *Katangese Peoples Congress v. Zaire*, which it decided in 1995. In *Katangese Peoples Congress*, a liberation movement from the Katanga region of what was then Zaire filed a claim for independence based on Article 20(1) of the Charter. The Commission held that the Charter only recognizes a legal basis for self-determination in circumstances of either massive violations of human rights or prohibition of a peoples' participation in public affairs. Applying the test from *Katangese Peoples Congress* to the case of Southern Cameroons, the Commission found that, even though multiple individual rights of Southern Cameroonians were violated, the Republic of Cameroon neither committed massive human rights violations nor completely barred Southern Cameroonians from participating in governance and public affairs.

Consequently, the Commission's recognition of Southern Cameroonians as a people likely provides few, if any, additional rights or privileges to the people of the Southern Cameroons. However, the Commission's recognition of the Southern Cameroonians as a people may strengthen their case for greater political autonomy within the Republic of Cameroon.

AFRICAN COURT'S FIRST JUDGMENT SHOWCASES JURISDICTIONAL LIMITS

In its historic first judgment, rendered on December 15, 2009, judges of the African Court of Human and Peoples' Rights voted unanimously to dismiss a case for lack of jurisdiction. The complainant, Michelot Yogogombaye, had requested that the Court suspend ongoing proceedings initiated by Senegal against former Chadian dictator Hissène Habré, who has lived in exile in Senegal since being deposed in 1990. Habré is alleged to be responsible for 200,000 cases of torture and 40,000 politically motivated murders committed during his presidency. The ruling highlights an immense obstacle in the way of the Court's jurisdiction over complaints filed by individuals or NGOs against an African state: the respondent state must have first given its consent.

The complaint alleged that the case against Habré is politically motivated, citing the 2008 amendment of the Senegalese Constitution that permits retroactive application of Senegalese criminal law, the result of international pressure to prosecute Habré. Yogogombaye claimed the amendment violates both the Senegalese Constitution and Article 7(2) of the African Charter on Human and Peoples' Rights, requiring that "no penalty may be inflicted for an offence for which no provision was made at the time it was committed."

In response, Senegal moved to dismiss Yogogombaye's complaint for lack of jurisdiction. Senegal argued that before individuals can file complaints before the Court, "the respondent State must first have recognized the jurisdiction of the Court to receive such applications in accordance with Article 34(6) of the Protocol establishing the Court."

Yogogombaye contended that, because Senegal is a member of the African Union, which promulgated the Protocol, Senegal has *de facto* "made the declaration prescribed in Article 34(6) accepting the competence of the Court to receive applications submitted by individuals."

In finding for Senegal, the Court affirmed that Article 34(6) makes direct access to the Court contingent on a prior “special declaration” by the respondent state authorizing cases to be brought against it by individuals. Because Senegal has made no such declaration, the Court dismissed Yogogombaye’s complaint for lack of jurisdiction.

At present, the African Commission on Human and Peoples Rights provides the only other avenue available to individuals and NGOs intent on filing a claim before the Court against a state that has not made a special declaration. Establishing a relationship similar to that of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, Article 5 of the Protocol grants the Commission authority to refer cases to the Court. It is as yet unclear what criteria the Commission will use to determine whether to refer a case to the Court.

In light of the horrific crimes carried out under Habré’s regime, the Court’s dismissal of Yogogombaye’s complaint may seem comforting. However, the Court could just as easily dismiss a case in which the complainant is a victim of state abuses. What then will convince African states to offer their own victims the possibility of filing a direct complaint before the Court?

As is evidenced by the fact that Burkina Faso and Mali are the only two states that have filed the special declaration, African states are not eager to increase their exposure to potential complaints. Consequently, *Yogogombaye* lays bare one great obstacle to accessing the new Court. For the Court to fulfill its objective of “promotion and protection of Human and Peoples’ Rights,” citizens and non-state actors must advocate for Article 34(6) declarations from their governments.

COMPLIANCE WITH EXISTING MANDATE MUST COME BEFORE WAR CRIMES TRIALS AT AFRICAN COURT ON HUMAN AND PEOPLES’ RIGHTS

“Extending the jurisdiction of the African Court on Human and Peoples’ Rights to cover international crimes would undermine justice and accountability on the continent,” asserted a coalition of eight prominent international human rights groups in an expert opinion published December 17, 2009. The statement came

in response to a February 2009 decision made by the Assembly of the African Union (AU) during its 12th Ordinary Session. The decision pertained to a perceived abuse of the principle of universal jurisdiction, a repeated topic of concern within the Assembly.

