

## **Comentarios y aportes a la versión revisada de fecha 23 de julio del borrador de Declaración a ser adoptada en la Reunión de Alto Nivel para hacer frente a los grandes movimientos de refugiados y migrantes que tendrá lugar el 19 de septiembre de 2016**

Excelencias,

Las organizaciones firmantes saludamos la creación de un espacio de diálogo en el marco de las Naciones Unidas en relación a los desafíos que plantean las migraciones internacionales en el mundo actual. Frente a estos desafíos la comunidad internacional debe desarrollar respuestas dirigidas a respetar, proteger y garantizar los derechos humanos de las personas migrantes y refugiadas.

Nuestras contribuciones a este proceso, y en específico al borrador de la Declaración a ser adoptada en la Reunión de Alto Nivel, se basan justamente en nuestra larga experiencia de trabajo en materia de derechos humanos de las personas migrantes y refugiados no solamente en Argentina, sino también a nivel regional e internacional<sup>1</sup>.

En este sentido consideramos esencial que los siguientes tres puntos constituyan el marco de esta Declaración:

### **1. LOS DERECHOS HUMANOS Y LA RESPONSABILIDAD ESTATAL COMO EJES CENTRALES DE LA DECLARACIÓN**

Los Estados miembros de Naciones Unidas y la comunidad internacional han logrado un consenso internacional con respecto a la dignidad intrínseca de todas las personas, sin ninguna distinción frente al goce de sus derechos humanos<sup>2</sup>. La normativa internacional establece que los Estados tienen la obligación de respetar, proteger y garantizar<sup>3</sup> los derechos humanos de todas las personas que se encuentren bajo su jurisdicción<sup>4</sup>. Por ello que es fundamental que la Declaración a ser adoptada esté fundamentada en los principios y normas del Derecho Internacional de los Derechos Humanos.

Si bien el borrador en discusión contiene referencias al derecho internacional de los derechos humanos, es imprescindible que su referencia también esté en el preámbulo de la Declaración. Como mínimo, debería contar con una cláusula introductoria que determine el alcance de los términos de esta declaración, que podría estipular: "los Estados reafirman que están obligados a respetar, proteger y garantizar los derechos humanos de todas aquellas personas que se encuentren bajo su jurisdicción". **Para ello, además de los cambios de redacción abajo detallados, sugerimos que el parágrafo 1.14 se convierta en párrafo 1.4 y el 1.12 en párrafo 1.5.**

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<sup>1</sup>El Centro de Estudios Legales y Sociales (CELS) trabaja con la promoción y protección de los derechos de los migrantes desde 1990. Este trabajo es hoy desarrollado por medio del litigio estratégico, investigación e incidencia en políticas públicas en Argentina y en los órganos internacionales y regionales de derechos humanos (la Comisión Interamericana de Derechos Humanos, los Comités de Tratados, Procedimientos Especiales, etc). El CELS ha participado, entre otros procesos regionales e internacionales, en la realización de aportes a los *Principios y Directrices Recomendados sobre los Derechos Humanos en las Fronteras Internacionales* del Alto Comisionado para los Derechos Humanos de las Naciones Unidas. La Comisión Argentina para los Refugiados y Migrantes (CAREF) es una asociación civil que trabaja por los derechos de las personas migrantes, refugiadas y solicitantes de asilo desde 1973. Para ello brinda servicios profesionales de asesoramiento, orientación, capacitación y asistencia social y jurídica y a la vez propicia acciones que permitan la definición de políticas de Estado. Desde 2002, el CELS, CAREF y con la Facultad de Derecho de la Universidad de Buenos Aires (UBA) tenemos una Clínica de Derechos de Inmigrantes y Refugiados. La Clínica asesora y patrocina un promedio de 300 casos anuales de personas migrantes y/o refugiados. A su vez, hemos tenido en conjunto mucha participación en el proceso de reforma de la Ley de Migraciones de Argentina (ley 25.871 de 2003) y en la elaboración de su decreto reglamentario (2010), que inauguró un nuevo paradigma de las migraciones en el país, desde la perspectiva de los derechos humanos. Ambas organizaciones participaron en el Diálogo de Alto Nivel sobre Migración y Desarrollo de 2013.

