

The Relationship Between the ICC and the Security Council: Challenges and Opportunities

MARCH 2013

On November 8, 2012, the International Peace Institute (IPI) and the Permanent Mission of Liechtenstein to the UN hosted a roundtable discussion on the relationship between the International Criminal Court (ICC) and the United Nations Security Council. The meeting brought together Security Council member states that are party to the ICC's Rome Statute and other states with an interest in the court's work. Additional members of the Security Council attended the lunchtime discussion with ICC Prosecutor Fatou Bensouda that followed.

This meeting note summarizes the ideas and suggestions that arose during these discussions. It was drafted by Till Papenfuss, then a policy analyst at IPI. The note reflects the *rapporteur's* interpretation of the meeting and not necessarily the views of all other participants.

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Executive Summary

Concrete action is needed to improve the UN Security Council's practice of referring situations to the International Criminal Court (ICC). This was the main message to emerge from a roundtable discussion on the relationship between the ICC and the Security Council held at the International Peace Institute (IPI) on November 8, 2012. Organized by the Mission of Liechtenstein to the UN and IPI, the event brought together Security Council member states that are party to the court's Rome Statute and a number of other states parties with a particular interest in the work of the court. A lunch discussion with ICC Prosecutor Fatou Bensouda also included other members of the Security Council.

During the meeting, a number of suggestions were made regarding ways in which the Security Council, the International Criminal Court, and member states could contribute to improving the relationship between the council and the ICC.

RECOMMENDATIONS FOR THE SECURITY COUNCIL AND ITS MEMBER STATES

- Devise a coherent accountability strategy, apply consistent standards, and articulate Security Council policy with regard to ICC referrals.
- Make use of the wide range of diplomatic tools at the council's disposal to buttress the court and enforce ICC arrest warrants.
- Use the council's powers to impose sanctions and asset freezes to induce cooperation by states.
- Stop imposing limitations on the ICC's jurisdiction, on the obligations of states to cooperate with the ICC, and on UN sources of funding for the court in referral resolutions.
- Refrain from endorsing amnesties in situations where crimes punishable under the Rome Statute appear to have been committed.
- Expand the Security Council's informal working group on tribunals and regularly hold open debates on peace, justice, and the ICC.
- Permanent members of the Security Council should avoid using the veto in situations where crimes punishable under the Rome Statute appear to have been committed.

RECOMMENDATIONS FOR THE INTERNATIONAL CRIMINAL COURT AND STATES PARTIES

- States parties should assemble a dedicated caucus to push the Security

Council to progressively improve its practice in the area of justice and accountability.

- The court itself should proactively engage with the Security Council—for example, through the court’s visits to New York.
- The court should invite the Security Council to visit to The Hague.

Background

As the principal organs responsible for the prosecution of the world’s worst war criminals and for the maintenance of international peace and security, respectively, the International Criminal Court and the United Nations Security Council share a complex and delicate relationship. However, this relationship need not be as complicated and fraught with challenges as it currently is, and the Security Council and others could do more to constructively engage with and support the ICC.

This report is based on the results of a roundtable discussion that was hosted by the Permanent Mission of Liechtenstein to the UN and the International Peace Institute on the relationship between the ICC and the Security Council at IPI’s Trygve Lie Center for Peace, Security & Development on November 8, 2012. The report does not reflect a consensus view of all participants; rather, it summarizes the various ideas and suggestions for action that were raised during the meeting. The event brought together Security Council member states that are party to the *Rome Statute of the International Criminal Court* and a number of other states parties with a particular interest in the work of the court. A lunch discussion with ICC Prosecutor Fatou Bensouda was open to all other members of the Security Council as well.