On this occasion, the Assembly’s objection pertained to France’s November 2008 arrest of Rose Kabuye, the Chief of Protocol to the President of Rwanda and former officer in the Rwandan Patriotic Front, for her alleged involvement in the assassination of former Rwandan President Juvenal Habyarimana. The Assembly criticized the arrest and formally requested the AU Commission “to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes.”

However, as the authors of the expert opinion assert, any extension of the subject matter jurisdiction of the Court must be “compatible with the United Nations Charter and, by implication, the Rome Statute of the ICC.” Meeting this standard could be difficult.

In addition to needing increased financial and diplomatic resources to support the expertise needed for an expanded jurisdiction, the Court would also require AU Member States to strengthen norms of compliance and cooperation. The current low rate of compliance with decisions of the African Commission on Human and Peoples’ Rights suggests that adherence to decisions by the Court in contentious criminal cases would not be easily achieved. Consequently, contrary to AU Member States’ obligation under Article 4 of the AU Constitutive Act to fight impunity, enlarging the jurisdiction of the Court could even widen the impunity gap for individuals responsible for egregious crimes.

Expanding the jurisdiction of the Court is not the only means of bolstering the credibility of the African regional human rights system. Improving compliance and cooperation within the current legal framework could also minimize the frequency with which foreign courts invoke universal jurisdiction over African nationals. Additionally, as the largest regional group within the Assembly of States Parties to the Rome Statute of the ICC, AU Member States could enhance their engagement and thereby exert greater influence within the ICC. Therefore, in anticipation of the

Commission’s review of the Court’s jurisdiction, AU Member States must prioritize compliance with the existing mandate of the Court.

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EUROPEAN COURT OF HUMAN RIGHTS

ETHNICITY REQUIREMENTS FOR CANDIDATES: HUMAN RIGHTS VIOLATION OR PEACE PROMOTION?

Provisions of the Bosnian and Herzegovinian constitution restricting the ability to run for the Presidency or the House of Peoples to the three “constituent peoples,” Bosniacs, Serbs, and Croats, violates the European Convention on Human Rights, the European Court of Human Rights held on December 22, 2009. In *Sedjić and Finci v. Bosnia and Herzegovina*, two otherwise qualified Bosnian and Herzegovinian citizens, one Jewish and the other Roma, were deemed ineligible to run for the Presidency and the House of Peoples, solely because of their ethnicity. The Court determined that the contested constitutional provisions violate several Convention provisions, including Article 14, the prohibition of discrimination, together with Protocol No. 1 Article 3, the right to free elections, and Protocol No. 12 Article 1, the general prohibition of discrimination.

Annexed to the 1995 Dayton Peace Accords, which ended the ethnic conflict, the Bosnian and Herzegovinian constitution distinguishes between two categories of citizens: “constituent peoples” and “others.” The Constitution requires that the House of Peoples be composed of 15 members, equally divided among each of the three constituent groups. One member of each group comprises the three-member rotating Presidency. Individuals who do not identify themselves as Bosniacs, Croats, or Serbs, like the applicants in this case, are forbidden from running for these offices.

At the time of the Constitution’s enactment, mandating equal representation of the warring groups in the Presidency and the upper parliamentary house promoted the peace-keeping aims of the Dayton Peace Accords. The Court reasoned, however, that because the extreme ethnic

tension between these three groups has considerably stabilized in recent years, such limitations are no longer necessary.

While acknowledging that a complete abandonment of the power-sharing mechanisms may not be suitable at this time, the Court proposed that Bosnia and Herzegovina could replace the discriminatory provisions with “mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities.” For example, the lower parliamentary house, the House of Representatives, ensures representation of both of the state’s political territories, the Federation of Bosnia and Herzegovina and the Republika Srpska. The Constitution requires that two-thirds of the House of Representatives be selected from the Federation of Bosnia and Herzegovina while the other third be chosen from the Republika Srpska, regardless of ethnicity. Mandating regional representation rather than an ethnic quota may preserve peace between the entities without excluding non-constituent groups.

The effect of the Court’s decision remains to be seen. Debates on constitutional reform began in Bosnia and Herzegovina in 2005, but have yielded no significant changes thus far. Most recently, in October 2009, U.S.-EU brokered talks in Butmir failed to produce meaningful agreement, casting uncertainty on the ruling’s ability to instigate real change. Elections for the Presidency and House of Peoples will next be held in October 2010.