<sup>2</sup>Los Estados tienen el deber fundamental de respetar los derechos y libertades reconocidos en los tratados internacionales de derechos humanos y de garantizar su libre y pleno ejercicio a **toda persona** que esté sujeta a su jurisdicción, sin discriminación, tal como enunciado en el art. 2 de la Declaración Universal de los Derechos Humanos de las Naciones Unidas.

<sup>3</sup>La obligación de respetar y garantizar los derechos reconocidos "implica el deber de organizar todo el aparato gubernamental y, en general, todas las estructuras a través de las cuales se manifiesta el ejercicio del poder público, de manera tal que sean capaces de asegurar jurídicamente el libre y pleno ejercicio de los derechos humanos." (Caso Velásquez Rodríguez, sentencia de 29 de julio de 1988 de la Corte Interamericana de Derechos Humanos, párr. 166)

<sup>4</sup>El deber de asegurar los derechos humanos a todas las personas dentro de la jurisdicción del Estado no está limitado al territorio del Estado parte, sino que se extiende a todas las personas bajo su autoridad y responsabilidad. (ONU-CDH, 1981, §12.2, 12.3, ONU-CDESC, 2003, §31 y UE. Comisión Europea de Derechos Humanos. Stocké v. República Federal De Alemania. Decisión. 12 Oct. 2005, §166.)

Asimismo, en ciertos tramos de la declaración – destacados más adelante – el lenguaje de los derechos humanos se ve debilitado y subordinado a otras cuestiones. Su fortalecimiento es imprescindible para garantizar que el respeto, protección y garantía de los derechos humanos sean el eje central del documento.

## **2. LA RESPONSABILIDAD DE LAS POLÍTICAS MIGRATORIAS RESTRICTIVAS Y SECURITARIAS EN LA GENERACIÓN DE LAS VULNERABILIDADES DE LA POBLACIÓN MIGRANTE Y REFUGIADA**

La adopción de esta declaración brinda a la comunidad internacional la oportunidad para reconocer y advertir que la grave crisis humanitaria que atraviesa el Mediterráneo, y que puede ser a su vez vista en otras latitudes, como en Centroamérica y la frontera entre Estados Unidos y México, también es producto de políticas migratorias restrictivas que han diseñado, implementado o autorizado algunos Estados. De hecho, estas políticas pueden considerarse una de las causas profundas y estructurales de la migración irregular y de las situaciones de vulnerabilidad que enfrentan la población migrante y refugiada. El incremento de las políticas de control y de enfoque “policial” o incluso “militar” de las fronteras dan cuenta de cómo los Estados protegen el ingreso y permanencia en su espacio territorial, con consecuencias insoportables para los derechos humanos de miles de personas en movimiento.

La cooperación internacional para el desarrollo juega un rol importante en relación a las causas estructurales de las migraciones en los países de origen y tránsito, como reconoce el borrador de la Declaración. Sin embargo, esta cooperación no debe estar condicionada a medidas que privilegien retener o contener la migración. Este tipo de cooperación genera el recrudecimiento de los mecanismos de control en Estados que no son de destino o pueden denominarse mixtos (de tránsito y destino) y que operan como fronteras para el arribo de migrantes y refugiados a otros Estados. La práctica evidencia que estos Estados no sólo no han podido contener los flujos efectivamente, sino que han agravado aún más la violación de derechos humanos de las personas migrantes y refugiadas.

Por otra parte, consideramos que la militarización y la securitización de las fronteras para el control de la migración irregular transforma estas zonas en uno de los espacios en los que la seguridad nacional se privilegia frente a los derechos humanos. Es decir, la securitización de las fronteras busca legitimar violaciones a los derechos humanos por medio de prácticas como las detenciones de migrantes y refugiados y el uso indiscriminado del retorno no voluntario. Para superar este paradigma las medidas a adoptarse en esas zonas deben darse en el marco de una política clara, consistente y respetuosa de derechos humanos como establecen los *Principios y Directrices Recomendados sobre los Derechos Humanos en las Fronteras Internacionales* del Alto Comisionado para los Derechos Humanos de las Naciones Unidas<sup>5</sup>.