The roundtable discussion followed on the heels of the first-ever Security Council open debate on “Peace and Justice, with a Special Focus on the Role of the International Criminal Court” on October 17, 2012, which was convened by Guatemala during its presidency of the Security Council. The debate in the Security Council brought much-needed attention to this issue. Indeed, until this point, “the

relationship between the Security Council and the International Criminal Court [had] never been comprehensively discussed in the Council, despite the fact that ample experience has been accumulated on the interaction between the Council and the Court in their shared pursuit of peace and justice.”¹

The open debate in the Security Council was largely constructive and produced a wealth of ideas for improving the relationship between the ICC and the council. Surprisingly, the debate “did not produce many opposing views to the ICC, notwithstanding the fact that only seven of the 2012 Council members were states parties to the Rome Statute and that the AU has formally adhered to its request for an Article 16 deferral for President Omar al-Bashir of Sudan,” according to the Security Council Report.²

Building on the momentum of the open debate and the insights generated during the roundtable discussion at IPI, this report seeks to shed light on the key challenges in the relationship between the council and the ICC and to lay out practical steps to progressively improve this all-important relationship.

Key Challenges

The challenges in the relationship between the ICC and the Security Council are significant. Many of the key problems are rooted in the Security Council’s referral practice, which has placed a number of limitations on the jurisdiction of the court and on the sources of financing to pay for the ICC investigations. This practice subsequently has limited obligations of states to cooperate with the court in enforcing its decisions. These issues have been further exacerbated by the lack of follow-up support by the Security Council on the investigations it had mandated in the first place.

SECURITY COUNCIL REFERRALS

As in any court system, the ICC is limited to investigating situations within its jurisdiction. The ICC can investigate a case when a crime is committed in a state that is party to the ICC or if

1 United Nations, “Letter Dated 1 October 2012 from the Permanent Representative of Guatemala to the United Nations Addressed to the Secretary-General,” UN Doc. S/2012/731, October 1, 2012, available at www.un.org/Docs/journal/asp/ws.asp?m=S/2012/731.

2 Security Council Report, “The Rule of Law: The Security Council and Accountability,” Cross Cutting Report on the Rule of Law No. 2, New York, January 2013, available at www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/cross_cutting_report_1_rule_of_law_2013.pdf.

the person accused of committing the crime is a national of a state party. Article 13(b) of the court's Rome Statute, however, also vests the UN Security Council, acting under Chapter VII of the UN Charter, with the authority to refer situations to the ICC, including those where crimes were committed on the territory of non-states parties or by nationals thereof. To date, this is the only way to make ICC jurisdiction universal—i.e., extended to any state, whether it is an ICC state party or not.

The Security Council has twice used this power and referred the situations in Darfur and in Libya to the International Criminal Court. UN Security Council Resolution 1593 (2005) referred the situation in Darfur,³ and UN Security Council Resolution 1970 (2011) referred the situation in Libya.⁴ These two referrals were important milestones for the ICC. After a period of active opposition to the ICC by the United States, the 2005 Darfur referral represented a major policy shift by the US government. And, following the many difficulties arising from the Darfur referral, the Libya referral—and the speed with which it was adopted—was equally surprising.

However, Darfur and Libya were not the only conflict situations outside of the ICC's jurisdiction that the UN Security Council could have referred to the ICC. Israel's Operation Cast Lead in the Gaza Strip in 2009 and the government-led final offensive in the Sri Lankan civil war are select examples of situations where atrocity crimes may have been committed, but where the ICC did not have jurisdiction and the Security Council did not (but could have) used its powers to refer cases to the ICC.

The Security Council is a political body: its decisions are affected by its political nature, especially given the veto power of its permanent members. The decisions of the Security Council are often affected less by considerations of judicial purity and coherence than by factors relating to the conflict at hand. While selectivity may be a justifiable or inevitable stance from the point of view of the Security Council, this built-in bias has serious

implications for the perceptions of legitimacy and the integrity of the ICC.

LIMITATIONS OF JURISDICTION

Beyond the decision of whether or not to refer a situation to the ICC, it is important to consider how a referral is made. In its current practice, the Security Council has imposed certain conditions aimed at limiting and circumscribing exactly who is to be covered by the jurisdiction of the court. For example, in UN Security Council Resolution 1970 (2011) concerning the referral of the situation in Libya to the ICC the council

“Decide[d] that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.”⁵

While the ICC necessarily has jurisdiction over nationals from a state that is party to the Rome Statute, this language is intended to extend ICC jurisdiction to Libyan nationals, but exclude all other nationals of states that are not party to the Rome Statute. Thus, besides selectivity in its practice of referring cases to the ICC, here the Security Council also restricted the reach of the court. This is interpreted by some as a double standard undermining the credibility of the court.