SWISS BAN ON MINARETS HEADS TO EUROPEAN COURT

On December 16, 2009, Hafid Ouardiri, an Algerian-born Muslim living in Switzerland and former spokesman for the Geneva Mosque, filed a complaint with the Court challenging Switzerland’s recent constitutional amendment barring the construction of new mosque minarets. The ban, approved in a November 2009 referendum by 57.5 percent of the Swiss population and 22 of the state’s 26 cantons, will add a new Article 72(3) to the Swiss constitution, plainly stating, “The construction of minarets is prohibited.” Ouardiri argues that the amendment violates Convention Article 9, the freedom of thought, conscience, and religion; Article 13, the right to an effective remedy; and Article 14, the prohibition of discrimination.

The Swiss People’s Party, a conservative political party previously criticized for its racist campaigns, initially proposed the amendment with several other small groups in April 2007. Although recognizing that the Swiss constitution guarantees the freedom of religion, the website for the Federal Popular Initiative Against the Construction of Minarets argues that “the minaret is the symbol of a political-religious claim that . . . places religion above the State.” Because minarets represent respecting religion more than the laws of the state, these structures, according to the site, represent an “attempt . . . to impose a legal system based on sharia in Switzerland,” thus threatening the supremacy of the Swiss federal government.

The Swiss government opposed the initiative and urged citizens to reject it, yet stated that it will not overturn the amendment. Micheline Calmy-Rey, the Federal Councilor of the Swiss Federal Department of Foreign Affairs admitted in an interview with *Le Monde* that, although “the [Swiss] government and political parties were surprised by the result” of the referendum, a government reversal is unlikely. To dismiss the referendum would be “to suppress participative democracy,” continues Calmy-Rey.

The Swiss government adamantly asserts that the minaret ban neither reflects anti-Islam sentiment nor impacts Muslims’ ability to practice their religion; however, the referendum fueled fears of an increasingly hostile environment for Switzerland’s 400,000 Muslims. Farhad Afshar, leader of the Coordination of Islamic Organizations in Switzerland, revealed to *The New York Times* that the “[m]ost painful for [Muslims] is not the minaret ban, but the symbol sent by this vote. Muslims do not feel accepted as a religious community.”

If accepted by the Court, this case would pose an interesting scenario. The Swiss government, which opposed the initiative, would serve as the party defending the vote. According to Ouardiri’s attorney Pierre de Preux, “We will have both the plaintiff Hafid Ouardiri and the defendant, Switzerland, saying the same thing. The court is still free to decide whatever it wants, but it sure is going to help the request.”

The Court has yet to determine whether to admit the case. To present a case before the Court, the applicant must have

exhausted all other available domestic judicial remedies; however, the Swiss Federal Tribunal, Switzerland’s highest court, lacks jurisdiction over cases contesting referenda. Even if the Court accepts the application for a hearing, a decision is unlikely for several years.

HUMAN TRAFFICKING VIOLATES ARTICLE 4

In a historic judgment, the Court held that human trafficking constitutes a violation of Article 4 of the Convention, the prohibition of slavery and forced labor. In its January 7, 2010 ruling in *Rantsev v. Cyprus and Russia*, the Court elaborated on the positive obligations of all states to combat human trafficking by adopting “appropriate” legal and administrative frameworks, taking preventative measures, and providing adequate investigations of known cases of trafficking.

The case centered on Oxana Rantseva, a Russian national, who entered Cyprus on an *artiste* visa, a visa commonly associated with commercial sexual exploitation. After she ran away from the cabaret where she worked, Rantseva’s employer brought her to the police to have her deported. Following a brief detainment, police decided against deportation and released Rantseva back to her employer. Hours later, Rantseva was found dead below the balcony of another employee’s apartment, a bed sheet tied to the railing above her. Never investigating the possibility that she was a human trafficking victim, perhaps trying to escape, the Cypriot government closed the case, declaring that the “strange circumstances” of Rantseva’s death suggested an accident. Despite Russia’s request for further investigation, Cyprus refused to reopen the case.

Although Cyprus admitted to violating several Convention articles, the Court proceeded to examine the case because of the serious nature of the allegations of trafficking, ultimately finding violations of Article 2, the right to life; Article 4, the prohibition of slavery and forced labor; and Article 5, the right to liberty and security. While not specifically equating human trafficking with slavery, the Court determined that it clearly fell within the scope of Article 4, because human trafficking “by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership.” States therefore have a posi-

tive duty to prevent trafficking and protect its victims. The Court found Cyprus violated Article 4 by failing to take proactive measures to prevent and investigate the suspected trafficking. Russia violated Article 4 as well by failing to investigate Rantseva's recruitment by traffickers.

