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Prosecuting War Criminals

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Judge Richard Goldstone

"Richard Joseph Goldstone is a South African former judge. During the transition from apartheid to multiracial democracy in the early 1990s, he headed the influential Goldstone Commission investigations into political violence in South Africa between 1991 and 1994. Goldstone's work investigating violence led directly to his being nominated to serve as the first chief prosecutor of the United Nations International Criminal Tribunal for the former Yugoslavia and for Rwanda from August 1994 to September 1996. He prosecuted a number of key war crimes suspects, notably the Bosnian Serb political and military leaders, Radovan Karadžić and Ratko Mladić." ***source: wikipaedia***

I was delighted to get an invitation from Brian Walker to address a meeting of the Religious Society of Friends in Kendal Town Hall. I was particularly pleased for two reasons. The first is that for many years I have admired the philosophy and the work of the Quakers and the second, let me confess, I could not resist an invitation to come to the Lake District. I have always wanted to come and have never had the time or the opportunity. It has been a wonderful twenty-four hours in this lovely part of the world. What I propose to do is give you some of the history of the Law of War, so that you can understand the tools - the laws both domestic and international - that are available to us when we seek to prosecute war criminals. I will discuss the development of Humanitarian Law and universal jurisdiction, the work of the United Nations and the War Crimes Tribunals, and I will say a little about the International Criminal Court. The history of the Law of War, as it used to be called - it is now called International Humanitarian Law, or simply Humanitarian Law - goes back many thousands of years. One finds references to elementary aspects of the Law of War in Chinese and Indian writings of at least a thousand

years ago - even two to three thousand years ago. The idea was to have reciprocity: if you treat my people who you capture on the battle field humanely, I will reciprocate and do the same in respect of your citizens; but let me warn you, if you treat my captured people badly, do not expect any better treatment of yours. Thus it was very much a reciprocal arrangement, and the Law of War in its modern guise continued in that tradition.

The modern Law of War began, of course, as a result of the work of the International Committee of the Red Cross in the nineteenth century. Henry Dunant, a wealthy Swiss businessman, was horrified at the way injured soldiers were left to die in agony on the fields of Solferino in Italy, and he decided to do something about it. I think we should remember that it was one person who founded the International Committee of the Red Cross: it is amazing what leadership can do and what a difference one person can make. It is interesting that the very first recipient of the Nobel Peace Prize was Henry Dunant, in response to the work of the International Committee of the Red Cross.

International Law generally deals with when it is legal to make war, but Humanitarian Law, as developed by the Red Cross, deals with the way in which wars should be fought. Thus it does not deal with whether war should be declared, or whether a war is lawful. The analogy that I always like using comes from the so-called sport of boxing: the Queensberry Rules apply only once the bell has been rung and two men - I am afraid to say these days even women - enter the boxing ring and try to knock each other senseless. The Queensberry Rules do not refer to, nor do they have anything to do with, the morality or legality of the sport of boxing; they are simply triggered by the bell ringing to indicate the first round. The Law of War is similar. This confuses many people - they wonder why the Law of War does not outlaw war. It does not outlaw war because it is only triggered when the war begins. I think that is an important aspect to bear in mind. Historically, the Law of War recognised nations rather than individuals. Before the Second World War, and before the United Nations system, there was no such thing as an international court recognising individual

human beings - the World Court was under the League of Nations, which recognised only governments - nor were individuals recognised as the subject matter of International Law. 'Human Rights' were matters for governments to adhere to or to violate; it was not the business of the international community. That, of course, changed in response to the terrible war crimes committed by the Nazis. Human kind was so horrified, and the consciences of decent people so disturbed, that views on law began to change. International leaders recognised that individual human beings should indeed be given recognition. Thus, the first reference to human rights in an international instrument of law is in the Charter of the United Nations. Hot on the heels of the Charter came the Universal Declaration of Human Rights, which was neither an international treaty, nor a law; it was an aspiration which, happily, spawned more binding international human rights conventions in the 1960s and after.