## **3. LAS POLÍTICAS DE REGULARIZACIÓN MIGRATORIA COMO UNA DE LAS PRINCIPALES SOLUCIONES A LOS DESAFÍOS PLANTEADOS EN LA DECLARACIÓN**

Es indispensable iniciar un nuevo pero necesario camino para modificar el paradigma de regulación de las migraciones. El cambio de paradigma implica que “regular las migraciones” deje de ser sinónimo de impedir, limitar, perseguir y criminalizar y se transforme en el sinónimo de garantizar condiciones de tránsito y permanencia dignas y seguras. Incluso, como sinónimo de regularizar, de otorgarle documentación nacional a las personas migrantes para que la regularización sea un derecho y no un caso excepcional.

Desde nuestra experiencia en el terreno, atendiendo y asesorando a migrantes que ya están en el país de destino, es posible constatar que cuando las políticas tienen como eje central el acceso a la documentación local -o de regularización migratoria-, su efecto en el ejercicio efectivo de sus derechos es enorme. De hecho, se ha podido evidenciar que tener documentación local se transforma en un importante instrumento simbólico y material que empodera a la población migrante; quienes re-significan sus espacios sociales fortaleciendo el ejercicio de su ciudadanía. En consecuencia, creemos que una forma de darle operatividad a la agenda del desarrollo sostenible 2030, en la que se incluye el acceso a la educación de calidad, la salud, el trabajo decente y la reducción de las desigualdades, entre otras, es garantizando el acceso a la regularización. En síntesis, si bien reconocemos que los

<sup>5</sup>Este documento recomienda a los Estados medidas prácticas para cumplir con las normas de derechos humanos a las que están sujetos ante los titulares de derechos que se encuentran en las fronteras internacionales. La ejecución de cada directriz debe cumplir con los principios indicados en el mismo documento. Disponible en [http://www.ohchr.org/Documents/Issues/Migration/OHCHR\\_Recommended\\_Principles\\_Guidelines\\_SP.pdf](http://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines_SP.pdf)

derechos se tienen independientemente del estatus migratorio, consideramos necesario incluir en el actual debate el acceso a la documentación que permita la regularización migratoria, para poder ejercer de forma plena y efectiva todos los derechos.

Existen hoy políticas nacionales y locales que demuestran que esta es una meta alcanzable. Algunas legislaciones en América Latina han incorporado la regularización como eje de sus políticas migratorias. Las experiencias de Argentina y de Uruguay por ejemplo reflejan este cambio de paradigma. Otros cambios legislativos en la región sugieren un desarrollo en el mismo sentido, como el caso de Bolivia y el debate de reforma migratoria en Brasil. A los cuales es posible sumar la experiencia de regularización dentro de los países miembros del MERCOSUR (Mercado Común del Sur).

A continuación haremos algunas propuestas de cambio del texto de la Declaración sobre la base de los argumentos expuestos en los puntos 1, 2 y 3, detallados arriba en este documento.

### **SUGERENCIAS AL TEXTO DE LA DECLARACIÓN**

TEXTO ORIGINAL	TEXTO PROPUESTO
<p>1.4 In adopting a year ago the 2030 Agenda for Sustainable Development, we recognized clearly the positive contribution made by migrants for inclusive growth and sustainable development. Our world is a better place for that contribution. The benefits and opportunities of safe, orderly, regular and responsible migration are considerable and are often underestimated. Displacement and irregular migration, on the other hand, present complex challenges.</p>	<p>Proponemos <b>ELIMINAR</b> este párrafo ya que los beneficios de la migración segura y ordenada, así como la importancia de la Agenda 2030 están mencionados y mejor argumentados en el párrafo 1.15.</p>
<p>1.5 Though their treatment is governed by separate legal frameworks, refugees and migrants have the same universal human rights and fundamental freedoms. They also face many common challenges and have similar vulnerabilities, including in the context of large movements. “Large movements” may be understood to reflect a number of considerations, including: the number of people arriving; the economic, social and geographical context; the capacity of a receiving State to respond; and the impact of a movement which is sudden or prolonged. The term would not, for example, cover regular flows of migrants from one country to another. “Large movements” may involve mixed flows of people, whether refugees or migrants, who move for different reasons but who may use similar routes.</p>	<p>1.5 Though their treatment is governed by separate legal frameworks, refugees and migrants have the same universal human rights and fundamental freedoms. They also face many common challenges and have similar vulnerabilities, including in the context of large movements. <b><u>International human rights standards determine a number of obligations for States in order to guarantee these rights and freedoms.</u></b> “Large movements” may be understood to reflect a number of considerations, including: the number of people arriving; the economic, social and geographical context; the capacity of a receiving State to respond; and the impact of a movement which is sudden or prolonged. The term would not, for example, cover regular flows of migrants from one country to another. “Large movements” may involve mixed flows of people, whether refugees or migrants, who move for different reasons but who may use similar routes.</p>
<p>1.6 Large movements of refugees and migrants have political, economic, social, developmental, humanitarian and human rights ramifications which cross all borders. These are global phenomena which call for global approaches and global solutions. No one State can manage such movements on its own. Neighbouring or transit countries, mostly developing countries, are disproportionately affected. Their capacities have been stretched to breaking point, threatening their own social and economic cohesion as well as their development and security. In addition, protracted refugee crises are now commonplace, with long-term repercussions for those involved</p>	<p>1.6 Large movements of refugees and migrants and have political, economic, social, developmental, humanitarian and human rights <del>ramifications</del> <b><u>consequences</u></b> which cross all borders. These are global phenomena which call for global approaches and global solutions that must <b><u>respect, protect and guarantee all human rights of migrants and refugees.</u></b> No one State can manage such movements on its own. (...)</p>

