THE BRAZILIAN TRANSLATION FOR “RAPE” IN THE ARTICLE 7 “G” OF THE ROME STATUTE

A TRADUÇÃO BRASILEIRA PARA “RAPE” DO ARTIGO 7 “G” DO ESTATUTO DE ROMA

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ABSTRACT
This article analyzes the Brazilian translation of the crime “rape,” contained in article 7(g) of the Rome Statute, established in Brazilian law by the Executive Decree n. 4.388/2002 as “agressão sexual.” First, the contrast between these two expressions reveals a difference in their semantic field. Second, this study indicates the essential aspects of Brazilian criminal law when the Rome Statute was internalized. At that moment, the definition of rape in Brazil was applied only to male conduct against women and strictly described the possible behaviors that fit that definition. Given these differences, this article reflects on the behaviors described by the Brazilian translation. It also uses the Case Akayesu, which took place at the International Criminal Tribunal for Rwanda, and the identification of rape and genocide, as a comparative and interpretative theoretical tool to highlight the limitations and challenges of Brazilian criminal law relating to gender and sexual crimes.

Keywords: rape, genocide, crimes against humanity, Brazilian Criminal Code, Rome Statute.

RESUMO
Este artigo analisa a tradução brasileira do crime “rape”, constante do artigo 7º, alínea g, do Estatuto de Roma, instituído no direito brasileiro pelo Decreto Executivo n. 4.388/2002 como “agressão sexual”. Primeiro, o contraste entre estas duas expressões revela uma diferença no seu campo semântico. Em segundo lugar, este estudo indica os aspectos essenciais do direito penal brasileiro quando o Estatuto de Roma foi
internalizado. Naquele momento, a definição de estupro no Brasil era aplicada apenas às condutas masculinas contra as mulheres e descrevia estritamente os possíveis comportamentos que se enquadravam nessa definição. Dadas essas diferenças, este artigo reflete sobre os comportamentos descritos pela tradução brasileira. Também utiliza o Caso Akayesu, ocorrido no Tribunal Penal Internacional para Ruanda, e a identificação de estupro e genocídio, como ferramenta teórica comparativa e interpretativa para destacar as limitações e desafios do direito penal brasileiro relativos a crimes de gênero e sexuais.

Palavras-chave: estupro, genocídio, crimes contra a humanidade, Código Penal Brasileiro, Estatuto de Roma.

RESUMEN
Este artículo analiza la traducción brasileña del delito “violación”, contenido en el artículo 7, inciso g, del Estatuto de Roma, establecido en la legislación brasileña por el Decreto Ejecutivo n. 4.388/2002 como “agresión sexual”. En primer lugar, el contraste entre estas dos expresiones revela una diferencia en su campo semántico. En segundo lugar, este estudio señala los aspectos esenciales del derecho penal brasileño en el momento de la internalización del Estatuto de Roma. En ese momento, la definición de violación en Brasil se aplicaba sólo a la conducta masculina contra las mujeres y describía posibles comportamientos que se ajustaban a esta definición. Dadas estas diferencias, este artículo reflexiona sobre los comportamientos descritos por la traducción brasileña. También utiliza el Caso Akayesu, ocurrido en el Tribunal Penal Internacional para Ruanda, y la identificación de violación y genocidio, como herramienta teórica comparativa e interpretativa para resaltar las limitaciones y desafíos del derecho penal brasileño en materia de género y delitos sexuales.

Palabras clave: violación, genocidio, crímenes de lesa humanidad, Código Penal brasileño, Estatuto de Roma.

1 INTRODUCTION

In Article 7, the Rome Statute (1998) sets out the criminal behaviors considered crimes against humanity, subject to trial by the International Criminal Court (ICC). Among such conduct, the authoritative English version addresses what we usually call “crimes against sexual dignity.” These include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. In turn, on September 25, 2002, the Brazilian Federal Administration published the Executive Decree n. 4.388 and internalized the Rome Statute in its entirety, bringing the following translation: sexual assault, sexual slavery, forced prostitution,
forced pregnancy, forced sterilization, or any other form of violence in the sexual field of comparable severity.