The limitations on the jurisdiction of the court in Libya were a result of negotiations in the Security Council and seen as necessary to secure the political buy-in to be able to pass the referral resolution. Indeed, the reservations many states outside of the Rome Statute system have concerning the possible prosecution of their nationals by a foreign court and the implications for concepts such as sovereignty cannot be overstated.

However, it could be argued that the Security Council can only activate the Rome Statute as a whole, not selected parts of it. Article 13(b) gives the Security Council the authority to refer a

3 UN Security Council Resolution 1593 (March 31, 2005), UN Doc. S/RES/1593, available at www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf.

4 UN Security Council Resolution 1970 (February 26, 2011), UN Doc. S/RES/1970, available at www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf.

5 *Ibid.*, operative para. 6.

situation to the ICC, but does not imply any restrictions on the ICC's jurisdiction. The Office of the Prosecutor, therefore, might not feel bound by the restrictions included in Security Council resolutions. Given their questionable legal foundation, and despite having been included in the text of the Security Council resolutions, these exemption clauses might not withstand judicial scrutiny in later ICC court proceedings.

COSTS OF INVESTIGATIONS

A growing workload without concurrent budget increases is putting a strain on the ICC's finances. While the overall economic situation in countries around the world limits the availability of funds in general, the ICC faces an additional financial challenge. Security Council resolutions referring situations to the ICC stipulate that all costs resulting from the respective investigations be borne by the parties to the Rome Statute and voluntary contributions.⁶

Despite the language used in the referral resolutions, however, it would be possible for the United Nations to provide funding to the ICC. According to Article 17 of the UN Charter, the General Assembly is solely responsible for the budget of the United Nations and would thus not be bound by Security Council resolutions in terms of deciding on funding for the ICC. In addition to the responsibility of the General Assembly over UN budgetary matters, there are two provisions that specifically stipulate that United Nations funds can be allocated to the ICC.

The Rome Statute states that one of the sources for covering the expenses of the court shall be "funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council."⁷ This possibility was further codified in the *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, which states

"The United Nations and the Court agree that the conditions under which any funds may be provided to the Court by a decision of the General Assembly of the

United Nations pursuant to article 115 of the Statute shall be subject to separate arrangements. The Registrar shall inform the Assembly of the making of such arrangements."⁸

So far, however, no such separate agreement has been concluded and no decision has been taken by the UN General Assembly to allocate funds from the United Nations budget to the ICC. This lack of consideration has resulted in significant budgetary pressures on the ICC, as is frequently highlighted in statements by court officials at the meetings of the Assembly of States Parties.

LACK OF COOPERATION AND NON-ENFORCEMENT OF ARREST WARRANTS

One of the most important factors affecting the work of the ICC is the cooperation of states and enforcement by the Security Council. Because the ICC has no enforcement powers of its own, cooperation of states is the quintessential element that gives meaning to the court's decisions. The challenges of cooperation are multifaceted, involving the Security Council referrals, follow-up support by the Security Council, and practical support by both states parties and non-states parties in enforcing the court's decisions.

The referrals by the Security Council also narrowly define the requirements for states to cooperate with the court in a way that is analogous to the aspects of jurisdiction and financing. Security Council decisions referring cases to the ICC must be passed acting under Chapter VII of the UN Charter. As such, the decisions are binding for all UN member states. However, in the resolutions referring the situations in Darfur and in Libya, the council used its powers to oblige only the situation countries to cooperate with the court. While states that are party to the Rome Statute are by default obliged to cooperate with the court, the Security Council resolutions merely urged non-states parties to cooperate with the court, significantly limiting its potential effectiveness.

Follow-up action by the Security Council once a referral has been made is almost as important as the

⁶ See, for example, operative paragraph 8 in UN Security Council Resolution 1970.