<p>and also for their host countries and communities. These burdens must be shared with such countries on an equitable basis.</p>	
<p>1.8 Refugees and migrants in large movements often face a desperate ordeal. Many take great risks, embarking on perilous journeys which many may not survive. Some employ the services of criminal groups, including smugglers. Many fall prey to such groups or become victims of trafficking. Even if they reach their destination, they face an uncertain reception and a precarious future.</p>	<p>1.8 Refugees and migrants in large movements often face a desperate ordeal. Many take great risks, embarking on perilous journeys which many may not survive. <b><u>Many suffer human rights violations by border and security agents.</u></b> Some employ the services of criminal groups, including smugglers. Many fall prey to such groups or become victims of trafficking. Even if they reach their destination, they face an uncertain reception and a precarious future, <b><u>due to restrictive migration policies.</u></b></p>
<p>1.9 The challenge to world leaders is moral and humanitarian. We are determined, first and foremost, to save lives. We are also determined to find long-term and sustainable solutions. We will combat with all the means at our disposal the abuses and exploitation suffered by countless refugees and migrants in vulnerable situations.</p>	<p>1.9 <del>The challenge to world leaders is moral and humanitarian.</del> <b><u>The current situation is a human rights challenge to world leaders in order to save lives.</u></b> <del>We are determined, first and foremost, to save lives.</del> We are also determined to find long-term and sustainable solutions, <b><u>that should include regularization policies.</u></b> We will combat with all the means at our disposal the abuses and exploitation suffered by countless refugees and migrants in vulnerable situations. <b><u>We will take measures in order to generate migration policies based on a human rights approach. We commit to working toward ending militarization and securitization of migration control.</u></b></p>
<p>1.10 We acknowledge a shared global responsibility to manage large movements of refugees and migrants in a humane, sensitive and compassionate manner, while acknowledging that there are varying capacities to respond to these movements. International cooperation, and in particular cooperation among countries of origin or nationality, transit and destination, has never been more important; win-win cooperation in this area has profound benefits for humanity. Refugees and migrants involved in large movements must have the comprehensive policy support, practical assistance and legal protection consistent with States' obligations under international law. We also recall our obligation to respect their human rights and fundamental freedoms fully, and we stress their critical need to live their lives in safety and dignity. We pledge this support to those affected today as well as to those who will be part of future large movements.</p>	<p>1.10 We acknowledge a shared global responsibility to manage large movements of refugees and migrants in a from a <b><u>human rights perspective</u></b> humane, sensitive and compassionate manner. (...) We also recall our obligation to respect, <b><u>protect and guarantee</u></b> their human rights and fundamental freedoms fully, and we stress their critical need to live their lives in safety and dignity</p>
<p>1.14 We reaffirm the purposes and principles of the United Nations Charter. We reaffirm also the Universal Declaration of Human Rights and Fundamental Freedoms and the core international human rights treaties. We reaffirm, and will fully protect, the human rights of all refugees and migrants, regardless of status; all are rights holders. Our response will demonstrate full respect for international law and where applicable international human rights law, international refugee law and international humanitarian law.</p>	<p><del>1.14</del> <b><u>1.4</u></b>. We reaffirm the purposes and principles of the United Nations Charter. We reaffirm also the Universal Declaration of Human Rights and Fundamental Freedoms and the core international human rights treaties. We reaffirm, and will fully <b><u>respect, protect and guarantee</u></b> the human rights of all refugees and migrants, regardless of status; all are rights holders. Our response will demonstrate full respect for international law, <b><u>including international human rights law</u></b>, and where applicable <del>international human rights law</del>, international refugee law and international humanitarian law.</p>