Russian and Cypriot law criminalizes human trafficking, yet both states continue to have significant problems. The 2008 U.S. Department of State Trafficking in Persons Report categorizes Russia and Cyprus as Tier 2 Watch List states. Country rankings, which range from Tier 1 to Tier 3, are based on the state's status as a source, destination, or transit country and the government's initiative and resources available to combat trafficking and accommodate victims. Russia, deemed a source, destination, and transit state, "has yet to provide comprehensive victim assistance," according to the report. Although Cyprus, primarily a destination state, has taken some legislative initiative against trafficking, its failure to abolish the *artiste* visa, despite knowledge that the "the word 'artiste' . . . has become synonymous with 'prostitute,'" has kept the country on the Watch List.

The Council of Europe has taken measures to combat trafficking amongst Member States, including adopting the Convention on Action against Trafficking of Human Beings. Legally binding on States Parties, the Anti-Trafficking Convention seeks to aid victims and establishes a monitoring mechanism to report the progress of domestic implementation and make specific policy recommendations to States Parties not in compliance. The Court's ruling in *Rantsev* should render the Anti-Trafficking Convention more effective. Holding that the European Convention bans human trafficking, the rulings now require all member states, including those that have failed to sign or ratify the Anti-Trafficking Convention, to prevent trafficking and protect victims.

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INTER-AMERICAN SYSTEM

IACtHR REFORMS RULES OF PROCEDURE

On November 24, 2009, the Inter-American Court of Human Rights (IACtHR) presented its new rules of procedure, describing the reform process as "the product of constructive, participatory, and transparent communication with the different actors and users of the Inter-American System." The Court received suggestions from the Inter-American Commission, several Member States, and various civil society organizations. The reform reflects a noteworthy effort to ensure procedural equality among parties, refocuses the Commission as a neutral organ within the Inter-American system, and recalibrates Court proceedings to be more efficient.

The new rules seek to ensure that the Commission acts as a neutral organ intended to guarantee procedural equality among parties in proceedings before the Court. Prior to the reform, the Commission initiated proceedings before the Court by submitting a limited application that only identified claims and parties to the case, set forth facts that gave rise to an alleged violation of the American Convention of Human Rights or the American Declaration of the Rights and Duties of Man, listed evidence provided by the parties, and stated its conclusions. Additionally, the Commission was required to provide the Court with a copy of its Article 50 report. Such a report is prepared in compliance with Article 50 of the Convention and issued to a state containing conclusions, proposals, and recommendations that if complied with, would remedy alleged violations of the Convention or the Declaration and would obviate any need for the Commission to initiate proceeding before the Court. In addition, the Commission was previously not required to forward to the Court the entire case file, including a copy of the State's response to the Article 50 report. In other words, the Commission's report materials sent to the Court did not include actions the state may have taken to remedy alleged violation of the Convention or Declaration.

Under the new rules, the Commission must submit a merits report that includes all the information previously required plus its observations regarding the state's answer to the Article 50 report recommendations

and its reasons for submitting the case to the Court. The Commission's report to the Court will now contain all documents in the case file, including all communications following the issue of the Article 50 report. The new rules therefore ensure the Commission's neutrality by requiring it to send all relevant information regarding the case, without selecting documents or information that could be perceived as favoring one party over the other.

Similarly, the reform seeks to curtail the Commission's function as an advocate for either party in the litigation. Previously, the Commission would offer witnesses and declarations which supported the victim's claim, thereby assuming the role of the victim's advocate. Now, the Commission will not offer witnesses to support a victim's claim, and can only offer expert witnesses in limited circumstances. This change exemplifies the reform's objective of defining the Commission as an organ that promotes respect for human rights in general, but does not act as a legal representative to specific alleged victims.

The new rules also reinforce the Commission's neutral role before the Court by creating a mechanism that provides victims with neutral representation. Under the previous rules of procedure, the Commission represented those victims who lacked legal representation. Article 37 now allows the Court to appoint an "Inter-American Defender" to act as a legal representative for the victim throughout the proceedings. Through this reform, victims will be guaranteed an attorney to represent them before the Court; economic considerations will no longer impede access to legal representation; and the Commission will be prevented from taking the conflicting roles of a victim's legal representative and a neutral organ.

The new rules aim to make Court proceedings more efficient. For instance, Articles 28, 44, and 51(11) authorize the Court to use new technologies to expedite proceedings and facilitate communication between the Court, the Commission, the state, and the victims. Moreover, the new rules permit the Court to accept electronic briefs from all parties and receive statements through electronic audio-visual means.