⁷ UN General Assembly, *Rome Statute of the International Criminal Court*, July 17, 1998, Article 115(b).

⁸ UN General Assembly, *Relationship Agreement between the United Nations and the International Criminal Court* (August 20, 2004), UN Doc. A/58/874, Annex, Article 13(2). This agreement was approved by UN General Assembly Resolution 58/318 (September 20, 2004) and ICC Assembly of States Parties Resolution ICC-ASP/3/Res.1 (September 7, 2004). It is available at www.icc-cpi.int/nr/rdonlyres/916fc6a2-7846-4177-a5ea-5aa9b6d1e96c/0/iccasp3res1_english.pdf.

referral itself. When such follow-up support is not forthcoming, when the Security Council is not using the powers at its disposal to advance the cause of justice, the amount of progress the ICC can achieve when left to its own devices is very limited. The lack of progress in the situations in Darfur and Libya demonstrate these challenges in practice, particularly with regard to non-enforcement of arrest warrants. When Prosecutor Fatou Bensouda recently presented the sixteenth report of the ICC to the Security Council on the situation in Darfur, she expressed her frustration at the lack of support from the council: “My Office and the Court as a whole have done their part in executing the mandate given by this Council in accordance with the Rome Statute. The question that remains to be answered is how many more civilians must be killed, injured and displaced for this Council to be spurred into doing its part?”⁹

Opportunities and Strategies for Action

Concrete action is needed to enhance the working relationship between the ICC and the Security Council. Some measures require drastic changes to how the Security Council approaches its work on accountability and the ICC; other measures are procedural in nature and can be achieved in the short term. Combined, these will not only strengthen the ICC and further the cause of international justice, they will also clarify the policies of the Security Council and increase its leverage vis-à-vis the threat or actual use of international accountability mechanisms such as the ICC.

ARREST STRATEGIES

The area where the Security Council can arguably provide the most robust support to the ICC is the enforcement of arrest warrants. In the two situations that the Security Council has referred to the ICC, not a single person sought by an ICC arrest warrant has landed in the dock of The Hague.

The state of Sudan has defied the International Criminal Court regularly: not only has the

Sudanese government retained and in some cases promoted those leaders implicated in the commission of atrocity crimes in Darfur, but President Omar al-Bashir has also visited foreign countries, including some states parties who are legally obliged to enforce the ICC arrest warrants. A rare exception was the Republic of Malawi in 2012, which honored its obligations under the Rome Statute and publicly denied Omar al-Bashir entry, threatening his arrest and surrender to the ICC during an AU summit that was supposed to be held in Lilongwe.¹⁰

Libya is a more complicated case. Of the three suspects, Muammar al-Gaddafi was killed during his capture, and the two remaining indictees Saif al-Islam Gaddafi and Abdullah al-Senussi are in custody in Libya. Instead of surrendering them to the ICC, however, Libya has challenged the admissibility of the case against Saif al-Islam Gaddafi on the grounds that the state is willing to genuinely prosecute him itself. The same may yet happen in the case of Abdullah al-Senussi, who was surrendered to Libya by Mauritania in late 2012. While the admissibility challenge is being reviewed, the Office of the Prosecutor is suspending its investigation.¹¹

In both situations, the Security Council has mandated the ICC to prosecute those persons who bear the greatest responsibility for the commission of the gravest crimes. The Security Council has failed, however, to back up these initial decisions with concrete action to enforce the arrest warrants. Arresting high-profile political leaders accused of committing large-scale atrocity crimes is not trivial and can have serious political repercussions.

Given these risks and the huge importance of arrests for the perceived legitimacy and the actual functioning of the court, it is incumbent upon the Security Council to devise a clear strategy and announce its policy on supporting and enforcing ICC arrest warrants, including in those situations that were brought to the ICC by states themselves and those situations where the prosecutor initiated an investigation acting *proprio motu*.

⁹ Fatou Bensouda, “Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, Pursuant to UNSCR 1593 (2005),” speech delivered to the Security Council, December 13, 2012, available at www.icc-cpi.int/iccdocs/PIDS/statements/UNSC1212/UNSCDarfurSpeechEng.pdf.