The mere comparison between the two excerpts transcribed above is enough to reveal only one of the countless differences between the Brazilian Portuguese translation and the original in English. Furthermore, the current Anglo-Saxon and legal usage of the term “rape”¹ indicate common core meanings. Why would the Brazilian text choose the expression “sexual aggression” as a defining category of the criminal legal framework?

Given this difference, delimited, apparently simple, and located in the order of language and discourse, this article presents reflections on the possible translation criteria used by the Brazilian Administration when it presented the institute of “sexual aggression” and potential legal consequences arising from it.

2 TRAJECTORY OF THE TERM “RAPE” IN THE BRAZILIAN CRIMINAL LAW

2.1 LEGAL FRAMEWORK AND THE CRIME OF RAPE

On September 25, 2002, during the internalization of the Rome Statute in Brazilian law, the national Criminal Code had already determined that rape was a biproprium crime – that that could only be committed by a male and only be suffered by a female.

Furthermore, any criminal conduct relating to rape was limited to carnal conjunction through violence or serious threat practiced by a man against a woman. In this regard, it should be noted that the terms under which this crime was then placed were consistent with the spirit of the first version of the Criminal Code, which entered Brazilian law through Decree-Law no. 2,848 on December 7, 1940.

The text put into operation already started from the premise that crimes of this kind could only: i) be incarnated by a man against a woman, which excluded possible

¹ According to the electronic version of the Concise Oxford English Dictionary (11th electronic edition), here are the entries for the verb “rape:” Verb 1. (of a man) force (another person) to have sexual intercourse with him against their will. 2. spoil or destroy (a place). Noun an act or the crime of rape. (Emphasis added).
forms of similar violence practiced by a man against another man and cases of criminal practice in a similar operative way of women against man and woman against woman; ii) be practiced in a specific way, such as through the penetration of the female sexual organ by the male sexual organ, which should happen by violence or severe threat.

Here is the law at that time:

Art. 213 - To constrain women to carnal conjunction through violence or serious threat:

Penalty - imprisonment, from three to eight years

Single paragraph. If the victim is under the age of fourteen: (Included by Law No. 8.069 of 1990)

Penalty - imprisonment, from six to ten years

As a first comparison, see the current wording regarding rape:

Art. 213. To constrain someone, through violence or serious threat, to have carnal conjunction or to practice or allow another libidinous act to be practiced with him:

Penalty - reclusion, from six (6) to ten (10) years

§ 1 If the conduct results in bodily injury of a serious nature or if the victim is under eighteen (18) or over fourteen (14) years:

Penalty - imprisonment, from eight (8) to twelve (12) years

§ 2 If the conduct results in death:

Penalty - imprisonment, from twelve (12) to thirty (30) years

It is true that conducts not subsumed under the revoked norm – which expressly mentioned carnal conjunction and then should be resolved, under penal perspective, with other criminal law frameworks – suggests a critical line of penal dogmatics aimed at investigating the reasons that led to the restriction of the legal nature of the crime of rape to the condition of biproprium. This same critical approach should also inquire about the reasons why such a restrictive description of rape was sustained untouchable by the parliament and insistently confirmed by the Brazilian Courts until recent years. Anyone who turns to the circumstances that specify the field of theoretical production in the zetetic disciplines of law finds, without greater difficulty, the strong vein of criticism of
heteronormativity that characterizes every corner of Brazil where power can be exercised in any form.

It is worth noting the ways of attributing meaning to the conducts that orbit penetration, which the law until then considered sex itself, serve as a reference for delimiting the criminal frameworks. As a matter of comparative law in the international field, one can speak of freedom of transit in criminal law. Examples include rape and sexual assault. As observed in the practice of international courts, the expression here is only capable of receiving or being adjusted to the possible meanings that social circumstances give them.

The exact difference between the Brazilian criminal law that was previously in force and the one that is now in power can also be seen if the axis of debate is shifted to crimes of sexual violence, including penetration, which is the central nucleus of the revoked typology of rape – committed against children. In the case of the 1940 Brazilian law, this included female adolescents and children.