The trigger for recognising individuals in International Law was Nuremberg. The Nuremberg Tribunal was set up by the four victorious powers, in what was called the 'London Agreement', towards the end of the Second World War. The four powers decided that the Nazi leaders should be given a fair trial - fair certainly by the standards of the 1940s and early 1950s - but the laws that were used were found to be wanting. The law is always retroactive. For example, as ways of doing business change with the use of the Internet, so the laws of banking have to change. The Law of War is similarly retroactive. After each great war the Geneva Conventions have been updated. They had to be updated after the First World War because nobody had contemplated air war - there was no such thing when the first laws were drafted in the nineteenth century. After the Second World War they had to be updated: the four Geneva Conventions with us today date from 1949, with two optional protocols updating them in 1977.

So, new laws were needed to prosecute the Nazis. It was decided to add to the jurisdiction of the Nuremberg Tribunal what were called, 'Crimes against Humanity'. Though such crimes had been referred to by academics between the two

great wars, there had never been such a thing in the legal lexicon. They were recognised for the first time in charges laid against the Nazi leaders - amongst other crimes. Recognition of crimes against humanity was the key that opened a Pandora's box. Firstly, it demonstrated that some crimes are so huge, and are so horrible, that they are crimes not only against the immediate victims themselves; they are crimes not even only against the country - and its people - where the crime was committed; they are crimes truly against all of human kind. Secondly, it introduced universal jurisdiction, for if these are crimes against all people in the world, the courts of any country, no matter how remote from the scene of the crime, have jurisdiction to bring such a person to justice and, if found guilty, to punish them.

The idea of universal jurisdiction was not completely new. For many hundreds of years pirates have attracted universal jurisdiction: they can be put on trial in any court in the world, no matter where their act of piracy took place. This legal situation arose out of necessity - since pirates do not commit their crimes on land, they do not commit their crimes in the jurisdiction of any one court. Unless all courts have jurisdiction, they would be given an effective amnesty. So universal jurisdiction was recognised for pirates. But as a result of the holocaust, and the other terrible crimes committed by the Nazis in the Second World War, International Law recognised the principal of universal jurisdiction in respect of war crimes.

Interestingly, the Genocide Convention, which followed Nuremberg in 1948, did not incorporate universal jurisdiction. The Genocide Convention did three things. Firstly, it defined this most horrible of crimes, the crime that requires the mental intent of wiping out a whole people or part of a people. Indeed, they had to invent a new word for genocide, because nobody had ever thought of a crime of that magnitude. It had never entered any sane person’s mind before the Second World War that anybody would wipe out a people, and although it had happened with the Armenians at the end of the First World War, there had never been a law in reaction to it. Secondly, the Genocide Convention said that the crime of genocide should be

charged in domestic courts; in other words, a country should put on trial any of its citizens (or people within its borders) who commit genocide. Thirdly, however, the Convention goes on to say that a person suspected of committing genocide could also be charged by an international court. That is very interesting: in the Genocide Convention, which the United Nations passed unanimously on the 11th December 1948 - the day after the Universal Declaration of Human Rights - UN members realised and hoped that in the not too distant future there would be an international criminal court. But it was wishful thinking in 1948. It was almost half a century before the first international criminal court was set up by the United Nations, for the former Yugoslavia. The first use in International Law of universal jurisdiction was, in fact, in the Geneva Conventions of 1949. As I have said, the Geneva Conventions had to be updated: the drafters and the plenipotentiaries who met in Geneva in 1949 realised that here, too, new war crimes needed to be recognised. They defined a new species of crime called 'grave breaches of the Geneva Conventions': the worst war crimes of all. They went on to hold that all countries that ratified the Geneva Conventions - today that is almost every nation of the world - have a duty to prosecute anybody suspected of having committed a grave breach of the Geneva Conventions. Further, they said that if a country cannot or will not prosecute and punish somebody committing a grave breach, that country has an obligation to hand the person over to a country that is willing and able to do so. Thus universal jurisdiction was for the first time recognised and made obligatory on all countries ratifying the Convention. The next use of universal jurisdiction, interestingly for me, was in respect of apartheid in South Africa. In 1973 the United Nations passed a convention that declared apartheid to be a crime against humanity, almost a completing of a circle between Nuremberg and apartheid in 1973. Universal jurisdiction was conferred by the United Nations Convention: it provided that any country ratifying the Apartheid Convention should bring to justice in their courts people guilty of the crime of apartheid, even though it was committed in South Africa. Unfortunately, neither Britain nor any other of the leading Western nations ratified that convention; had they done so,