¹⁰ ICC Assembly of States Parties, “Report of the Bureau on Non-cooperation,” ICC Doc. ICC-ASP/11/29, November 1, 2012, available at www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-29-ENG.pdf.

¹¹ ICC Office of the Prosecutor, “Fourth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant Resolution 1970 (2011),” available at www2.icc-cpi.int/NR/rdonlyres/C88D601E-E112-4E87-A162-AD530F467E64/285082/UNSCreportLibyaNov2012_english1.pdf.

Such a strategy needs to specify possible actions, such as authorizing and providing requisite capacities to UN peace operations to enforce arrest warrants. Furthermore, a strategy could outline a number of indirect measures that can increase the pressure on and constrain the freedom of movement of individuals indicted by the ICC. Targeted sanctions such as travel bans and asset freezes are examples of such measures. Finally, an arrest strategy can play an important forward-looking role in making clear exactly what kind of actions and obligations arise from referrals of situations by the Security Council to the ICC vis-à-vis the enforcement of arrest warrants.

SECURITY COUNCIL SUPPORT TO THE ICC

The challenges confronting the ICC go beyond the question of arrest warrants. There is an overall need for coherence in the Security Council's policies on questions of international accountability and the ICC. As the mandating authority—at least in the situations that it has referred to the ICC via Chapter VII resolutions—the Security Council is responsible for ensuring that the ICC is able to carry out its work. As was outlined above, concrete measures are possible to increase the number of arrests that are made on behalf of the ICC. Beyond arrest warrants, the council can make use of the wide range of diplomatic tools at its disposal—coercive and otherwise—to buttress the court.

For example, the Security Council can also use or threaten the use of sanctions and asset freezes to induce cooperation by states with the court in general and increase the pressure on persons accused of having committed atrocity crimes, including political leaders such as Sudanese President Omar al-Bashir. Such pressure can increase the compliance of states in supporting the work of the court, isolate the respective leaders, and thereby greatly increase the impact of the court's decisions. Furthermore, frozen assets can eventually be used to cover legal fees of defendants before the ICC and, later, to pay reparations to victims.

It is important to remember that the Security Council can wield its political weight in supporting the ICC. The members can use the council as a bully pulpit to support international justice efforts—the court of international public opinion can play an important role in efforts to end

impunity. Security Council support of international justice can go a long way in helping the ICC to succeed provided there is a credible threat of more robust action, a coherent political message, regular statements, and other political initiatives. To lend credence to these efforts, what the council does not do is also important. It should not endorse amnesties, and the permanent members of the council should refrain from using the veto in situations where crimes punishable under the Rome Statute appear to have been committed.

This will take a collective effort and commitment not only by the permanent and the non-permanent members of the Security Council, but also from the wider membership of the Assembly of States Parties to the Rome Statute. A particular responsibility lies with those members of the Security Council that are also states parties of the International Criminal Court. The Security Council presidency of Guatemala and the convening of the open debate on peace, justice, and the ICC is a good example in this regard.

As a final element, procedural changes can elevate the profile and streamline the work of the Security Council on matters of international justice. For example, the Security Council's informal working group on tribunals could be expanded to deal with the ICC, providing a forum and space for continuous debate on these issues. In addition, it would be possible for a new separate mechanism to be created to achieve this aim.

ACTION OUTSIDE OF THE SECURITY COUNCIL

Most of the recommendations in this report are targeted directly at the Security Council membership. However, a lot can be done “from the outside looking in” to make sure these recommendations are implemented. It is unlikely that they will be realized in the absence of a collective effort by all concerned parties, including civil society, states parties, and the court itself.

The role of civil society—in particular that of actors working together in the Coalition for the International Criminal Court (CICC)—in supporting and building up the court is well known and of unprecedented importance. This work must continue.

At the political level, a dedicated caucus of states

parties could be assembled to push the council to progressively improve its practice in the area of justice and accountability. This group would lead by example in advancing international justice and present a united political front in demanding more council support for the ICC, greater coherence in the council when addressing accountability, and non-use of the veto with regard to atrocity crimes.