In the Criminal Code, as it was first created, the conduct of rape evoked the application of a qualifier for cases in which the victim was under 14 years old. Under the terms in which the law was in force, the magistrate should consider the minor victim's personal circumstances and establish the starting point for calculating the base penalty, observing Articles 59 et seq. of the Code, which is currently enforced.

However, in a very different way, the conduct currently configures a kind of rape of the vulnerable, the type whose command is given by Article 217-A of the Criminal Code, inserted by Law n. 12,015 / 2012, with an increase in its Paragraph 5, which was inserted by Law No. 13,718, 2018:

Article 217-A. Having carnal conjunction or performing another libidinous act with a child under fourteen (14) years old:

Penalty - imprisonment, from eight (8) to fifteen (14) years

§5 The penalties provided for in the caput and §§ 1, 3, and 4 of this article apply regardless of the victim's consent or the fact that she had sexual relations prior to the crime

In addition to naming the crime, even giving it a different topic, that is, a new
geographical position in the Code, the transcribed alteration innovates in terms of repercussions in the penalty calculation. The Brazilian three-phase system of penalty distribution attracts the regular regime for calculating the judicial, aggravating, and mitigating circumstances, and finally, the causes of increasing and decreasing the sentence, as provided for in the codified and extravagant legislation.

Thus, given the transcribed text, the criminal justice system achieved gains quantitatively and qualitatively. In the first case, because the legislator managed to include a more comprehensive list of critical criminal types, which also means encompassing various factual circumstances with violent contexts under analytical judgment. This includes violence against other vulnerable groups, such as children. Thus, it is not difficult to see that the law received the new Article 215-A with the insertion of recent crimes in 2018, inserted by national law 13.718, which deals with sexual offense and responds to different human conduct, which affronts sexual dignity and until then had no effective penal response. In these cases, it is certain that the repressive and preventive functions of criminal law, at least in this matter, were reinforced and expanded in the fold between the factual and the legal world, its area of action.

In the second case, regarding the qualitative dimension, the criminal law that incriminates conduct of aggression against sexual dignity produces a more nuanced criminalization framework and, at the same time, is coherent with the expansion of the area affected by this penal field. Regarding both quantitative and qualitative perspectives of sexual dignity, the criminal justice system achieved an incriminating typological expansion, and at the same time, deepened and densified the internal coherence of its protective-repressive system through a simple but very effective mechanism of distinction between institutes that is, through the outline and nuances of these same institutes.

Such innovations in criminal matters also affect the fundamental rights enshrined in Article 5 of the Brazilian Constitution, such as material equality, liberty, the prohibition of torture, inhuman and degrading treatment, intimacy, etc. In a progressive constitutional reading, legal changes in matters of sexual dignity occurred following the Constitution in a genuine process of entropy. In the face of such advances, it is no longer possible to go back because reducing the protection of life transmuted into sexual dignity would necessarily mean reverting crucial fundamental rights achievements.
The Brazilian legislature has taken many steps to get it to the present moment. In turn, the Brazilian state has frequently interrupted the cycle of care which addressed issues related to sexual violence of all kinds. In this sense, it should be noted that in February 2019, the Federal Supreme Court judged the direct action of unconstitutionality by omission n. 26, which aimed the omission of the federal parliament in combating the most varied forms of homophobic aggression. As a result, the Court decided that any homophobic-motivated aggression must be considered a criminal offense according to the Law n. 10.639/2003, the law to prevent and punish racial discrimination. A progressive movement, certainly, which must be further complemented by a parliamentary initiative to address especially crimes of homophobia.

Nevertheless, the changes that have already been perfected and those to be implemented indicate another criminal legal framework about sexuality and crimes of sexual violence. Therefore, it is a new state of legal art that needs to be analyzed separately.