they would have been obliged to arrest South African ambassadors, ministers - and probably business men and women who visited London to do very lucrative trade - and charge them with the crime of apartheid. It was predominantly African and Asian countries that ratified the Convention, and they were not very important to apartheid leaders or business people at that time. It is a matter for thought: had this convention been taken seriously by European and North American countries, and had South African politicians, diplomats and business people been unable to travel for fear of arrest, I have little doubt that apartheid would have died a good decade before it did. Sadly, that was not the thinking in the major capitals in those days, certainly not in the Western world. So although there was recognition of universal jurisdiction in the convention, there was never, to my knowledge, a single case of universal jurisdiction being used against a person suspected of committing the crime of apartheid. Universal jurisdiction was next used in 1984 in the Torture Convention. This was the convention that led to the arrest in England of General Pinochet when he was receiving medical treatment in a London clinic. And that, of course, started a whole new ball game. Many other oppressive dictators around the world began to have problems travelling. I remember reading that the former dictator of Indonesia, Suharto, cancelled medical treatment in Germany because he feared that a warrant of arrest under the Torture Convention might be awaiting him. Soon after the Pinochet affair, the dictator of Ethiopia had to flee South Africa, where he was receiving medical treatment, because Human Rights Watch in New York publicised that he was there. He feared arrest, and there have been many others in his position. It is fascinating that these oppressive dictators, who care nothing for the lives of the people under their care, always seek for themselves the best medical treatment; and it is always medical treatment that they have to run away from for fear of arrest. They also like holidays abroad and I think many former dictators - and present dictators - are now having to get both their medical treatment and their vacations at home to a much greater extent. That is a good thing, maybe not for travel agents, but I think for the world it is probably a healthy development. The

next use of universal jurisdiction was in the United Nations resolution that made provision for the War Crimes Tribunals for the former Yugoslavia and Rwanda. The United Nations Security Council assumed the right to create universal jurisdiction: suspects can be arrested under that statute wherever they may be found, and the Yugoslavia Tribunal has jurisdiction over crimes committed in any of the states of the former Yugoslavia. These crimes can be tried in The Hague - far from where the crimes were committed. A similar situation arose with regard to Rwanda: even if people who planned to commit the genocide in Rwanda in 1994 were subsequently found in Kenya or Uganda, they would be subject to justice in the War Crimes Tribunal sitting in Arusha, in Northern Tanzania.

One sees, then, the growing use of universal jurisdiction. Indeed, in the sixteen international conventions dealing with terrorism there is in all of them the use of universal jurisdiction. Many people, particularly in the United States, are surprised that of those conventions, fourteen anti-date the attacks of 9.11.2001. The earliest United Nations convention dealing with the scourge of terrorism comes from the 1970s, with regard to the hijacking of aircraft, the protection of international diplomats taken as hostages, the piracy of civilian ships, and so forth. There is in fact a plethora of United Nations conventions dealing with acts of terrorism, even in the absence of an agreed definition of terrorism within the international community.

As international use of universal jurisdiction increased, so too did domestic use. Famously, the Belgian parliament and judges took it upon themselves to give their courts the power to arrest and put on trial anybody committing war crimes, even if they had no connection with Belgium. They were not alone in this - there were other European countries with the same idea - but Belgium introduced it. This has now of course been amended by the Belgian parliament under threat from Washington, but it shows that there are various ways to deal with war criminals: international courts and domestic courts. Thus we in the international community are always grappling with two difficult questions: which are the appropriate courts, and what are the appropriate methods to deal with war criminals?

Added to development in international justice in regard to war crimes, was the growth of the idea of Humanitarian Intervention. It certainly came to the fore in respect of Kosovo. Humanitarian Intervention involves the use of military force, if necessary, to protect the lives of innocent civilians. Some very difficult questions obviously arose for pacifist organisations in consequence of Kosovo, because here was a case where I do not think anybody could question the motives of the NATO nations. The NATO members intervened in Kosovo for one reason only, and that was to protect the lives of innocent Albanian Muslim people who lived in this province of Serbia. There was no ulterior motive, there was no land, there was no oil, there was no trade; there was no interest at all for the United States, the United Kingdom, or any of the other NATO nations, other than the lives and safety of the people. By the time bombing started, over a million Kosovo Albanians had already been forced from their homes into refugee status, or had become displaced persons in their own province of Kosovo.