Finally, the court itself can influence its relationship with the Security Council. It can proactively engage the Security Council and, for example, use visits to New York and the UN Security Council as opportunities for dialogue to advance the ICC agenda. Furthermore, the court could invite the Security Council to The Hague, possibly within the framework of a joint invitation from the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia, or upon invitation of the Netherlands as the host state.

Conclusion

In its ten short years of existence, the court has come a long way and established itself as a key institution in international affairs. There is a growing consensus that impunity in the face of atrocity crimes is no longer acceptable and that political leaders who are responsible for these crimes get punished accordingly. But the ICC, which fundamentally challenges core tenets of international relations and established paradigms,

and which is seen by many as biased towards Africa, is not uniformly welcome. On the contrary, suspicion of the ICC persists and a minority of countries (representing a majority of the world population) remain outside of the Rome Statute system. Thus, the ICC and the cause of international criminal justice have become both a mainstream phenomenon and a source of controversy and disagreement.

This tension is on regular display in the UN Security Council, which has a uniquely ambiguous relationship with the ICC. The challenges characterizing the relationship between the ICC and the Security Council need to be taken seriously and have to be addressed one by one.

However, growing acceptance of international justice and constructive engagement with the court, as displayed during the Security Council open debate on peace and justice, give reason to hope that improvements will be made. After all, a more coherent Security Council strategy on accountability, for example, would not only benefit the ICC: it could also clarify the conditions under which the Security Council refers situations to the ICC and, importantly, when it does not do so, and why.

Ultimately, only a collective, constructive, and sustained effort and continuing dialogue involving all stakeholders will produce the much-needed improvements in the relationship between the ICC and the Security Council identified in this report.

Agenda

The Relationship Between the ICC and the Security Council: Challenges and Opportunities

November 8, 2012

09:00 – 09:15

Breakfast and Welcome

Francesco Mancini, *Senior Director of Research, International Peace Institute*
Christian Wenaweser, *Permanent Representative, Permanent Mission of Liechtenstein to the United Nations*
Tiina Intelmann, *President of the Assembly of States Parties to the International Criminal Court*

09:15 – 10:45

Session 1: The ICC and Other Accountability Mechanisms as Tools for the Security Council

In what situations should the Security Council employ accountability mechanisms, in particular referrals to the ICC? When making referrals, how should the council best deal with associated issues (e.g., financing of Security Council–mandated investigations, exclusion of individuals from non–states parties, cooperation by non–states parties with the ICC)? Should the council prepare for the possible activation of the court’s jurisdiction over the crime of aggression? Is there action by the council that can precede, complement, or replace a referral to the ICC? What other accountability tools are available to the Security Council? Is there a role for other actors (e.g., regional organizations, high-level UN officials, individual states)?

Chair

Gert Rosenthal, *Permanent Representative, Permanent Mission of Guatemala to the United Nations*

Presenters

Richard Dicker, *Director, International Justice Program, Human Rights Watch*
Lori Damrosch, *Henry L. Moses Professor of Law and International Organization, Columbia University*

10:45 – 11:00

Coffee Break

11:00 – 12:30

Session 2: Follow-Up Action, Generating Diplomatic Support

What is the role of the Security Council in the effective follow-up to accountability processes, such as ICC referrals (e.g., diplomatic support, ensuring cooperation with the ICC, execution of arrest warrants, possible mechanisms within the Council)? Is there a role for other actors (e.g., regional organizations, high-level UN officials, individual states)?

Chair

Bruno Stagno Ugarte, *Executive Director, Security Council Report*

Presenters

Tiina Intelmann, *President of the Assembly of States Parties to the International Criminal Court*

Prince Zeid Ra'ad Zeid Al-Hussein, *Permanent Representative, Permanent Mission of Jordan to the United Nations*

13:00 – 14:45

Working Lunch: The Court's Perspective on the Relationship Between the Security Council and the ICC

Keynote Speaker

Fatou Bensouda, *Prosecutor, International Criminal Court*

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