2.2 DIFFERENT MEANINGS FOR “RAPE”

In contrast to the authoritative version of the Rome Statute, the Brazilian criminal law in force when that instrument was internalized described a more restricted criminal conduct than the expression “rape.” As we have seen, Brazilian law limited rape to a male penetrating a female’s sexual organ, practiced with the conscious will and aimed at satisfying the desire or libidinous impulse of the active agent of the crime.

However, it is different outside of Brazil. A wider circle of forms of sexual violence is consistent, in foreign and international law, with the current definition of rape. In this sense, it should be noted that the regulation and resolution of civil and military conflicts is one of the precious objects of international law, whose existence resides precisely in the specific need to consider another. In such contexts of greater or lesser hostility, the heteronormative code reigns according to which the female body is the spoil of war. Sexuality, measured in the female body, is also turned into a space sparked by disputes over meaning that vary in hue but are often shamefully related to male domination.
In the case of ethnic and racial conflicts, such forms of domination gain prominence and operate as distinctive mechanisms of social segregation and the ultimate goal of reducing, suffocating, and eliminating a specific group. Thus, the term “rape” can, and in the context of crimes against humanity, should be read as encompassing a set of criminal conduct that includes rape as a crime bicommon – possible to be committed and suffered by men and women.

The topological situation and the semantic formation of the Rome State Article 7 point “G” also suggest the broader and nuanced treatment of crimes against sexual dignity, listed at that convention as a crime against humanity. Let us consider the original, followed by the translation:

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
   [ ... ]
   (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

1. For the purposes of this Statute, "crime against humanity" means any of the following acts, when committed in the framework of an attack, general or systematic, against any civilian population, with knowledge of such attack:
   [ ... ]
   g) Sexual assault, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, or any other form of sexual violence of comparable severity.

(emphasis added).

Considering the text above, we can derive two common denominators capable of giving some sense of unity to the nuclear verbs of paragraph “G.” The first one, worth repeating, is that the criminal conducts described then injure a specific good in life, comprising sexual dignity and materiality in personality rights that include physical integrity, intimacy, image, freedom of choice, and going and coming. The second is in the main section – hence the relevance of a topological reading of the “rape” institute, which cannot be neglected. The head of the article opens a list of crimes against humanity. This same caput offers cogent elements that must be faced to improve the offenses listed in the norm. Such conjunctive, or cumulative, requirements are i) when committed in the framework of an attack, generalized or systematic; ii) against any civilian population, and iii) knowing this attack.
After all, it appears that the rule in the Statute requires circumstances of considerable specificity, which can be considered better if confronted with cases given by reality, the subject of our next topic.

2.3 OUTSIDE PERSPECTIVE: THE AKAYESU CASE

Cases involving systematic human rights violations do not choose a place or time. On the contrary, in the more delimited and intimate relationships of domination, distinct and subtle forms of disregard for the dignity of the human operate. On the other hand, in a particular place and at a specific time, such violations acquire such a systematized form, forming a set of quantity and specificity that their realization prefigures the most radical form of violence. These cases of genocide and crimes against humanity are treated with particular importance by the Rome Statute. Despite or because of the violence involved, they serve as a reference framework for reflections on the legal action policies of international law.

For this case, namely, the possible meanings of the crime “rape” and the place of this institute within the scope of international criminal law, our most careful attention deserves the content of the decisions handed down by the ICC for Rwanda in the Case Akayesu, on September 28, 1998, as well as the appeal that occurred on June 1, 2001. In the statute of that court, the crime defined as “rape” integrates the list of crimes against humanity and, compared to the genocide in Rwanda that occurred in 1994, is of particular importance. In that same trial, the magistrates were careful to assess the use of discriminatory expressions certain to Kyniarwanda, a Rwandan language, used in the killing of Tutsis by Hutus.