Kosovo raised a very difficult question as to the morality of using war to protect the lives of innocent people. The Swedish Prime Minister set up an International Investigating Committee - of which I was a member - to look into that and other questions. Our Committee included representatives of five continents, both lawyers and non-lawyers. We came to the unanimous conclusion that the intervention in Kosovo was illegal, because it did not have Security Council authorisation, but that it was legitimate or justified by the moral and political considerations that had led to intervention. Many people had difficulty following that - some people found it an oxymoron to declare an action legitimate yet illegal - but that was the conclusion that we reached and it has, I think, been generally accepted. It was accepted by the United Nations Security Council itself. Interestingly, after the Kosovo bombing had succeeded in putting an end to the ethnic cleansing - a horrible concept - of the Kosovo Albanians, Russia proposed a resolution in the Security Council condemning the bombing. That resolution was defeated by thirteen votes to two, which was a very strong expo facto justification, or acceptance at its lowest, of the NATO action in Kosovo. The Kosovo Commission set

certain thresholds. You see, the problem with unilateral action, or action without the Security Council, is who is to be the judge? In this case, it was the NATO powers - it was the democracies of Western Europe and North America - that took the decision; and you and I can probably live with those governments taking that sort of decision, at least some of the time. But if they have the right to take those sorts of decisions, other governments in less democratic parts of the world are also free, and who are we to say, 'what right have you to take that decision without the Security Council?' Of course, this was exacerbated by the war on Iraq earlier this year, when one nation, maybe two, effectively decided to make war on Salaam Hussein's Iraq: unilateral action without the Security Council. I must say - having been a party to the 'illegal but legitimate' conclusion on Kosovo - that to my horror, some leaders in London and in Washington tried to use the idea of 'illegal but legitimate' intervention to justify the war on Iraq. But, of course, what a huge difference there is between the motivation for the war on Saddam Hussein, and that in respect of Kosovo. Some leaders said, 'we are making this war to protect the people of Iraq,' but of course it simply was not true; it was a bad excuse that was not persisted in, and it was not persisted in because the people of Iraq did not welcome the United States or even the United Kingdom troops waving stars and stripes or union jacks. It was not humanitarian intervention at all.

One sees, then, a growing need for more definition, a need to look at whether International Law is coping. I do not think that International Law or any other law should be put above change or scrutiny, though it must not be change simply for the sake of change. Certainly, a number of bodies, including the International Committee of the Red Cross, are debating whether, in the face of international terrorism and the use of modern technology by a very few people, laws need to be changed. I will now say something of the difficulties and successes I have experienced through my work with the United Nations War Crimes Tribunals. The Tribunals got under way in a very slow and unsatisfactory fashion. My own appointment is possibly the best illustration of the problems. It came about in this way. The Security Council set up the Yugoslavia Tribunal in

May of 1993, and the judges were selected - through the interaction of the Security Council and the General Assembly - in September and October of the same year. Under statute, the Security Council has to appoint the Chief Prosecutor, and because this was regarded as being something new and important, the Security Council agreed that there would have to be consensus on their choice. Boutros Boutros-Gali was then the General Secretary of the United Nations - he nominated Venezuelan Attorney General, Ramon Escobar Salom as first Chief Prosecutor. Escobar Salom was appointed unanimously, but he informed Boutros-Gali that he could not come immediately because he was busy prosecuting a former President of Venezuela for fraud; he said he could not walk out in the middle of the trial, but it would finish in January. The trial did indeed finish in January - the former President was convicted and imprisoned - and Escobar Salom arrived in The Hague as the first Prosecutor. Three days later, however, he called Boutros-Gali to tell him that he had accepted an invitation to become the Minister of Home Affairs in Venezuela and was resigning as Prosecutor.