Finally, Article 19 now prohibits judges from considering and deliberating in cases against states of which they are nationals,

limiting possible bias by the Court. Article 25 now authorizes the representatives of alleged victims who do not agree on one “common intervener” in a case, to appoint up to three common interveners. A common intervener is the only person authorized to present pleadings, motions, and evidence during the proceedings; in cases with multiple victims, agreeing on a single individual has proved difficult. In sum, these procedural reforms appear to reflect the different interests and concerns of parties before the Court and will hopefully enhance procedural efficiency.

IACtHR DENOUNCES VENEZUELA’S CRIMINALIZATION OF SPEECH AGAINST THE GOVERNMENT

On November 20, 2009, the Inter-American Court of Human Rights found Venezuela violated Francisco Usón Ramírez’s right to freedom of expression when it sentenced him to prison under a statute that criminalizes statements dishonoring the Venezuelan military. American University Washington College of Law’s Impact Litigation Project represented Usón before the Court.

In November 2004, a Venezuelan military tribunal convicted Usón for “dishonoring and disrespecting the [armed] forces of Venezuela,” as articulated in Section 505 of the penal code, after Usón spoke on television about an incident in which prison guards at a military fort were alleged to have burned an inmate with a flame-thrower. Usón suggested that, if the allegations were true, the assault was probably premeditated by members of the military. The military judge held that Usón’s declarations offended the honor of Venezuela’s armed forces and sentenced him to five and a half years in prison. Usón served three and a half years and was conditionally released on parole.

The IACtHR declared that section 505 of the Venezuelan penal code, which criminalizes speech that dishonors the Venezuelan armed forces, violates Article 13, freedom of thought and expression, of the Convention. The Court explained that

the right to freedom of expression is not absolute. Article 13(2) of the Convention provides that exercising the right may be subject to subsequent liability when limitations to the right are “expressly established by law” (the legality requirement) and only restrict the right to “the extent necessary to ensure: (1) respect for the rights or reputations of others; or (2) the protection of national security [and] public order,” (the necessary and proportional requirements). Venezuela argued that the limitations to freedom of expression created in Section 505 were consistent with Article 13.2; the IACtHR found otherwise.

The Court noted that Section 505 was too vague and ambiguous to meet the legality requirement of Article 13.2. Specifically, the statute did not strictly prescribe the elements constituting an injury to the honor of the armed forces, nor did it specify the *mens rea* requirement. Moreover, the IACtHR held that while the state’s interest in protecting the honor of the armed forces was a legitimate aim that could justify restricting freedom of expression, the criminal sanctions prescribed in Section 505 were excessively vague and ambiguous, and therefore incompatible with the American Convention. Finally, the IACtHR found that the limitation on speech was disproportional, balancing the government’s interest in protecting the honor of the military with Usón’s right to comment on a matter of public importance. In a carefully parsed-out conclusion, the IACtHR criticized the state, holding that it gave “greater and automatic protection to the honor and reputation [of the armed forces] without considering the heightened protection accorded to freedom of expression within a democratic society.”

The Court also declared that Venezuela violated Usón’s rights under Article 8 (right to fair trial) and Article 25 (right to judicial protection) of the Convention because Usón was tried in a military court, although he was not an active military officer nor had he committed a crime of military nature. The Court ordered the state to annul Usón’s trial and clear his criminal record, and also ordered reparations.

The *Usón* case is best understood within Inter-American jurisprudence related to *desacato* or contempt laws, which criminalize speech against the government or public officials. For example, in *Kimel v. Argentina* the IACtHR found that the state’s criminal definition of defamation could not be extended to protect the government’s honor. Also, the Inter-American Commission on Human Rights has stated that *desacato* laws are inconsistent with democracy because they provide greater protection to public officials than to private citizens and in democratic societies the government should be subject to public scrutiny.

Although the IACtHR found that Venezuela violated Usón’s right to freedom of expression, the decision could have gone further by spelling out two important points. First, the Court could have rejected the notion that the government has a permissible interest in protecting the honor and reputation of an institution like the armed forces. Instead, the Court found that Venezuela’s interest in protecting the military’s honor was a legitimate aim that may justify imposing subsequent liability on freedom of expression. This finding is problematic because an abusive state could promulgate contempt laws and limit dissent or critical speech with the justification that these laws aim to protect government honor.

Second, the Court could have ruled that the state may *never* use its criminal law to protect the military’s honor. As a result, it left open the possibility that the state could amend its laws to be compatible with the Convention and then use it against citizens to protect the military’s honor. To its credit, however, the Court did create an extremely high threshold for imposing criminal liability to protect the government’s right to honor. **HRB**

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