<p>2.1 Underlining the importance of a comprehensive approach to the issues involved, we will ensure a humane, sensitive, dignified, gender-responsive and prompt reception for all persons arriving in our countries, and particularly those in large movements, regardless of their migratory status. We will also ensure full respect for their human rights.</p>	<p>2.1 Underlining the importance of a comprehensive approach to the issues involved, we will ensure a <b>human rights centered</b>, humane, sensitive, dignified, gender-responsive and prompt reception for all persons arriving in our countries, and particularly those in large movements, regardless of their migratory status. We will also ensure full <b>respect, protection and guarantee</b> of their human rights.</p>
<p>2.3 Recognising that States have rights and responsibilities to manage and control their borders, we will implement both on arrival and return border management procedures, including disembarkation procedures and security and identification procedures, which are in conformity with applicable obligations under international law, including international human rights law and international refugee law. We will ensure that public officials and law enforcement officers who work in border areas are trained to uphold the human rights of all persons crossing, or seeking to cross, international borders. We acknowledge that States, while obliged under international law to examine any request for asylum made at their borders, are entitled to take measures to prevent illegal border crossings and to protect against terrorists entering their countries. We will strengthen international border management cooperation, including in relation to training and the exchange of best practices. We will intensify support in this area for host governments and help to build capacity as appropriate.</p>	<p>2.3 Recognising that States have rights and responsibilities to manage and control their borders, we will implement <del>both on arrival and return border</del> <b>policy</b> management procedures, including disembarkation procedures and security and identification procedures, which are in conformity with applicable obligations under international law, including international human rights law and international refugee law. We will ensure that public officials and law enforcement officers who work in border areas are trained <b>must guarantee</b> uphold the human rights of all persons crossing, or seeking to cross, international borders. <del>We acknowledge that States, while obliged under international law to examine any request for asylum made at their borders, are entitled to take measures to prevent illegal border crossings and to protect against terrorists entering their countries.</del> We will strengthen international border management cooperation, including in relation to training and the exchange of best practices. We will intensify support in this area for host governments and help to build capacity as appropriate.</p>
<p>2.4 In large movements of refugees and migrants, we will make efforts to collect accurate information. We will distinguish correctly between refugees and migrants, and identify correctly their nationalities, as well as their reasons for movement.</p>	<p>Proponemos <b>ELIMINAR</b> este párrafo ya que los beneficios de reunir esta información están mejor argumentados en el párrafo 2.17.</p>
<p>2.12 Reaffirming that all individuals seeking to cross international borders are entitled to due process in the assessment of their legal status, entry and stay, we will consider alternatives to detention while these assessments are underway. We will review policies that criminalize cross-border movements. Furthermore, recognizing that detention is never in the interests of children, we commit to working toward the earliest possible ending of this practice.</p>	<p>Acordamos con la propuesta presentada por el grupo de países latinoamericanos con relación a este párrafo:</p> <p>2.12 Reaffirming that all individuals seeking to cross international borders are entitled to due process in the assessment of their legal status, entry and stay, <del>we will consider alternatives to detention while these assessments are underway.</del> We will <b>move away from review policies that criminalize cross-border movements and from practices of detention for the assessment of their legal status.</b> Furthermore, <b><u>we commit to never detain children for this purpose.</u></b></p>
<p>2.14 We recognize that refugees and migrants in large movements are at greater risk of being trafficked and of being subjected to forced labour. We will, with full respect for the rules of international law, vigorously combat human trafficking and migrant smuggling, including through targeted measures to identify victims of trafficking. We will provide protection and support for the victims of human trafficking, and will ensure that they are not penalised for</p>	<p>Proponemos <b>ELIMINAR</b> este párrafo ya que su contenido ya está comprendido en otros momentos del documento y especialmente en el párrafo 2.13.</p>