It was now January of 1994, some seven months had passed since the Tribunal had been set up, and there were eleven frustrated, angry judges with no work to do in The Hague. Between January and June of 1994, Boutros-Gali nominated eight people to be Prosecutor. Each one was vetoed by members of the Security Council. Russia vetoed five who came from NATO countries. The United States put up one of their people, an academic who happens to be a Muslim, and the United Kingdom vetoed him. That decision angered Muslim nations because they thought, rightly or wrongly, that the United Kingdom did not want a Muslim in that position. There were good grounds for having such a view with regard to the religious make up of the Balkans. Then, when the United Kingdom put up a Scottish lawyer, the Muslim countries vetoed him to punish the United Kingdom. One of the nominees put up by Boutros-Gali was Soli Sorabjee, the Attorney General of India, who would have made an outstanding prosecutor; unfortunately, Pakistan - which had a seat on the Security Council - vetoed the idea of an Indian holding that position.

Imagine the effects, I might say, on the victims. The victims of most terrible war crimes were buoyed-up when the Security Council set up the Tribunal: they thought, somebody is taking notice of our victimisation. Then there was no prosecutor for fifteen months because of political games, and there were political games being played by the members of the Security Council.

This, then, was the position in June of 1994, when a bright French judge suggested to the Italian President of the Tribunal that if they could find somebody with the support of Nelson Mandela, it would be impossible in the middle of 1994 for anybody to veto him or her in the Security Council. So they came to me. I was not particularly interested for good reasons. I knew nothing about Humanitarian Law and I was not an international lawyer. I had never prosecuted in my life, nor did I know anything about the Balkans. When the invitation came from Judge Cassese, I had no intention at all in taking it. But then two things happened, two important people in my life thought differently. One was Nelson Mandela, who said that it was very important I should do this - the War Crimes Tribunal was important and it was the first international position offered to a South African after our democratic election in the middle of 1994. He put a great deal of pressure on me, and he had as his great ally my wife, who thought it was a good idea to get out of South Africa for a couple of years as we had lived under heavy policy security. I really had no way of resisting a combination of Nelson Mandela and my wife, so I ended up taking the position. But you can see behind this process the real political games that went on, and the reason why, in my view, War Crimes Tribunals in International Courts should not be controlled by politicians. They are simply not going to work. If those sorts of games are also the manner in which decisions are taken as to where war crimes should or should not be investigated, then in my view, and I say it in all seriousness, rather do not have an International Criminal Court at all. In any event, the Tribunals began and I was fortunate in having outstanding advisors, and a wonderful Deputy Prosecutor from Australia, Graham Blewitt, without whom none of it would have happened. Tremendous support came from the United States in the beginning. Of

course, it is ironic now, but without the United States' economic, financial and political help, the Yugoslavia Tribunal would never have got off its feet; and, having got off its feet, would never have been as successful as it was. The same can be said for the Rwanda Tribunals. We did have successes. No human institution has only successes and no failures, but the Yugoslavia and Rwanda Tribunals have been successful in two important areas in my view One is that they have proved without any question that an International Criminal Court can work and can put on fair trials. I have heard no serious criticism relating to the fairness of the procedures adopted in The Hague or Arusha Tribunals. Second, and perhaps as important, is the fact that advances have been made in Humanitarian Law because of those Courts. Indeed, until those Courts began functioning the wonderful body of Humanitarian Law, which the International Committee of the Red Cross has been responsible for building-up over almost one and a half centuries, was never used; and if the law is not used it stagnates, it becomes worth little more than the paper on which it is written. But with the use of it in the Yugoslavia and Rwanda Tribunals the law advanced. For example, systematic mass rape became recognised for the first time as a war crime: though it was not referred to in any of the laws (which had been drafted by men, by the way, and I think that is the reason for it), rape has been held in the Rwanda tribunal in certain circumstances to constitute genocide. So there has been a huge advance in the law.

These successes were sufficient to galvanise the movement towards a permanent International Criminal Court. Again, it is ironic that it was the United States that led that movement. It was the United States that encouraged the Secretary General of the United Nations to call the meeting in Rome in June and July of 1998 for an agreement on the International Criminal Court. What changed, and it was a tragedy, was that the United States, under pressure from its own military, performed an about-turn. Instead of being the leading nation in favour of the International Criminal Court, the United States became an opponent; and when it came to the vote in Rome, the United States joined only six other countries, including Syria, China,

Qatar, Yemen and Israel, in opposing the Rome Statute. During the Clinton administration, they were not going to take active steps to undermine the International Criminal Court; and they signed, though they had no intention of ratifying the Rome Statute. But that, of course, has changed. When the Bush administration came into power, President Bush gave notice to the Secretary General that he was un-signing what President Clinton had signed, and that he was not going to sit by: his administration was going to take active steps to undermine the infant International Criminal Court.