Thus, criminal conduct encompassed by “rape” participated in the context of the elimination of a specific ethnic group, the Tutsis, and implied the conscious desire for ethnic extinction as a particular purpose. For example, consider this excerpt of the decision rendered in the first instance:

731. With regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that, in its opinion, they constitute genocide in the same
way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

Furthermore, the statements taken by the court indicate that the notion of “rape” also added other forms of violation of the body and practices of the sexual connotation that transcend the carnal conjunction, including using the same objects used for exterminating Tutsis. Systematic rape, as a form of general violation and extinction of predetermined groups, was nothing new during these trials. The violence practiced in the Balkans in the early 1990s resonated, in a way, with the Rwandan genocide, which lasted no more than three or four months and resulted in the deaths of more than 800,000 people. Therefore, looking only at fragments of recent history, we already have the material used to create the Rome Statute. In that sense, the ICC must be seen as the first permanent court in line with the historical process that has shaped the court ad hoc installed during the 20th century.

2.4 REASONS FOR THE TRANSLATION

Admitting this premise, it is not an exaggeration to recognize that the rape expression listed in Article 7 of the Rome Statute, which includes crimes against humanity, alongside criminal conduct of a sexual connotation, means more than the type of rape provided for, at that time, by the Brazilian Criminal Code and carries a plus scope and effects.

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Having read the moment, we conclude, precisely from this contrast, that Brazil opted for the expression “sexual assault” because it is more comprehensive than the type in the now repealed Article 213 of the penal diploma and believed it was adequate to meet with other expressions of item "G" of Article 7 of the Convention, which results in the optimal translation of the Rome Statute.

It should also be verified that the translators above don’t identify themselves, _stricto sensu_, with the national legislator. This is because, as a rule, the processing of international conventions is filtered by the Ministry of Foreign Affairs, which means the adjustment of its terms in two moments: i) eventually when the dispute is in an international forum during the negotiation of the terms of the treaty with other countries; ii) indeed, before the submission of the text of the treaty, by the Civil House, to the National Congress, for approval, under Article 49, I, of the Constitution of the Republic.

On the other hand, we have the figure of the national legislator, who sits in one of the seats of the Congress and whose cognitive process is not to examine the text in question from a comparative perspective of the linguistic aspects and legal consequences of the treaty that was now signed and whose approval was then submitted to the two Houses.

This is also relevant data because it poses the following scenario. If, as understood by the international majority publicist doctrine, Brazil adopts the moderate dualist current, which requires a simple executive act to bring the treaty norms to the national order already ratified, and even before that submits this treaty to the approval of the Legislative Power, under the constitutional terms, these same powers are still limited to the terms ratified in the signing of the treaty and to the translations that the Ministry of Foreign Affairs forged in detail. Given that, it does not diminish but only adds richness and success to the body of the work of the treaties to which Brazil is a signatory.

Subsequently, following the analysis, the Brazilian legislator innovated and amended the same section of the Criminal Code with the following wording:

Rape

Article 213. To constrain someone, through violence or serious threat, to have carnal conjunction or to practice or allow that with him if another libidinous act is performed:
Penalty: imprisonment, from six (6) to ten (10) years.

§ 1. If the conduct results in bodily injury of a serious nature or if the victim is under eighteen (18) or over fourteen (14) years:

Penalty: imprisonment, from eight (8) to twelve (12) years.

§ 2 If the conduct results in death,

Penalty: imprisonment from twelve (12) to thirty (30) years

In fact, if Law n. 12.015/2009 removed the gender barrier that limited men to the condition of the potential active subject of the crime of rape, the same law did not change the other elements of the criminal legal framework. Therefore, no specific purpose can be inferred from it, other than the actual libidinous act. “Sexual assault” was in a different position in the Brazilian translation of the Statute, which can now cover the most different conducts of sexual violence, other than those described in the same paragraph "G." In fact, this is a residual legal framework scope. In a way, it clashes with the Brazilian penal legislative technique because it obscures, does not clarify, makes imprecise, and does not delimit, which are the factual conducts subject to the subsumption of this norm.