<p>crimes committed as a direct result of human trafficking. With a view to disrupting the criminal networks involved, we will review our national legislation to ensure conformity with our obligations under international law on migrant smuggling, human trafficking, maritime safety as well as with international standards for border management. We will implement the United Nations Global Plan of Action to Combat Trafficking In Persons. We will establish or upgrade, as appropriate, national and regional anti-human trafficking policies. We note initiatives such as the African Union Horn of Africa Initiative on Human Trafficking and Smuggling of Migrants, the ASEAN Plan of Action Against Trafficking in Persons, Especially Women and Children, and the Work Plans against Trafficking in Persons in the Western Hemisphere. We welcome reinforced technical cooperation, on a regional and bilateral basis, between countries of origin, transit and destination on the prevention of trafficking and smuggling of human beings.</p>	
<p>2.16 We commit to combatting discrimination in our societies against refugees and migrants and will undertake efforts aimed at their integration and inclusion. Relevant national policies will be developed to these ends in conjunction with civil society (including faith-based organizations), the private sector, employers' and workers' organizations and other stakeholders. We also note the obligation on refugees and migrants to observe the laws and regulations of their host countries.</p>	<p>2.16 We commit to combating discrimination in our societies against refugees and migrants and will undertake efforts aimed at their integration and inclusion. <b><u>We recognize the importance of regular channels and regularization policies to enable both integration and prevention of discrimination of migrants and refugees.</u></b> Relevant national policies will be developed to these ends in conjunction with civil society (including faith-based organizations), the private sector, employers' and workers' organizations and other stakeholders. We also note the obligation on refugees and migrants to observe the laws and regulations of their host countries.</p>
<p>3.1 We are committed to protecting the safety, dignity and human rights and fundamental freedoms of all migrants, regardless of their migratory status. We will cooperate closely with each other to facilitate and ensure safe, orderly, regular and responsible migration, including return (whether voluntary or otherwise) and readmission. We recall at the same time that each State has a sovereign right to determine who to admit to its territory.</p>	<p>3.1 We are committed <b><u>to respect, protect and guarantee</u></b> the safety, dignity and human rights and fundamental freedoms of all migrants, regardless of their migratory status. We will cooperate closely with each other to facilitate and ensure safe, orderly, regular and responsible migration, including return (whether voluntary or otherwise) and readmission. We recall at the same time that each State has a sovereign right to determine who to admit to its territory, <b><u>always respecting international human rights law.</u></b></p>
<p>3.14 We will consider more opportunities for safe, orderly, regular and responsible migration, including employment creation, Labour mobility, circular migration, family reunification and education---related opportunities. We will pay particular attention to issues such as protection of the labour rights of migrants, recruitment and other migration---related costs, remittance flows, transfers of skills and knowledge and the creation of employment opportunities for young people.</p>	<p>3.14 We will consider more opportunities for safe, orderly, regular and responsible migration, including <b><u>decent work</u></b> employment creation, labour mobility, circular migration, family reunification and education---related opportunities. <b><u>We recognize the important role of regularization policies to strengthen the self-reliance of migrants and to guarantee their human rights.</u></b> We will pay particular attention to issues such as protection of the labour rights of migrants, recruitment and other migration---related costs, remittance flows, transfers of skills and knowledge and the creation of employment opportunities for young people.</p>
<p>3.15 We strongly encourage cooperation between, on the one</p>	<p>3.15 <del>We strongly encourage cooperation between, on the one</del></p>

hand, countries of origin or nationality and, on the other, countries of destination and other relevant countries in ensuring that migrants who do not have a legal right to stay in the latter can return to their country of origin or nationality in a safe, orderly and dignified manner. Such cooperation would include ensuring proper identification and provision of relevant travel documents. Any type of return, whether voluntary or otherwise, must be consistent with international human rights law and in compliance with the principle of non-refoulement. It must also respect the rules of international law and must in addition be in keeping with the best interests of the child and with due process. We support enhanced reception and reintegration assistance for those who are returned.

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