Since then, the judges have been elected, and ninety-two countries have ratified the Rome Statute, so there is a critical mass of nations, including every member of the European Union, and certainly a strong majority of Commonwealth countries. But 'the jury is out'. I do not know whether that Institution is going to be successful in the face of opposition from the World's sole superpower. I am not un-optimistic. They have appointed an outstanding and very experienced Argentinian Prosecutor, Luis Moreno-Ocampo, who has built up a wonderful staff. He has already indicated publicly that the first investigations will be into terrible war crimes committed in the Democratic Republic of the Congo, a situation crying out for investigation. It is also a sensible place to start, politically; whether the decision was taken with that in mind I do not know - and if I did know I would not discuss it - but it is perhaps a good thing that the first investigations will be in a part of the world that the United States does not feel particularly threatened by. If it was in the Middle East, I think it would be a very different situation. Incidentally, since none of the relevant countries have ratified the Rome Treaty, the International Criminal Court does not in fact have jurisdiction over any war crimes committed in the Middle East.

I am an optimist and I have no doubt that there is a need, a crying need, for an International Criminal Court if war criminals are going to be put on trial. Let me end by saying that the most important aspect of international law - and I have referred to them indirectly already - are the victims. They are always forgotten. Politicians seem to put them at the bottom of the

agenda if they appear on it at all - when it came to those vetoes in the Security Council, nobody gave a thought to the victims. The victims are always people who are far away from your shores, people who look different to you, and who do not, therefore, seem to evoke the sympathy or even the interest of many people. One sees it even now in this present Iraq war: newspapers in the United States and in the United Kingdom are very precise about the number of their people who have been killed, yet I have not even seen estimates of the number of Iraqis, innocent Iraqis, who have been killed in this war. They simply drop off the agenda because they do not matter. I think this explains, also, how some of the horrors of war can be committed: because certain people do not seem to evoke our sympathy, they are somehow less worthy than our own. I do not think that some of these war crimes would be committed if these people are regarded as our equal and as deserving of equal rights.

What, then, are the issues facing us in the twenty-first century? As I have said, I am an optimist, but I am not a great optimist about stopping war. The twentieth century was a very bloody one. One thing I do know is that if war criminals are seriously hunted down and punished it can act as a deterrent. It will not work in all cases, but in some cases it will. It is like any criminal justice system, no different from that of your own country: the more efficient the legal justice system, the lower the crime rate; the less efficient the legal justice system, the higher the crime rate. I can see it being no different in the international community. If would-be war criminals truly feared arrest and punishment some of them would think twice. I will give one illustration in conclusion. In all of the three recent wars fought by NATO and/or the United States - in Kosovo, Afghanistan, and Iraq - great care has been taken to avoid civilian deaths. Kosovo was remarkable: in seventy-eight days of bombing, fewer than two thousand people were killed; quite remarkable having regard to the figures you heard earlier of 10:1 [the ratio of civilian deaths to deaths of members of the armed forces] in virtually every other war since the Second World War. Afghanistan was the same, to a lesser extent; there, daily statements were made by the United States' President and

military leaders, saying 'we are taking steps to protect innocent civilians, we are applying the Geneva Conventions.' And so, too, in Iraq, though mistakes and wrong decisions may have been made.

Were it not for war crimes tribunals and the publicity given to war crimes, I do not believe there would have been that attitude on the part of the Western nations with regard to the protection of civilians. Of course, it is not great comfort, because it is the oppressive dictators, not the democratic countries, that one worries about; but, certainly, in other wars, the democracies did not think twice about killing innocent civilians. In Vietnam 90% of the war dead were civilians, in Korea 54%. There was no thought given when dropping the atom bomb on Hiroshima. This is a change and it is a change that I have no doubt has been brought about by the existence of the war crimes tribunals, and the fear that leaders in the Western world - be they political or military leaders - have of being branded as war criminals. Public opinion is also changing and public opinion is important. That is the importance of groups like this, because your voices are heard. It is not only the Henry Dunants who make a difference - all of us, in our private lives and in our public lives, can make a difference.

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