Given this vacuum, there is no reason to identify it as a criminal standard blank because the Rome Statute, particularly Article 7, is a direct rule - an immediate effect on the conduct appreciated by the Criminal Law. In the homeland doctrine, there has been no scathing criticism so far, indicating that in this case, the principle of the legal reserve has been mitigated far beyond the count so that the homeland legislator cannot correctly apply the type of “criminal aggression.” It would be necessary to submit a decree that incorporates the Rome Statute to alteration through a new executive order with the explicit correction of the term, changing it to a new one.

On the other hand, it is necessary to consider the geographical position of the sexual assault provided for in the Rome Statute. Placed alongside sexual slavery, forced prostitution, forced pregnancy, forced sterilization, or “any other form of violence in the sexual field of comparable gravity,” a micro-systematic reading of the institute indicates that such conduct is included in a list of other crimes against sexual dignity.

Furthermore, from a linguistic perspective closer to the authoritative English version, it is essential to note that the words used to define behaviors such as “forced
sterilization” indicate specific purposes – and, therefore, intentions – intended to cover the aggression of an excellent legal collective that transcends the sexual dignity of the victim.

Furthermore, by expanding a little on the systematic and topographical reading that we make of “sexual aggression,” we find that it is situated in the extensive list of crimes against humanity, all of which are subject to the caput of Article 7. Such behaviors are types of crimes against humanity because they necessarily require the words in comparison, namely, “rape” and “sexual aggression,” to be re-dimensioned.

4 CONCLUSION

In the background of the current Brazilian model for receiving international treaties, language is the standard fabric where the international and national orders of discourse meet. The issue can then be conceived with two different approaches: one that takes as its primary object the linguistic signs materialized in the text, in this case, the terms “rape” and “sexual aggression;” another, which takes as its principal object the discursive places where these signs are produced and where they are destined.

First, it appears that the friction between the terms “rape” and “rape” produces a regular linguistic noise, which the observer who is located within the Brazilian legal system will feel some lack and the necessary limitation that the principle of reservation law imposes on the reading that is set on the criminal type of rape. Likewise, it is noted that the friction between the terms “rape” and “sexual aggression,” the latter adopted in the Brazilian translation of the Rome Statute Article 7 paragraph "G," produces, on the contrary, a noise that announces the excessive expansion, and vagueness, of the Brazilian text.

In practice, this means that the possible commission of a crime against humanity, with systematic attacks characterized by conducts of sexual violence and conducts residual to the other types described in subparagraph "G" of Article 7, will pose an obstacle to criminal repression within the limits of Brazilian jurisdiction. This is because, as we have seen, precisely the residual character of the term “sexual aggression” means an offense to the principle of the legal reserve.
Furthermore, according to the preamble of the Rome Statute, it should be noted that the jurisdictional competence of the ICC is complementary. In other words, the ICC has jurisdiction when the performance of the national jurisdiction of the signatory countries of its charter is insufficient. In taking this unavoidable command, Brazil already offers inadequate protection under the terms of the treaty because it fails to provide the bodies of its judiciary with judges throughout the national territory, notably those of the Federal Justice, competent to prosecute crimes provided for in convention of which Brazil is a party and have the tools necessary to carry out the repression of crimes against humanity provided for in that Statute.

Such conclusions take us to a second plane, namely, that of discursive places. It is often said that the time of diplomacy and the time of recipients of diplomatic activity are different. The former is more extensive because it obeys a macro-structured order of events combined with varying codes of communication and international dynamics, each distinct. This is more accelerated because it is stuck to the ground of life where it takes place without holding back because of the conventions that are made in distant places. On the other hand, language is the standard repository in which codes harmonize or clash, or its issuers bring and deliver news to different discursive locations, whose progress obeys more local internal time than universal.

Thus, the Brazilian discursive place is different. It has produced for specific categories of criminal types the third generation of Criminal Law, with faster and shorter procedures. For example, systems and quicker and sharper for crimes such as money laundering and drug trafficking. On the other hand, it has not yet had the time to take care of the nuances that crimes against humanity and genocide require, even failing to notice the contours that such behaviors acquire in very specialized Brazilian social relations. Therefore, the treatment not given to the crime of “rape,” inscribed in Article 7, point "G," of the Rome Statute is just the beginning.
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